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will normally be claimed as part of the transaction price that is said to be owing. For damages, the relevance of GST will have to be looked at more carefully. Where a proceeding has been commenced and has been settled, then the act of settlement may constitute a new taxable supply or an adjustment event to an old supply. Therefore, it is likely that there will be a GST implication and this will have to be factored into the terms of settlement.

Trade Practices

Large corporations will no doubt be seeking regulatory advice on how not to fall foul of the ACCC's new pricing guidelines which, in general terms, require that any cost savings associated with the introduction of GST (in conjunction with the abolition of other taxes) have to be passed on to consumers. As mentioned above, this is governed by Part VB of the Trade Practices Act 1974 (Cth).

Conclusion

The above, of course, represents a mere sprinkling of the legal issues associated with GST. However, I am convinced that if the fundamental concepts are understood then any legal adviser will have a better chance of making sure the client is not adversely affected in its business dealings by the introduction of GST.

I have not even got around to mentioning GST consequences of franchise arrangements or licences or other intellectual property related agreements. There is also going to be a lot of general advice initially on when and how GST is going to be payable in relation to various transactions. For example: importers will need to know how and when GST will be levied on imports. Employers are going to want to know how GST is to be levied on fringe benefits. The possibilities are endless and no doubt there is plenty of work around for young lawyers!

The Copyright Amendment (Digital Agenda) Bill – An Overview

Craig Doolan

HISTORY AND OBJECTIVES

The reforms introduced by the Bill stem from proposals in the 1997 *Copyright Reform and the Digital Agenda* Discussion Paper, which arose out of the changes recommended by the Copyright Convergence Group in 1994.

The *Copyright Amendment (Digital Agenda) Bill* seeks to implement changes which will bring Australia's Copyright Act 1968 (Cth) ("the Act") into line with the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty and Performances and Phonograms Treaty.

The rationale behind the amendments is that copyright owners' rights should subsist irrespective of the medium or means of reproduction/publication. The aim of the amendments is to preserve the traditional rights of copyright owners in the context of developments in technology which have occurred over the last thirty years.

The gap between modern technology and the Act was highlighted in the decision in the case of *Telstra v APRA* (1997) 71 ALJR 1312 where Telstra was held liable for the infringement by its subscribers (who were illegally playing music as 'hold' music over Telstra's lines) of copyright in musical works. In its judgement the High Court acknowledged its decision posed significant difficulties for Internet Service Providers (ISPs) and carriers such as Telstra, but stated that it was bound to decide the case on the existing legislation and that changes to the legislation was the realm of the legislature, not the courts.

REFORMS

The right of communication

The main reform is the introduction of a new technology-neutral right to "communicate" copyright material to the

public. "Communicate" means "to make available online or electronically transmit a work or other subject matter."

Copyright holders will have the exclusive right to communicate the copyright material to the public, replacing the existing technology-specific broadcasting right which currently only applies to "wireless" broadcasts and broadcasts to subscribers to a diffusion service.

The new right will apply to literary, dramatic, musical and artistic works, sound recordings, cinematography films and television and sound broadcasts. It clearly contemplates the making available of copyright material online, e.g. by uploading material onto a server connected to the internet.

A communication will be taken to have been made by the person responsible for determining the content of the communication (or in the case of a broadcast, by the person who provided the broadcasting service by which the broadcast was delivered).

Mindful, it seems, of situations such as that which arose in the Telstra case, the amendments will specifically provide that a carrier or ISP is not taken to have authorised any infringement of copyright in a work merely because it provides facilities used by a person to do something which infringes copyright owner's rights.

However, in order to avoid liability completely, the carrier or ISP will need to satisfy the court that it did not authorise the infringement having regard to:

- its power to prevent the infringing act;
- the nature of the relationship between it and the person who committed the infringing act; and
- whether it took any reasonable steps to prevent or avoid the doing of the act, including whether it complied with any relevant industry codes of practice.

Retransmission rights

Currently, pay TV operators may retransmit free-to-air television broadcasts without the permission of the owners of the rights in the broadcast (or of the owners of the literary, dramatic, artistic or musical works therein). The Bill will amend the Act to provide that, with few exceptions, the pay TV operator or "retransmitter" may only retransmit free-to-air broadcasts if it undertakes by way of a "remuneration notice" to pay royalties to a collecting society (similar to APRA in respect of musical works).

EXCEPTIONS

Fair dealing

The existing exceptions which allow copying of part of a work for the purposes of research and study, criticism

and review, news reporting and the obtaining and provision of legal advice, and the exceptions which apply to universities and libraries, will be preserved and amended to account for changes in technology.

Reproductions by educational institutions

In the same way that statutory licences presently apply (whereby, on payment of a royalty pursuant to a statutory licence, educational institutions are able to make multiple hardcopies of copyright material available to students), educational institutions will be able to communicate such material online to students subject to the payment of royalties.

The provisions which allow copying of a "reasonable portion" of a work (which currently is 10% or one chapter of the work in question) will be amended to allow for the copying of "10% of the total number of words in the work". The Bill also provides:

- that if a reproduction is made or communicated by or on behalf of a person under this exception, another reproduction/communication may not be made by or on behalf of that person within fourteen days;
- In the case of material made available online, the exception only applies to the 10% limit at any given time (i.e. a person may not make another part of the work in question available whilst the previous part continues to be available online).
- The Bill allows for the reproduction of no more than fifteen pages of a printed anthology.

Temporary reproductions

Temporary reproductions of copyright material are often made in the course of browsing on the World Wide Web and in communication via the internet. For example, whilst you are searching on the internet at your workplace, temporary copies of the material made available on the net may be made on your employer's remote ISP in the process of passing it along to the next machine in the chain (such as your employer's local server and, in turn, your PC).

This temporary storage of information is also known as "caching" and enables your PC to reconnect instantly with a site you have already visited (as when you use your web browser to retrace your "steps" from the link you have ended up at) rather than having to reestablish from scratch the chain of links leading to the website or other source of information, which may be in the US or elsewhere overseas.

The amended Act will provide that the copyright in a work is not infringed by making a temporary

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reproduction of the work "as part of the technical process of making or receiving a communication".

It is unclear exactly how "temporary" the reproduction must be; conceivably, if material is actually stored on a server beyond the time spent in an individual instance of browsing and is substituted for the external site, this may not be sufficiently temporary to benefit from the exception.

Enforcement of copyright protection

It is common knowledge that changes in technology have made the reproduction and transmission/distribution of copyright material increasingly cheap and easy. The Bill introduces two new remedies to the owners of copyright, namely "technological copyright protection measures" and "rights management information."

- Technological copyright protection measures are those such as hardware and software locks, digital watermarks and encryption mechanisms which render copyright material unreadable/inaccessible without the use of a hardware or software 'key' which is only made available to licensed users of the copyright work. The Bill will introduce civil and criminal penalties against those who make, deal in or provide devices or services designed to circumvent such protective mechanisms.
- Rights management information is effectively an 'ID tag' on copyright material which identifies the copyright owner and the terms and conditions of use of the material. The Bill will introduce measures to prevent this information from being removed or altered.

In both cases the test will be whether the defendant knew, or ought reasonably to have known, that their conduct would offend these provisions.

Transitional provisions

The transitional provisions provide simply that from the date of commencement of the amended Act, the new laws:

- will apply to any existing works in which copyright subsisted immediately before the commencing day, and to any original work made on or after that day;
- will not apply in respect of a licence, contract or arrangement (other than an assignment of copyright) which was in force immediately before the commencement date unless that licence, contract or assignment expresses a contrary intention.

CONCLUSION

The Bill aims to achieve a balance between the protection of copyright and the potential stifling of access to information which is central to the concept of the World Wide Web.

Some think the new laws are fair. The Copyright Agency Limited (CAL) holds the view that the amendments will do no more than protect the interests of copyright holders and assuage fears that the growing market for publications online would disappear if reading on-screen were allowed free of charge¹. Others, such as Clarke², argue that the extension of the 18th Century concept of copyright in to the modern world of electronic publishing has resulted in an accidental and inordinate extension to the rights enjoyed by copyright owners.

LATEST UPDATE

LEGISLATION UPDATE – COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999

Digital Agenda Bill being examined by House of Representatives Standing Committee.

Regular readers will be aware that the Copyright Amendment (Digital Agenda) Bill 1999 was introduced into the House of Representatives on 2 September 1999. The Bill has been referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs for inquiry and report by 9 December 1999. Officers of the Attorney-General's Department's Intellectual Property Branch (Ms Joan Sheedy, Ms Helen Daniels and Mr Simon Cordina) and officers of the Department of Communications, Information Technology and the Arts (Ms Kylie Browne and Mr Nick Smith) gave oral evidence to the Committee on 23 September 1999. The Departments also provided the Committee with two jointly prepared written submissions. The Committee has received over 80 submissions on the Bill and held a number of public hearings. Details of the inquiry and copies of submissions are available from the Committee's web site at <http://www.aph.gov.au/house/committee/laca/digitalagenda/inqinf.htm>.

1 see *Australian Intellectual Property Law Bulletin* vol. 11 no 7 1999 at p.74

2 Clarke, R and Dempsey, G "Copyright Implications of electronic publishing" *AIPLB* vol. 11 no. 8 1999