country from where the broadcast is transmitted.

20 Even if the ISP is not "communicating", it is still exercising copyright because it is *reproducing* the external site. However, if the new provisions relating to temporary reproduction are introduced, the ISP may not be liable for infringing copyright for reproducing the external site if the reproduction is temporary and is "part of the technical process of making a communication". See discussion in section 6 of this article.

21 This is consistent with the decision in the defamation case *Thompson v Australian Capital Television Pty Limited* (1996) 186 CLR 574 where the Canberra television station was liable for publishing a defamation in a program produced in Sydney, relayed from Sydney to Canberra, and then broadcast in Canberra by the Canberra station. The Canberra station was not entitled to rely on the defence of "innocent dissemination" because even though it "did not participate in the production of the original material ...[the Canberra station] had the ability to control and supervise the material it televised." The fact that the near-instantaneous relay did not permit the Canberra station to monitor the content before it was broadcast was not an acceptable excuse because it was the Canberra station's decision that the telecast should be near instantaneous "... it adopted the immediacy of the program. It did that for its own purposes."

22 Supra n 16. In the case, the High Court held that Telstra was liable to APRA for exercising copyright in music controlled by APRA because music was played while a person was on hold during a telephone call on the Telstra telephone network, even though Telstra had no control in determining the music played.

23 Commentary at paras 115 and 116.

24 The terms "carrier" or "carriage service provider" are defined as defined in the Telecommunications Act 1997 (section 2 and 3 of the Bill amending section 10(1) of the Act).

25 Item 33 of the Bill inserting new section 39B of the Act, and item 83 of the Bill inserting new section 112C of the Act.

26 Copyright Society Seminar on the Discussion Paper 1998.

27 In particular, the Bill codifies the principles in *University of New South Wales v Moorhouse and Angus & Robertson Publishers Pty Limited* (1975) 133 CLR 1.

28 Item 31 of the Bill inserting new section 36(1)(a) of the Act, and item 70 of the Bill inserting new section 101(1A) of the Act.

29 In para 131 of the Commentary, the Government invites submissions on the approach in the Bill and in particular whether the "reasonable steps" should be clarified. We note that the approach is in contrast to the United States Digital Millennium Copyright Act 1998, the United States Act implementing the WIPO Copyright Treaty, which includes detailed notice and take down provisions.

30 Item 43 of the Bill inserting new section 43C of the Act.

31 Item 81 of the Bill introducing new section 11A of the Act. It is a curious anomaly that there is an exception for temporary copies of an audio-visual item or published edition but not of temporary copies of sound recordings and/or broadcast, particularly since the Bill does not introduce a right to communicate a published edition to the public.

32 Section 3(e) of the Bill.

33 Commentary at paras 10 and 73.

34 Commentary at para 73

35 GT Speech at para 26

36 Discussion Paper at paras 4.54 - 4.61

37 Commentary at paras 71, 72, 73

38 Discussion Paper para 4.59 - 4.61.

39 Commentary at para 72.

40 Item 43 of the Bill inserting sections 43C of the Act

41 Commentary at para 166. See also *Amalgamated Television Services Pty Limited v Foxtel Digital Cable Television Pty Limited* (1996) 66 FCR 75.

42 Commentary at para 167.

43 One of the speakers at the Copyright Society Seminar on 14 March 1999 asked why the Government had decided to use the mechanism used for the compulsory licence for the broadcast of sound recordings. The Attorney General's representative acknowledged that the mechanism may not be appropriate as sound recordings only involve one copyright owner, the owner of the sound recording, rather than a number of different copyright owners. The representative said that the Government would be interested in receiving submissions on this issue.

44 Australian Writers Guild; Australian Screen Directors Association

45 for example, Screenrights, Australian Screen Directors Authorship Collecting Society, Australian Writers Guild Authorship Collecting Society.

46 Item 101 of the Bill inserting section 199A of the Act.

47 Commentary at para 166.

48 Simon Cordina, Principal Legal Officer, Intellectual Property Branch, Attorney-General's Department speaking at the Copyright Society Seminar on the Bill held on 14 March 1999.

49 ibid

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Is The "User Pays" Principle at Risk in Australia's Copyright Act?

Simon Lake of Screenrights spoke at the 'Copyright Futures Seminar' about the organisation's concerns regarding the CLRC recommendations to expand the 'fair dealing' rules.

Screenrights is the copyright collecting society whose membership consists of underlying rights holders in Australian broadcast programs including producers, distributors, scriptwriters, owners of music and other rights holders in film and television programs.

Formerly known as the Audio-Visual Copyright Society, we are the non-profit collecting society established for the purposes of administering a scheme under the *Copyright Act* 1968 (Cth) ("*Copyright Act*") which allows programs to be copied from television and radio by Educational Institutions for educational purposes. This includes schools, universities, TAFES and for-profit colleges and institutions.

Since we have been set up to administer this scheme, we have developed a number of other schemes for members including a similar voluntary scheme in New Zealand. In addition, Screenrights collects cable retransmission royalties for members in Europe, the USA and Canada. We have over 1,000 members in 40 countries.

For Screenrights copyright is obviously our business.

In the recently reported words of Lesley Ellen Harris, the author of "Digital Property": "intellectual property is hot property".

In Harris' words:

> *"we are surrounded by digital assets - data bases, images, sound and video files - some already in digital form; others waiting to be converted. These are destined to become more and more valuable."*

Harris predicts that intellectual property will be "the currency of the 21st Century".

The current activities of Bill Gates, News Corporation, and the Getty Foundation in buying up all the archival material which they can, together with the skyrocketing of media and internet shares, certainly suggests that Harris is right.

DEVALUATION OF COPYRIGHT AND USER PAYS PRINCIPLES

It is axiomatic that any form of private property is devalued if trespassers cannot be excluded. So in 1999, are we in Australia at risk of devaluing this hot property?

Copyright law has always been based on the idea of creating rights of property owned by the creators of works. As far back as 1769 Lord Mansfield explained in the famous case of *Millar v Taylor* that copyright existed simply because:

> *"It is just that an author should reap the pecuniary profits from his own ingenuity and labour."*

Today it is clear the balance must be struck between rewarding our creators and ensuring access to their material, and I believe that the market should be given every opportunity to strike that balance. But even in circumstances where ready access is desirable or even essential, this alone should not be enough to remove the requirement to pay owners of copyright for that access. In these circumstances statutory licences have been and continue to be established to ensure access and fair payment.

Instances where no payment is required have by and large been limited to uses that have little or no impact on the rights owners' market for their work and offer some public benefit.

Globally, there appears to be a growth in what I would loosely and clumsily describe as the "no payment for use lobby". Coupled with technological changes, this poses a serious threat to the balance in our *Copyright Act*.

People are aware of recent changes to US legislation (known as the "Fairness in Music Licensing" acts) exempting restaurants and bars from the payment of music licensing fees. The effect of this, according to industry estimates, is that up to 70% of restaurants and bars in the US will now be exempted from making licence payments. There is much outrage over this decision to appease a well funded lobbying campaign. It has been reported that the European Union intends to challenge the legislation in the World Trade Organisation arguing a breach of both the Berne Convention and the WTO Agreement on Trade Related Intellectual Property (TRIPS).

US Republican Senator Fred Thompson is reported as describing the Fairness in Music Licensing acts as "indefensible" and "unfair". He expressed his "regret" at the:

> *"likely embarrassment that will ultimately fall on the [Senate] when the language it has passed is ruled to violate our treaty obligations".*[1]

The US Fairness in Music Licensing acts highlight the fact that there is a well funded and organised lobbying campaign seeking to ensure that copyright owners are not paid for the use of their works. By way of example, last month at a hearing at the US Copyright Office, educators sought an exemption for distance education instructors to use copyright works such as video clips without gaining permission from the copyright owners.

This approach does not contemplate that the exclusive rights of copyright owners can co-exist with issues of access through appropriate licensing schemes. Access and payment are construed as being mutually exclusive.

The "no payment for use" lobby is certainly not just an American phenomenon and the words of Senator Fred Thompson should be in our legislators' minds before we consider any widening of the exemptions to the *Copyright Act*.

The recently created Digital Alliance in Australia may well fall into the "no payment for use" camp. Whether or not this is too harsh a tag is yet to be seen.

The Digital Alliance has asserted that they want to advocate:

> *"the basic point that copyright should benefit not only owners of works but also the whole community of creators and users."*

Their literature appears to support a widening of the fair dealing provisions, pushing the idea that the "public benefit" of making works available should override the exclusive rights of copyright owners.

James Gleik, the author of "Chaos: Making a New Science Theory", in his article "I'll take the money thanks" [2] has quoted Pamela Sanderson, a law professor who has become a prominent opponent of what she calls the copyright industry. She wrote that:

> *"People should be able to share on a non-commercial basis. That's the ultimate purpose of copyright - to promote knowledge and discussion, not just to maximise rewards to copyright owners."*

Gleick's response echoes the view of Lord Mansfield from two centuries before:

> *"That's a great sound bite. Everyone is for knowledge, and no one is for greed. But the real idea of copyright - an idea that has evolved over generations of hard trial and spread to virtually every nation on earth - is that the way to promote knowledge and discussion is to grant ownership rights to people who create intellectual property. Let them control their work. Let them profit from it, if they can create something the marketplace desires."*

In Australia, there is little doubt that there is enthusiastic acceptance of the user pays principle being advocated by Gleik at all levels of government and throughout the general economy.

Most of us here today would recognise that it is increasingly unlikely to find a new stretch of road in Melbourne or Sydney which is not a toll-way. The user pays principle is evident in all of our commercial dealings when we are charged for the hire of a video, for renting property, for attending a university and for a myriad of government services.

THE USER PAYS PRINCIPLE AT RISK

So, is the user pays principle at risk in Australia's *Copyright Act*?

I would like to explore this question through two very different examples. The first is the Government's approach to the re-transmission of television broadcasts, where the user pays principle has been accepted.

The second example is the 1998 Copyright Law Reform Committee's *Report on Exceptions to the Copyright*

Act, and in particular the recommendations on fair dealing, which poses a considerable threat to this principle.

RETRANSMISSION REFORM

The history of re-transmission in Australia shows how difficult it is to implement a user pays principle when there has been an unintentional carve-out of copyright owner's rights. Section 199(4) of the *Copyright Act* allows for simultaneous re-transmission of broadcast signals by cable operators without payment to underlying rights holders. This provision was originally intended to assist people with poor broadcast reception but has allowed pay television operators to carry the free to air channels without paying the underlying rights holders.

The Coalition Government, to its credit, has endeavoured to close this loop-hole.

Significantly, there is now no opposition to the recognition of this principle from the pay TV industry as indicated in their Senate submission on 8 December 1998.

One of the reasons why the Government has deliberated so long and hard on this re-transmission legislation is that it had to reach what it considered to be an appropriate balance between the need to pay underlying rights holders for the unauthorised use of their work with the well documented problems many Australians have in receiving a clear signal. The Government also had to consider how the broadcast signal should be valued and the rights of the broadcasters to withhold their permission to use their signal.

After extensive consultation, the Government has attempted to reconcile these issues through having very specific self-help provisions. The basic thrust of these is that where self-help re-transmission occurs for the principal purpose of improving reception in the community and is done on a non-profit basis, then the re-transmission will not be subject to the statutory licence provisions in the *Copyright Act*.

Whilst it is always preferable from a copyright perspective to ensure that rights holders control their rights even if they are ascribed a nil value, the Re-transmission coalition of underlying rights holders did not oppose the self-help provisions because they are clearly stated, they are clearly for a non-profit purpose and they have a clear mechanism for ministerial review.

If the circumstances change there will be an opportunity to re-assess the valuation. In this example, the Government has shown that it is willing to make a strong commitment to the user pays principle and to only allow exceptions to this where they can be clearly justified.

CLRC'S FAIR DEALING PROPOSALS

So the re-transmission legislation, when enacted, may be good news for copyright creators and owners. Unfortunately, the same cannot be said at first blush about the implementation of the CRLC's majority recommendation of an open definition of fair dealing.

As many of you are no doubt aware, the current fair dealing provisions are limited to specific purposes: fair dealing for the purpose of research or study, reporting the news, criticism or review and legal advice. The CLRC has recommended removing the need for these specific purposes and replacing them with an open ended, fair dealing provision that would apply to both individual use and library use of copyright material.

The proposed definition will specifically refer to, but not be limited to, the current exclusive set of purposes. The CLRC has followed the US, which is the only other country to have an open-ended provision. Screenrights is hopeful that the government will vigorously scrutinise the CLRC's recommendation in the context of the market in which intellectual property is traded.

Indeed Richard Alston the Minister for Communications Information and Technology in an article penned for *The Australian* on the Davos economic forum said that it was agreed amongst political and economic leaders that "the information golden age was in its infancy". [3]

Whilst the "information golden age", as Senator Alston has put it, is in its infancy, it is surprising that in the context of rapid technological change, the CLRC has actually recommended widening the circumstances in which material can be used for free. Not exactly a nurturing attitude towards copyright creators and investors.

Technology has swung the balance in favour of users, so surely this is the time when we should be looking at strengthening the position of rights owners (as has occurred with cable re-transmission) rather than weakening them.

The CLRC's report was written to a brief which did not include a reference to the market in which intellectual property rights are traded. Its focus was on simplification and certainty for all parties. Thus there is no substantial analysis of the impact that the report's recommendations would have on affected rights holders' existing markets.

It would have also have been helpful if the report had provided any evidence of difficulties which those seeking rights clearances may have had.

If there have been difficulties with certain user groups in obtaining rights clearances, it is our contention that there are other mechanisms which could have been explored to deal with this rather than expanding the fair dealing provisions.

An open ended definition does create problems with interpretation which will result in expensive litigation in the courts. Is it really fair that the cost of working out what does or does not constitute a fair dealing should be borne by the copyright owners and copyright users?

And what are these newly contended-for fair dealing criteria? The CLRC suggest a "fair dealing" could be for "any purpose" and regard should be had to the "purpose and character of the dealing".

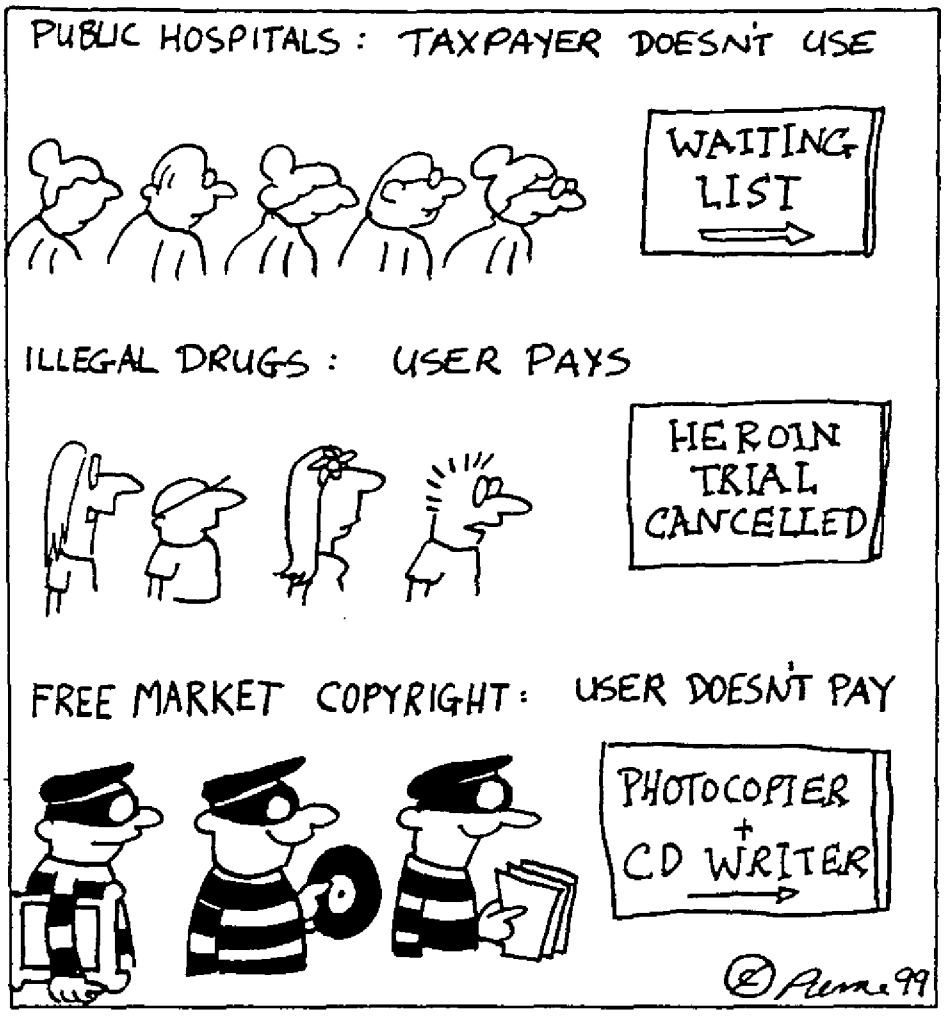
In a different context (where he had to take into account a suggested 'public interest' exception to the confidentiality of commercial test data), Justice Gummow said consideration of this proposed public interest exception:

> *"is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis."*[4]

Let us hope that any revision of the proposed open ended "fair dealing" provision would not be an invitation to "judicial idiosyncrasy".

THE CLRC FAIR DEALING POSITION

Moreover, it is arguable that the CLRC's open definition of "fair dealing" is contrary to Australia's obligations under Article 9(2) of the Berne Convention. This article provides that it is a matter for the legislation of the countries of the



union to permit the reproduction of such works in certain "special cases", provided that such reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

The CLRC has recommended removing the limitation to special cases and the introduction of free use exceptions that would conflict with the normal exploitation of the work, and that would unreasonably prejudice the legitimate interests of the author. In recommending that the use simply be "fair" and that electronic use be allowed under these provisions, we are opening the way for the digitisation and uploading of videos (and other copyright material) by libraries and individuals onto sites without payment to rights owners. This would, without doubt, affect the interests of creators and those who invest in their works.

Indeed, the open ended definition could create serious difficulties for Screenrights in its administration of the statutory licence relating to the copying of off-air broadcasts. If implemented, the revised definition of "fair dealing" could result in a blurring of the line between paid use of audio-visual material under the educational statutory licence and use under these free use provisions.

Under our current law, there is no general provision that allows a library to copy a transmission of audio-visual material for a student's personal research or study. Any copying done by libraries within educational institutions is done under their agreements with Screenrights and is paid for.

The fair dealing and library copying provisions were originally based on allowing certain limited uses, but did not conflict with the copyright owners' market for their works. It is open to question whether these exceptions make sense in the context of how material is accessed and used today. Libraries and individuals now have the capacity to reproduce and disseminate perfect quality reproductions at rapid speed.

Indeed, libraries could become like publishers for vast audiences, and with improvements in band width and compression technology they have the capacity to be mini unauthorised broadcasters of audio-visual works.

The Government's approach to re-transmission should be considered in this debate. In a real commercial environment, as opposed to the theoretical environment of the CLRC's report, a balance of access and equity could be found - one that respects legitimate rights of copyright owners and creators, while allowing exploitation of their works.

THE "TECHNOLOGY-NEUTRAL" ARGUMENT

The CLRC has stated that the open ended model approach is necessary to adapt to "changing technology" and the "digital age" (par 6.08).

In making reference to the need for the provisions to be technology neutral, the CLRC has not acknowledged that the existing provisions, being purpose-based, are already technology-neutral.

It is difficult to understand how the requirement that the use be for a specific purpose has any relationship with changing technology.

A change in delivery mechanism does not mean there should automatically be a change to the principle of payment for use.

We are particularly concerned about material that has never been digitised in the past. The Committee's recommendations could, for example, allow a user to upload all or part of a video onto a cipher access for the use of other participants in a study group.

WHY DOES THE CLRC SAY IT IS OK NOT TO PAY FOR USE?

The approach of the majority of the CLRC to the issue of payment for use can be most clearly found in their own words at paragraph 6.19 of the report:

> *"the majority believes that the fair dealing provisions are needed to ensure the free use of copyright material in the digital environment for purposes that are socially desirable, especially given that digital technology has the potential to restrict such use so as to enforce voluntary licensing agreements."*

These "socially desirable" purposes are not explicitly identified - they are just asserted.

The strong implication is that free access constitutes a "socially desirable" purpose, but the report is bereft of any explanation of why it is "socially desirable" for users to be given this free ride.

In the context of any other property right in our society, there would be considerable resistance. It would be, for example, "socially desirable" to allow the use of one's car for social services such as meals on wheels, but as the owner of that vehicle you may want some say in this.

CONCLUSION

In conclusion, I don't know the answer to the question I have posed in this paper, namely, whether the user pays principle is being threatened under the *Copyright Act*. The answer must wait until we see the Government's response to the CLRC's report.

The Government certainly appears to be committed to creating more opportunity for Australian creators in the digital age and should be congratulated for doing so. The creation of the ministerial Council of Information Technology is strong evidence of the Government's commitment in this area. However, without an appropriately supportive copyright environment, these content creation initiatives will be difficult to sustain.

And if there was any doubt as to the need of an appropriate copyright environment to fully participate in the digital economy, one only has to refer to the recently created WIPO industry advisory committee, which is comprised of top-level representatives of industry.

Chris Gibson, a member of the committee who is a WIPO expert on Internet-related issues was quoted as saying:

> *"Intellectual property issues are at the very core of electronic commerce...Protection is necessary to create a stable and positive environment for the continuing growth of electronic commerce."* [5]

If the Government did decide to carve out copyright owners' rights, it would be very difficult if not impossible to reverse.

If the potential market for a copyright owner's work is to be arbitrarily cut out through the adoption of the proposed fair dealing regime, strong proof should be provided of the failure of the licensing system to facilitate access whilst ensuring fair payment. Strong proof ought to also be provided, failing agreement between the parties, that the Copyright Tribunal is not the best forum for the debate over price and conditions of access to be decided.

If intellectual property is to remain "hot property" in the 21st Century, we collectively have to make sure that we do not undermine its value and cave in to the demands for no payment for use unless it is clearly justified. The CLRC's report on exceptions should be regarded as an important starting point for this debate.

At the end of the day all we are asking is for the Government to undertake the considered consultative approach that it undertook when considering the re-transmission issue to ensure that it makes a fully informed decision.

In that way, Australian creators and copyright owners can be confident that their investment in the "currency of the 21st century" is not being devalued.

1 "Royalty revamp hits raw chords with musos" by Brendan Pearson, *Australian financial Review*, 27 /1/99 pg.3

2 *New York Times*, August 4 1996

3 Senator Alston, Minister for Communications Information Technology in *The Australian* 9/2/99 p.32.

4 *Smith Kline and French Laboratories (Australia) Limited and Ors v Department Of Community Services and Health* (1990) 22 FCR 73 at 111.

5 "WIPO Director-General Creates New Industry Advisory Group" - *Washington File*, Washington DC: US Information Agency; and "E-commerce hottest topic at first meeting "by Wendy Lubetkin, USIA European Correspondent, 7/2/99

Simon Lake is the CEO of Screenrights. This paper is from a speech by Simon at the "Copyright Futures Seminar" hosted by the Australian Key Centre for Cultural and Media Policy, on 12 February, 1999

Liability for Electronic Communications

Karen Knowles outlines some relevant issues regarding liability for defamatory electronic communications and some practical guidelines for developing an internal e-mail policy.

Some of the many legal issues raised by a consideration of e-mail message content include defamation, breach of copyright, breach of the *Trade Practices Act* 1974 (Cth), breach of confidence, breach of privacy, breach of equal opportunity and racial discrimination laws and potential criminal activity.

This paper will primarily focus on:

- defamation via online services;
- some progressive measures being made in order to adapt to the new world of electronic media; and
- suggested guidelines for constructing an e-mail policy for staff.

DEFAMATION ON THE INTERNET

Libel is a defamatory statement made in some permanent form. Although there was initially some doubt as to whether an e-mail message amounted to a 'permanent form' this has now been confirmed by the courts.

Print-outs of e-mail messages are admissible in evidence and may be discoverable in legal proceedings. As such, when communicating via e-mail one should be conscious of the need to express oneself with the same clarity and reserve as for other written communications.

The widespread transmission offered by the Internet raises important issues of jurisdiction and governing law.

JURISDICTION

The Internet has no regard for national borders but the defamation laws in each jurisdiction can vary significantly. A