Libraries, Copyright and Digitisation[1]

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INTRODUCTION

Australia, along with a number of other jurisdictions, is currently attempting to revise its copyright law in order to respond to challenges said to be posed for copyright law in the digital environment. The perception that the challenges posed by digitisation and new forms of communications technology are fundamental has created international legal pressures for change in the form of the WIPO Copyright Treaty 1996 (WCT)[2] and the WIPO Performers and Phonograms Treaty 1996.[3] Neither of these treaties are yet in effect, nor has Australia become a signatory to either treaty.[4] Nevertheless, the Australian government's 1997 Discussion Paper, *Copyright Reform and the Digital Agenda*,[5] appears to have been prompted, in significant part, by the WIPO Copyright Treaty.[6] The consultative process initiated by this Discussion Paper has now spawned two drafts of the *Copyright Amendment (Digital Agenda) Bill,* upon the content of which the WIPO Copyright Treaty is a clear and acknowledged influence.[7]

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[1] This paper was originally presented to the ALLG (WA Division) at a meeting in Perth in February 1999. It was updated in January 2000 for publication - ED

[2] See http://www.wipo.int/eng/main.htm.

[3] *Ibid*

[4] See WIPO Website, "Signatories of Treaties Administered by WIPO Not Yet in Force" http://www.wipo.int/eng/main.htm

[5] Commonwealth of Australia, *Copyright Reform and the Digital Agenda Proposed Transmission Right Right of Making Available and Enforcement Measures* (July 1997) http://law.gov.au/publications/digital.htm

[6] For further discussion of the *Digital Agenda* Discussion Paper, see Macmillan & Blakeney, 1998, ' "The Internet and Communication Carriers" Copyright Liability', 2 *European Intellectual Property Review* 52, 57-59

[7] The most recent draft was released for public comment on 2 September 1999

The Australian Digital Agenda Bill has been released against the background of a ground-breaking report by the Copyright Law Review Committee (CLRC), the Australian Government's advisory body on copyright law issues. This report, entitled *Simplification of the Copyright Act 1968*,[8] involves a consideration of relatively fundamental aspects of Australian copyright law. The CLRC's terms of reference for this report required it to consider, amongst other things, the simplification of those parts of the *Copyright Act* 1968 (Cth) dealing with exceptions to the exclusive rights conferred on copyright holders "to make it able to be understood by people needing to understand their rights and obligations under the Act".[9] As would be expected, the fair dealing exceptions, which are a centrepiece of the law in this area, are given thorough treatment by the CLRC Report. Similarly comprehensive treatment is given to the issue of royalty free copying by libraries and archives. A central issue in formulating many of the recommendations of the Report is the way in which those recommendations should apply in the digital environment.[10] It also appears that this was the aspect of their recommendations in relation to which CLRC members had most difficulty in reaching consensus.

This paper considers the approaches taken by both the *Copyright Amendment (Digital Agenda) Bill* and the CLRC to the issue of royalty free copying. The paper focuses upon the areas of copying by individuals under the fair dealing regime and copying by libraries and archives.

THE DIGITAL AGENDA REFORMS

Striking the Copyright Balance

As is well-known, copyright law works by granting a range of exclusive rights in relation to the copyright work to the copyright owner, and then qualifying those rights by granting certain exceptions to them. In doing this copyright law purports to be striking some sort of balance between the owners of copyright material and those who wish to use that material.[11] In recognising the interests of those who wish to use copyright material, copyright law is arguably also recognising a public interest in free access to and circulation of

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[8] Copyright Law Review Committee, *Simplification of the Copyright Act 1968* (Commonwealth of Australia, September 1998); http://www.agps.gov.au/clrc/clrc%20report/ReportHeadings1.html.

[9] CLRC Terms of Reference (December, 1996), para 1(a): see n 7 *supra*, Appendix A

[10] And this matter was also included in the CLRC's Terms of Reference: n 8 *supra*, para 2(d)

[11] See further, eg, Waldron, 1993, 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property' 68 *Chicago-Kent Law Review* 841, 842; Macmillan (Patfield), 1997, 'Legal Policy and the Limits of Literary Copyright' in Parrinder & Chernaik (eds), *Textual Monopolies: Literary Copyright and the Public Domain*.

information [12] As would be expected by most (as a consequence of cynicism, realism or both), the *Exposure Draft and Commentary*[13] which accompanied the first draft of the *Copyright Amendment (Digital Agenda) Bill* had little to say on these matters. In this, perhaps more unexpectedly, it reflects the relative silence of its precursor *Digital Agenda* discussion paper.[14] The *Exposure Draft and Commentary* identifies the "central aim" of the reforms in the Bill to be "to ensure that copyright law continues to promote creative endeavour whilst allowing reasonable access to copyright material on the Internet and through new communications technology" [15] It asserts, accordingly, that the "reforms are a key component of the Government's overall commitment to encouraging the growth of the information economy".[16] More specifically, its only comment on the overall approach to the matter of copyright exceptions is that "[a]s far as possible, the proposed exceptions will replicate the balance struck between the rights of owners and the rights of users that has applied in the print environment" [17]

Right of Communication to the Public

The centrepiece of the reforms proposed by the *Copyright Amendment (Digital Agenda) Bill* is the copyright owner's new exclusive right of communication to the public. This provision is based upon Article 8 of the WCT. It is intended to subsume the copyright owner's exclusive rights to broadcast the work and to transmit it to subscribers to a diffusion service. This new right will apply to works under Part III of the present Copyright Act, that is, literary, dramatic, musical and artistic works; and it will also apply to sound recordings, films and broadcasts,

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[12] See, eg, Waldron, n 10 *supra*; Mason, 1997, 'The Users' Perspective on Issues Arising in Proposals for the Reform of the Law of Copyright' 19 *Sydney Law Review* 71; Macmillan (Patfield), 1996, 'Towards a Reconciliation of Free Speech and Copyright' in Barendt et al (eds), *The Yearbook of Media and Entertainment Law 1996*, 199, esp 226-232

[13] *Digital Agenda Copyright Amendments - Proposed Provisions Implementing the Government's Decision on the Digital Agenda Reforms. Exposure Draft and Commentary* (February 1999)

[14] Note 4 *supra*.

[15] Note 12 *supra*, Background: para 4

[16] *Ibid*

[17] Note 12 *supra*, Exceptions: para 30.

which are governed by Part IV of the Act. The right is not intended to be technology specific,[18] but by virtue of the new definition of 'communicate'[19] it applies only to electronic transmission or making available on-line.[20]

The content of the exceptions to this new right, is obviously crucial to balancing access to and use of information which is stored digitally. An issue which is particularly important to libraries and to their users is how this affects libraries making available to those users works in digital format.

Fair Dealing Exceptions

The *Copyright Amendment (Digital Agenda) Bill* makes no changes to the general structure of the fair dealing defences. With one exception, its only amendments to these sections are minor consequential amendments designed to effect the Government's decision to make the new right of communication to the public subject to the fair dealing exceptions. Accordingly, a fair dealing with literary, dramatic, musical and artistic work, or with an audiovisual work, for the purposes of research or study,[21] criticism or review,[22] reporting the news,[23] or giving professional legal advice[24] will amount to an exception to the right of communication to the public.

The one area of fair dealing law in which an important change has been made by the Bill is in relation to the quantitative test,[25] which forms part of the exception for fair dealing with literary, dramatic or musical works for the purpose of research or study. At present this test deems a dealing which involves the

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18 *Exposure Draft and Commentary*, n 12 *supra*, para 16.

19 *Copyright Amendment (Digital Agenda) Bill*, cl 6 amending s 10(1).

20 It is also interesting to note that, as a consequence of a new definition of "to the public", the right of communication gives exclusive rights to the copyright holder in relation to transmissions intended for the public either in Australia or outside Australia: *Copyright Amendment (Digital Amendment) Bill*, cl 16 amending s 10(1)

21 *Copyright Act* 1968 (Cth), s 40, in relation to literary, dramatic, musical & artistic works, & s 103C, in relation to audio-visual works.

22 *Ibid*., s 41, in relation to literary, dramatic, musical & artistic works, & s 103A, in relation to audio-visual works.

23 *Ibid*., s 42, as amended by cll 43 & 44 of the *Copyright Amendment (Digital Agenda) Bill*, in relation to literary, dramatic, musical & artistic works, & s 103B, as amended by cll 88 & 89 of the *Copyright Amendment (Digital Agenda) Bill*, in relation to audio-visual works.

24 *Ibid*., s 43(2), in relation to literary, dramatic, musical & artistic works, & s 104 (c), in relation to works regulated by Part IV, including audio-visual works. Note that any dealing for this purpose, not only a fair one, with a Part IV work is excepted under s 104(c).

25 *Copyright Act* 1968 (Cth), s 40(3).

copying of a periodical article or, in cases not involving periodical articles, a reasonable portion of the work in question (not exceeding ten per cent), to be a fair dealing. A issue raised in the digital environment is what is meant by a "reasonable portion" of a work in electronic form. In the *Copyright Amendment (Digital Agenda) Bill*, an attempt is made to address this issue, although the approach taken may raise more problems than it solves.

The second (and most recent) draft of the Bill provides[26] that, without limiting the meaning of "reasonable portion", if a literary or dramatic work has been published in electronic form then a reasonable portion will be up to ten per cent in aggregate of the number of words in the work or, if the work is divided into chapters up to one chapter. Where a published literary or dramatic work is contained separately in both hard copy form and electronic form then a reproduction of the work will only amount to a reasonable portion if it falls within the definition of this term for either hard copy or electronic works. One effect of this new provision is to exclude reproductions of musical works which are available electronically from falling within the reasonable portion test. Nevertheless, overall the provision is a considerable improvement on the earlier draft provision on the meaning of "reasonable portion" in relation to electronic works.

The earlier draft provided, in essence, that there could not be royalty free copying of a reasonable portion of electronic works which have not been published in hard copy. Further, if the hard copy was "reasonably available", whatever that means, then copies of a reasonable portion of a work could not be made from the digital copy. In proposing limitations of this type on the application of the reasonable portion test in the digital environment an attempt was being made to deal with the sort of situation where copyright works are only published electronically as part of a large database (of, for example, 100 hard copy books) with the result that if the existing ten per cent rule was applied to the database as a whole, the amount copied royalty free would account for far more than what would be thought of as a reasonable portion of a work under the present hard copy rules.[27] Under the proposed provision in the most recent draft of the Digital Agenda Bill this problem is dealt with by limiting the application of the reasonable portion works to literary works published electronically other than "a computer program or an electronic

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[26] *Copyright Amendment (Digital Agenda) Bill*, cl 20 amending s 10(2) by the insertion of s 10(2A)-(2C).

[27] *Exposure Draft and Commentary*, n 12 *supra*, para 39

compilation, such as a database". As neither "database" or "compilation", let alone "electronic compilation" are defined in the existing Copyright Act or the Digital Agenda Bill, the results of this may be a little uncertain. Not only is this of concern in relation to the quantitative test as it applies in the context of the fair dealing exceptions, it is also of concern in the context of the exceptions for copying by libraries. It is perhaps interesting to note at this point that, as discussed below, the CLRC could not find any acceptable way of dealing with the reasonable portion test in relation to electronic materials.

Library and Archive Exceptions

At present the library and archive exceptions fall within three main categories, which are as follows: copying for a user for the purposes of research or study[28] or copying for another library;[29] copying of unpublished works in library collections;[30] and copying for the purpose of preservation or in the event of loss or theft.[31] The provisions of the *Copyright Amendment (Digital Agenda) Bill* have some impact on permissable copying in each of these categories. As the following discussion illustrates, however, some of the amendments introduced, have significant implications with respect to the use of library resources and the development of library collections. This is particularly so with respect to the proposed new s 49(5A), which has been slipped into the exceptions for library copying on behalf of users and which is discussed below.

Copying for and by library users and for other libraries:

In relation to copying for a user for the purposes of research or study or copying for another library, under the legislation proposed in the Bill, libraries will be able to reproduce and supply material which has been requested in digital or electronic form. This is, however, such to two sets of limitations.[32] The first set of limitations are those which currently exist in relation to this type of copying.

The other set of limitations have been newly introduced to deal with the issue of electronic reproduction. Both these sets of limitations appear to apply whether the work is held by the library in hard copy form or has been acquired by it in digital form. The current limitations, to which the excepted copying is subject,

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[28] Copyright Act 1968 (Cth), s 49.

[29] *Ibid*, s 50

[30] *Ibid*, ss 51, 110A.

[31] *Ibid*, ss 51A, 51AA, & 110B

[32] *Copyright Amendment (Digital Agenda) Bill*, cll 48 -57, amending s 49, & cll 58-66, amending s 50.

include the need for the completion of a request and declaration by the person requesting the copy and also limit the copying to a periodical article or a "reasonable portion" of other published works.[33] The new limitations require that by the time the communication of the electronic copy is made the person to whom the work is communicated is informed that the work is subject to copyright protection and is informed of any other matters prescribed by regulation. These limitations also require the library to destroy the electronic reproduction which it has made once the material has been communicated to the user. For library users who are geographically remote, these provisions – while a little bureaucratic and heavy-handed – should facilitate reasonable access to library resources.

For those who are not geographically remote, the issue will be whether or not they may copy from the digital work themselves relying on the fair dealing exemptions that would apply if they were using library facilities to copy from a hard copy work held in the library. Bearing in mind the Government's decision that the same fair dealing exceptions are to apply in the digital environment as apply in the traditional hard copy environment,[34] one might have thought that (apart from the matter of the quantitative test) there would be no problem with this. However, this is not the case. Rather, the Bill makes it clear that libraries will be breaching the new right of communication to the public if they make material that has been acquired by them in digital format available to users to browse online unless they comply with the new s 49(5A).[35]

This proposed new sub-section permits libraries to make material acquired in electronic form available online to users in the library premises, but only under circumstances where the users cannot use library equipment to make an electronic reproduction of the work or electronically communicate the work in any manner. At first glance, this seems slightly less extreme than the earlier draft of this sub-section which permitted a library to make electronic material available to users only on library premises and only on a computer terminal which is not linked to a printer, does not have a disk drive, and is not capable of

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[33] See the discussion of "reasonable portion" in the text accompanying nn 59-60 *supra*.

[34] See text accompanying n 16 *supra*.

35 Inserted by the *Copyright Amendment (Digital Agenda) Bill*, cl 54.

transmitting the material via the Internet. Nevertheless, the effect of the re-drafted sub-section seems substantially similar. This effect is to result in a significant restriction on the way digital material is currently made available by libraries. For example, unless it obtained a licence, a library such as a university library would not be able to make its databases accessible to staff offices outside the library. This would be the case unless, by some sophistry, it could be argued that the premises of a university library included the whole university premises (the "virtual university library" argument). If this argument could be made it might then be possible to take advantage of what appears to be a rather peculiar loophole in sub-section (5A). The sub-section only proscribes electronic reproduction and communication of electronic material if it is done on equipment supplied by the library. If the virtual university library argument is accepted and if the equipment used in staff offices is not supplied by the library then it appears possible for users in such offices to engage in reproduction which amounts to fair dealing without taking the library outside the ambit of the limitation in sub-section (5A). However, it must be admitted that this argument rather smacks of having one's cake and eating it as well. If this is so, then the effect of the sub-section will be that to maintain the type of networked systems which currently exist, libraries will have to acquire licences from the copyright owners. This will increase the cost of research in places such as universities.

Even within library premises costs to libraries will be increased as a result of this provision. Libraries will face the choice of "locking" electronic material so that it cannot be copied or communicated to another site, of disabling computer terminals in order to comply with s 49(5A), or of paying licence fees. The result of this is, either way, increased costs to libraries in giving users access to digital material for the purposes of research and study carried out by those users. These are costs which do not apply with respect to giving users access to traditional print material. The Council of Australian University Librarians has also pointed out that such restrictions on access are by and large contrary to the contract which governed the library's purchase of the digital material.[36] As a result of all these considerations, serious issues arise, as to whether the Bill appropriately strikes the balance between copyright owners and the users of copyright material in this respect.

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[36] Council of Australian University Librarians, *Copyright Amendment (Digital Agenda) Bill 1999 - CAUL Response*, 19 March 1999.

After having digested the import of s 49(5A), it almost comes as a shock to discover that, notwithstanding the costs that have been heaped upon them, libraries still run the risk of being liable as authorisers of infringement for infringing activities which take place on computers located in the library.[37] This conclusion is implied by an amendment to the present s 39A(a) which confers immunity from such liability on libraries if copyright warning notices are displayed on or near the relevant copying machinery.[38] Of course, if libraries choose to lock electronic documents or to disable computer terminals in order to comply with s 49(5A) then there will be no possibility of liability for authorising infringement on such terminals. On the other hand, it is important to note that such choices will preclude fair dealing with such works by individual library users.

Reproduction of unpublished works in libraries:

The current provisions, as amended by the Bill, on copying of unpublished works held in library collections will also apply to reproduction of the material in electronic form and communication of that material.[39] The result of the amendments in this area will be to allow the reproduction of unpublished literary, dramatic, musical and artistic works for the purposes of research or study or for publication where the original version of the work is held in the library collection and is open to public inspection and where fifty years has elapsed since the death of the work's author.[40] This would include the reproduction of an unpublished work held in electronic form.[41] So far as unpublished sound recordings and films are concerned, where these are held in a library's collection and are open to public inspection then they may be copied, which includes copying in digital form, and communicated for the purposes of research or study.

Copying by libraries for the purpose of preservation, in the event of loss or theft, or otherwise:

Pursuant to the provisions of the Bill, libraries will be permitted to digitise copyright works in their collections for the purpose of preservation or in the

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[37] Although it should be noted that this is consistent with Australian law on the issue of authorising infringement: see *University of New South Wales v Moorhouse* (1975) 133 CLR 1

[38] Inserted by the *Copyright Amendment (Digital Agenda) Bill*, cl 41.

[39] *Copyright Amendment (Digital Agenda) Bill*, cll 67-70 amending s 51, & cl 91 amending s 110A.

[40] Note that the present requirement that, in addition to the elapsing of 50 years since the death of the work's author, 75 years should have elapsed since the work was made will be removed under the proposed amendments: *Copyright Amendment (Digital Agenda) Bill*, cl 67

[41] See *Copyright Amendment (Digital Agenda) Bill*, cll 68 & 70.

event of loss or theft and to transmit such digital versions electronically in accordance with the restrictions laid down in the present legislation.[42] The proposed amendments also permit the making of a reproduction of a literary, dramatic, musical or artistic work held in a library's collection and making that copy available online to be accessed by officers of the library.[43] An implication from this provisions might be that, if a work is reproduced other than digitally or electronically, that reproduction may be made available to library users. However, the further implication is that if a digital electronic copy is made this may only be made available to a library officer.[44] This implication is particularly strong with respect to literary, dramatic and musical works, since the proposed new s 51A(3)[45] explicitly permits the communication by way of library computer terminals of an electronic copy of an artistic work made for preservation purposes (provided such an electronic material cannot be copied in any way). There probably is a policy reason for this, other than the vague statement that it will "protect the interests of copyright owners",[46] but it is not immediately identifiable.

THE COPYRIGHT LAW REVIEW COMMITTEE PROPOSALS

Fair Dealing

The CLRC proposals regarding the royalty free exceptions to the exclusive rights comprised in copyright hinge upon its major proposal for the reform of fair dealing law. As discussed above, the present fair dealing exceptions only apply with respect to the use of copyright material for four purposes. Further, the application of the sections is complicated by the fact that the *Copyright Act*, rather eccentrically, divides copyright works into two different categories. As a result of this division, the fair dealing provisions with respect to research or study, criticism or review, and reporting the news are repeated, with some differences in language, for Part III works and audio-visual items (sound recordings, films and broadcasts) within Part IV. The fair dealing exception with respect to professional legal advice only applies in relation to literary, dramatic, musical and artistic works.[47] The CLRC Report proposes removing

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[42] *Copyright Amendment (Digital Agenda) Bill*, cll 73-78 amending s 51A, & cll 92-93 amending s 110B

[43] *Copyright Amendment (Digital Agenda) Bill*, cl 75 replacing s 51A(2) & (3).

[44] *Copyright Amendment (Digital Agenda) Bill*, cl 75 inserting s 51A(3); and see *Exposure Draft & Commentary*, n 12 *supra*, cl 58.

[45] *Copyright Amendment (Digital Agenda) Bill*, cl 75.

[46] *Exposure Draft & Commentary*, n 12 *supra*, cl 58.

[47] See n 23 *supra*

the Part III/Part IV split in the fair dealing provisions by consolidating this important exception in one provision. This proposes consolidated provision would not only deal with all types of copyright material, it will also open up the category of purposes for which fair dealing may take place.[48] The four purposes, described above, to which fair dealing is currently limited are mentioned in the proposed provision, but only as part of an inclusive list.

A feature of the present legislation is that the sections in Part III and Part IV[49] concerning fair dealing for the purpose of research or study contain an inclusive list of factors to be considered in determining whether or not the dealing in question is fair. These factors are:

> the purpose and character of the dealing;
> the nature of the work;
> the possibility of obtaining the work within a reasonable time at an ordinary commercial price;
> the effect of the dealing upon the potential market for, or value of, the work; and, where only part of the work is copied,
> the amount and substantiality of that part in relation to the whole work.

The peculiar thing is that this helpful list is not repeated for any of the other fair dealing exceptions. The CLRC proposes to remedy this by making this non-exclusive list relevant to the issue of fairness in relation to any dealing alleged to fall within its proposed composite fair dealing exception.

One important aspect of current Australian fair dealing law that has no international counterpart is the quantitative test in the current provision governing fair dealing with literary, dramatic and musical works for research and study.[50] The CLRC Report recommends that, as this provision requires no consideration of the general fairness criteria, it be removed from the fair dealing provisions and converted into a "stand-alone" exception.[51] It also recommends that the new stand-alone quantitative exception be extended to apply to all dealings with literary, dramatic and musical works rather than only dealings by way of copying. The CLRC Report does not consider whether the quantitative test should be extended to dealing for purposes other than research and study. It also does not consider whether the quantitative exception, as opposed to the fair dealing exception, should be limited to research and *private* study. The

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[48] CLRC Report, n 7 *supra*, para 6 143

[49] *Copyright Act* 1968 (Cth), ss 40 & 103C, respectively

[50] *Ibid*., s 40(3).

[51] Note 7 *supra*, para 6 68.

CLRC rejected this qualification, which would mirror the current UK provision,[52] on the grounds that the concerns raised could adequately be dealt with under its model on the basis of considerations of fairness.[53] This logic, however, does not apply to its proposed stand-alone quantitative exception.

Digital issues

Under its Terms of Reference,[54] the CLRC was obliged to take into account the then proposal by the Australian government to introduce its new exclusive right of communication to the public, which the government had indicated it intended to make subject to the fair dealing exceptions.[55] The CLRC Report concludes that making the proposed right of communication to the public subject to its proposed open-ended fair dealing provision is consistent with both the stated intentions of the government. Nevertheless, it is clear from the Report that the question of the extension of the proposed fair dealing exception and the proposed quantitative exception to the digital environment was a vigorously contested one.

The ease of copying in the digital environment appears, in the opinion of the CLRC, to be balanced by the new potential for copyright owners to monitor and license the use of their work.[56] As a consequence, the majority of the CLRC took the view that this underlines the need for fair dealing exceptions to apply.[57] The CLRC rejected the submission of the Copyright Agency Limited, a collecting society, that digital copying should fall outside the fair dealing exception and be governed by a voluntary or statutory licence scheme.[58] It agreed with the submission of the Australian Council of Library and Information Services that it would not be in the public interest to create a market in words and sentences.[59]

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52 See the *Copyright, Designs and Patents Act* 1988, s 29

53 Note 7 *supra*, paras 6.112-6.117.

54 Note 8 *supra*, para 2(a).

55 See The Hon Daryl Williams, 'Copyright and the Internet: New Government Reforms', Speech delivered at Murdoch University, 30 April 1998 http://wwwlaw.murdoch.edu.au/apipli/events/Agseminar-April98.html

56 CLRC Report, n 7 *supra*, para 6.18

57 *Ibid*, para 6.19

58 *Ibid*, para 6.21

59 *Ibid*, para 6.23.

In relation to fair dealing in the digital environment, two particular concerns raised by the CLRC Report are whether or not including a work in an electronic database or making a work available in a digital form could ever be regarded as fair dealings. In both cases the majority of the CLRC took the view that any explicit limitation in its proposed fair dealing provision would unnecessarily limit the flexibility of the provision. Nevertheless the Report recognises that in both these cases the dealing in question may very well be judged to be unfair on the basis of the inclusive list of fairness criteria in its proposed provision.[60] In both cases, the CLRC took the view that an assessment of the fairness of such a dealing would depend upon criteria such as the purpose and character of the dealing and the effect of the dealing on the potential market for the work. In relation to the copying of the work in digital format, the CLRC noted that of particular relevance to the application of these criteria is "the greater potential for access to, and therefore the value of, copyright material held in digital form, especially if such material is accessible via an electronic network".[61]

The question of the application of the proposed quantitative exception to the digital environment was a problematic one for the CLRC. While a number of submissions urged the CLRC to extend this exception to dealings with material available in digital form, the CLRC concluded that the quantitative test would not work in relation to such material and should be confined to copyright material published in print form. As already noted, this conclusion represents a more restrictive approach than that taken in the *Copyright Amendment (Digital Agenda) Bill*. The reasons that the CLRC decided to recommend the confining of the quantitative exception to non-digital printed copyright works were: first, difficulties with identifying discrete units of measurement for works in digital form; secondly, the lack of distinction which may exist between digitised copyright works; and thirdly, concerns that the application of the quantitative exception electronic databases would result in the non-infringing copying of large numbers of separate copyright works.[62] On the other hand, the majority of the CLRC did recommend that the quantitative exception apply where hard copy copyright material is converted to digital form.[63] Given the CLRC's recognition of the fact that such copying may well fall outside the criteria for fairness in its proposed fair dealing provision, this recommendation may be regarded as not entirely predictable.

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[60] *Ibid*, paras 6.43 & 6.93, respectively.

[61] *Ibid*, para 6.93

[62] *Ibid*, paras 6.53ff.

[63] *Ibid*, para 6.77.

Library exceptions

So far as libraries are concerned, the basic recommendation of the CLRC is that, subject to certain limitations, the provisions concerning library copying be brought into the proposed new fair dealing and quantitative test regime. The only provisions not recommended to be brought into this regime are those related to the copying and publishing of unpublished works held in the library's collection. As the CLRC recognises,[64] in order to bring the library exceptions into the proposed new fair dealing regime there will need to be a provision in the legislation to overcome the effect of *De Garis v Neville Jeffress Pidler Pty Ltd*.[65] This case, which held that in considering the application of the fair dealing exceptions the relevant purpose is that of the person actually undertaking the dealing, has acted as a bar to the application of the existing fair dealing exceptions to dealings undertaken by libraries. Accordingly, the CLRC Report recommends a provision to the effect that in applying the fair dealing exceptions to copying by libraries in response to requests by users and other libraries the relevant purpose for assessing whether the dealing is fair is that of the person requesting the copying.[66]

Once the problem of the *De Garis Case* is dealt with, it seems likely that the types of things that libraries currently do in relation to copying for users and other libraries, copying of works for preservation, and copying in order to replace works which have been damaged, lost or stolen, are likely to be regarded as fair dealing under the CLRC's proposed new regime. The only explicit limitation on this recommended by the CLRC is that copying of works for preservation and in order to replace works which have been damaged lost or stolen will only be a fair dealing if the works copied are part of the library's holdings.[67] This explicit limitation on the application of the new fair dealing regime will not subject libraries to any new limitations as s 51A, which currently governs this type of copying by libraries, makes such copying subject to the same limitation.

Generally speaking, the fact that copying or reproduction of a work is digital does not appear to take the work out of the ambit of the fair dealing regime proposed by the CLRC. Accordingly, the fact that digital copies are made for preservation purposes or to replace material which has been lost or stolen will not take the copying out of the fair dealing exception.[68] Similarly, making a

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64 *Ibid*, 7.63.

65 (1990) 18 IPR 292

66 Note 7 *supra*, para 7.64.

67 *Ibid*, para 7.106

68 *Ibid*, paras 7.110 & 171.

digital copy in response to a request and supplying that copy electronically will also be capable of being a fair dealing.[69] However, in order for all these types of activities to be excepted on the basis of fair dealing it will (of course) be necessary to assess whether the dealing is fair. Under the CLRC proposals such an assessment will be made on the basis of the inclusive list to be included in the proposed new fair dealing provision and other criteria developed in the general case law. Of the factors listed in the new provision, it appears that, with respect to library copying, the matters of whether it is possible to obtain the copyright material within a reasonable time at an ordinary commercial price and the effect of the dealing on the copyright owner's potential market will be of particular importance in assessing whether or not the dealing is fair. Types of dealings by libraries which the CLRC has indicated would be unlikely to be fair would be digitising library holdings and putting these holdings online for the purpose of browsing.[70] The CLRC also appears to take the view that libraries should not have a royalty free right to put material which has been acquired in digital format online for browsing by library users.[71] This, as the CLRC acknowledges,[72] is an even more restrictive position than that taken by the government in the *Copyright Amendment (Digital Agenda) Bill*. If such a position was to be endorsed legislatively it would make the disparity between the environment governing traditional print materials held in libraries and that governing electronic materials even greater.

Libraries will also be able to rely on the CLRC's proposed new stand-alone quantitative test, which relates to copying for the purposes of research or study.[73] As already noted, the effect of this will be to allow royalty free copying of a periodical article or ten per cent, but no more than a chapter, of a larger printed work. One of the restrictions on library use of this exception which is recommended by the CLRC does not amount to any greater limitation than currently applies to library copying, or will apply once the *Copyright Amendment (Digital Agenda) Bill* is passed. This is the CLRC's proposed provision that a library will not be able to take advantage of the quantitative exception if it

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[69] *Ibid*, paras 7.177 & 7.179

[70] *Ibid*, paras 7.181-7.184

[71] *Ibid*, para 7.187

[72] *Ibid*

[73] *Ibid*, para 7.82

makes a charge for the copying which exceeds the cost of supplying the copies.[74] The particular area, however, in which the CLRC proposals are more restrictive than the provisions of the Bill relates to the application of the quantitative test to copying of material which has been acquired by libraries in digital form. As discussed above,[75] the quantitative test proposed by the CLRC will not apply to copying of digital material. It appears, however, that unless the cumbersome approach taken in the *Copyright Amendment (Digital Agenda) Bill* proves to be completely unworkable in practice, the more liberal approach of the Bill will prevail. Certainly, it would be a pity to take the restrictive approach of the CLRC and thus further limit the ability of libraries to make material which they have acquired in digital format available to be used by their readers.

CONCLUSION

The CLRC proposals on the important areas of the fair dealing and library exceptions have the considerable merit of making the legislation considerably clearer for both owners and users of copyright works. The proposed fair dealing exception is also more flexible than the present fair dealing law. Flexibility may, of course, be regarded as a two-edged sword. While it enhances the scope of judges to take all relevant considerations into account, some may consider that there are losses in terms of predictability. However, as the proposed provision is substantially based on the existing legislation and well-developed judge-made law it seems unlikely that it will give much scope for undesirable judicial creativity. The main area of development seems likely to be in relation to the principles to be applied in cases involving digital considerations. In this area the flexibility of the proposed provision is likely to be a help rather than a hindrance in developing appropriate jurisprudence.

A cautionary note should, however, be sounded here. While the CLRC proposals give desirable flexibility in the development of appropriate copyright law for the digital environment, they also preclude flexible development of the law in some areas. The recommendation that the quantitative test have no application

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[74] *Ibid* This restriction is currently contained in the *Copyright Act* 1968 (Cth), ss 49(3) & 50(6). It should be noted in passing that while the CLRC proposes this as an explicit restriction in relation to the application of the quantitative test to library copying, it is likely to be an implicit restriction on library copying which falls within the proposed fair dealing regime. The reason for this is that copying for profit may be seen as an unfair dealing on the basis that it interferes with the legitimate market expectations of the copyright owner.

[75] See text accompanying n 61 *supra*

to works published in digital form, for example, may be regarded as unnecessarily limiting the development of the law. (As noted above, this may be a dead letter in the light of the approach of the *Copyright Amendment (Digital Agenda) Bill*.) The other area of particular concern with respect to the flexible development of the law is the recommended treatment of dealings by libraries with copyright works acquired by them in digital form. Under the CLRC proposals such dealings would, by and large, fall within the ambit of the proposed fair dealing regime. However, the fact that it seems unlikely that the making available of such works for browsing by users would be a fair dealing is a little worrying.

The fact that the *Copyright Amendment (Digital Agenda) Bill* takes only a slightly more liberal approach to the issue of royalty free exceptions in relation to digital material does little to alleviate concern. The workability of the limitations on the quantitative exception is an open question. The somewhat peculiar exception to the new right of communication to the public which allows libraries to make material acquired in digital format available for browsing only to users on the premises and on equipment which is incapable of any form of reproduction or communication of the copyright work in question has a number of implications. Not only does this makes life difficult for library users, it also may require libraries to disable valuable equipment which is currently put to multiple library uses. A knock on effect of this may be to deprive library users of the ability to engage in fair dealing in relation to digital copyright material held in libraries. Certainly, it ensures that the access for library users which prevails in relation to traditional print material is not duplicated in relation to the electronic environment. This is a serious issue in a world of proliferating digitisation. A consequence may be to restrict access to a considerable wealth of knowledge. Alternatively, libraries and their users will simply have to pay more in licence fees in order to access these riches. Either way we are turning libraries into gatekeepers for the new information age, rather than making them its facilitators.