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Copyright or Contract: The 2002 Review in Australia

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Abstract

During 2001/02 the Australian Government commissioned an inquiry into the relationship between contract and the copyright exceptions in Australian law. This was the first inquiry of this kind (worldwide), and was in part a response to rising concerns and commentary that had accompanied Australia's legislative response to the digital age, its so-called Digital Agenda Act, which had come into effect in March 2001. This paper describes the environment in which the inquiry was established; discusses the role of the Copyright Law Review Committee; and centrally, gives an account of the Review and its findings, with their particular significance for the operation of libraries in the digital age. In doing so several observations are made on the year long process of the inquiry, and the rising position of influence on public policy issues which the library sector has achieved in Australia in the last ten years.

Introduction: The Context for the Contract Versus Copyright Inquiry

Following the Geneva 'Internet Treaties' of December 1996, public policy debate in Australia on the future direction of copyright law intensified. It accelerated greatly after the Government released an exposure draft of its Digital Agenda Bill in February 1999. At the time the Government stated that:

the central aim of the reforms is to ensure that copyright law continues to promote creative endeavour whilst allowing reasonable access to copyright material on the internet and through new communications technology¹

What followed was over a year's intense lobbying by various interest groups, similar to that which occurred in many other jurisdictions. During this lobbying significant pressure was applied to the question of the role of libraries with one of the principal collecting societies in Australia making a particular point of seeking to overturn the library exceptions which have been long provided for in Australian law.

But the Government remained reasonably steady on its stated commitment to preserving a balance between the rights of copyright owners and the issue of public

access in the digital era. The high point of lobbying and debate occurred when the Government, having introduced the Bill into Parliament in September of 1999 referred it to one of its standing committees. This standing committee held a number of hearings in which public comment from various copyright interests, including libraries was sought.

Legislation was duly passed, legislation which essentially gave effect to the Government's original intention. However, when it came into effect in early 2001, the Government also announced that there would be a process of reviewing its provisions in three years time. That review is now under way, with the terms of reference released about three months ago in Australia. While it is not the topic of this paper, it is certainly worth noting that top of the list of the matters to be reviewed are the library exceptions, so the issue will come around again.

During the time taken for this process, the emerging question of whether contract should override exceptions which exist in law developed, and not only in Australia. By August 2001 for example the US Register of Copyrights and the Assistant Secretary for Communications and Information in the Department of Commerce in the United States, published a joint report on the Digital Millennium Copyright Act 1998, which in part sought to address concerns which had been raised that contracts were being used to override exceptions to the exclusive rights of owners in the United States Copyright Act.ⁱⁱ

The Copyright Law Review Committee

As everywhere else, law making in Australia is normally a complex process. In the domain of copyright it is important to note the role played by the Copyright Law Review Committee. Established in 1983, its role was to provide advice to the Attorney General on changes which might need consideration in the law of copyright as various circumstances developed in the country. Chaired by an eminent member of the legal profession, (there have been four chairs to date), the Committee has been characterised by a small membership of people appointed by virtue of their expertise in a number of fields. Usually the Committee has a particular set of policy issues referred to it as a 'reference', and seeks then to provide advice for the Government on the issues concerned including any proposed legislative responses. These issues can vary and be as specific as the role and functioning of the Australian Copyright Tribunal, or as broad as the question of general simplification of the Act.

The process undertaken has usually followed a pattern of calling for public submissions on a question for which an issues paper may have been generated. The Committee operates to a specific timeframe, say, a year, in which to make a report to the Attorney General. Responding to the report is of course entirely at the discretion of the Attorney General of the day.

With the development of rapid changes in the digital environment, some of the issues referred to the Committee have become more complex. In 2001 the Committee was renewed (its membership may alter for each reference), and the author was one of several appointments to the Committee to conduct the review into the contract issue.

The Review – The Process

In April 2001 the committee was given the task of enquiring into the relationship between contract and copyright. Although not reproduced in full here it is important to note that in setting out the Terms of Reference, the Government reiterated that it regarded

as important that Australian copyright law maintain an appropriate balance between the rights of copyright owners and the rights of copyright users. Against that background, the Copyright Law Review Committee is to enquire into and report on ... the extent to which electronic trade in copyright works and other subject matter is subject to agreements which exclude or modify exceptions to the exclusive rights of copyright owners provided under the copyright act ...ⁱⁱⁱ

Importantly the Government also stated within the Terms of Reference that the views of owners and users of copyright material on the extent of the problem should be sought by the Committee. The Committee was also to give advice on whether any preferred response should be a legislative or non-legislative change. This was a particularly important element of this particular enquiry.

The Committee was given until April 2002 to report. It therefore without delay generated an issues paper called 'Copyright and Contract' which was released to the community generally in June 2001. Thirty-six submissions were received and in October the Committee held a half day public forum in Sydney, to discuss issues and submissions. The forum had been preceded by a discussion paper.

The report was duly produced and submitted being one of the longer reports to Government produced by the Copyright Law Review Committee.

The Review – The Findings

To be succinct, the Committee did find in response to the Government's implied question that there was indeed a problem. Furthermore it formed the view that contracts which purport to modify the exceptions are likely to be enforceable and that could alter the balance intended by the Australian legislation. Most importantly, and certainly surprising to some, was the Committee's central recommendation that the Copyright Act be amended to provide that an agreement or provision of an agreement that excludes particular exceptions should have no effect.

All told, the Committee made six recommendations, which in summary were:

- i a recommendation that the Government work to promote an international solution to private international law issues relating to agreements which were the subject of this reference;
- ii the central recommendation that the Government amend the Act;
- iii a recommendation also that 'the integrity of the "permitted purposes" in section.116A(3) (4) and (7) of the Copyright Act be retained by preventing the copyright owner from making it a condition of access to his or her work or other subject matter that users will not avail themselves of a circumvention device or service for the .. purpose of doing an act that is not an infringement of copyright under' various sections ...;

- iv a recommendation or more properly a statement of view by the Committee that its recommendations do not alter the effect of another provision in the Act relating to confidentiality agreements;
- v a recommendation on the development of codes of conduct and model licences for dealings with the exceptions which are not covered in the main recommendation;
- vi no recommendation for change in the Circuit Layouts Act.^{iv}

On the last recommendation a second matter had been referred to the Committee, but there did not seem to be public concern nor any strong legal imperative for changing the legislation in the Committee's view, and it occupied only a tiny percentage of the Committee's time.

Since the Committee's recommendations were published in the report in October 2002 there has been a number of responses and reactions from various copyright communities. Generally speaking these have been commentaries from groups representing copyright owner interests to the effect that there is still insufficient evidence of a problem, and that the Government not be too hasty in seeking to respond with any legislative proposals.

In arriving at its findings the Committee was greatly concerned during the first part of its reference about the question - is there really a problem? When public submissions were called for in response to the issues paper, which in turn reflected the Government's question about the extent of a problem existing, the main body of submitted opinion clearly divided into two camps. Copyright owners, in short, declared that there was no evidence of a problem, whereas copyright users stated that there clearly was a problem, and presented evidence of this in submissions and in the public forums.

This last point is particularly interesting for libraries. In my own experience of being on the copyright law review for two references, and otherwise involved in lobbying and advocacy with Government Ministers, enquiries etc I have never seen such a strong requirement for specialist advice from the library sector. For it is the library sector that has the most experience of the rapid development of provision of copyright material under specific contracts, as electronic publishing, and the bundling of electronic publishing has grown.

It was interesting also in the public forum and submissions to see that the other grouping which emphatically agreed that there was a problem was a legal group, being practicing lawyers (within universities for example), who are required to go through the contracts that are being provided by large publishers for signature by the respective universities and their libraries.

Observations on the Process – Lessons for Libraries

This was one of the most interesting copyright tasks in terms of public policy advice that one could conceive. A major issue of the day is whether legislative provision that has developed over many years, and is based on some long standing principles of equity and limits to the exclusive rights of owners is to be circumvented by an economic 'reality' in which these rights assert new forms of monopoly. Of course the

copyright owners were not keen to declare that there was a problem. After all consistent with other lobbying in the last decade, it is not in their economic interest to do so. However, there were some significant alternative points of view expressed, including by the Director of one of Australia's most significant collecting societies, who at the public forum stated clearly that he thought that the intention of Parliament should not be thwarted by private agreement. In this he was in something of a minority.

The Copyright Law Review Committee has usually comprised a representative cross section of people representing the full range of interests and expertise, though more recently copyright owners have been critical of the presence of copyright user interests on the Committee.

The process of firstly understanding that there was indeed a problem, and then thinking what might be done about it was very demanding and very challenging, and led the more technically legal practitioners into very long and protracted debate.

It is always a possibility with such a committee that a minority report might be made in the event that the committee cannot achieve consensus. This is indeed what happened with another significant reference for the Committee which was on the simplification of the Copyright Act.

However, in this case the Committee achieved a consensus report. It did so by focussing particularly on those exceptions in Australian law which are firmly rooted in longstanding concepts about rights of public access and their effect in limiting the owners' exclusive rights. Therefore, the specific sections of the Act providing for exceptions for fair dealing, and for the role of libraries are the subject of the Government's recommendations, while the other, very extensive list of other exceptions, including the statutory licences, were not.

It was by this technique of distinguishing within the categories of exceptions that the chances of unanimous findings by the Committee were significantly enhanced.

Lessons for the library world from this important report, include the vital need to be able to communicate worrying changes in our rapidly changing digital environment effectively and swiftly when given the opportunity.

Conclusion

There was a real risk in this review that the view that there was not really a problem would prevail. The point just made about the importance of library evidence was crucial, even though in the one public forum that was held various libraries publicly differed with each other, with the spokesperson for one particularly large library in Australia essentially reaffirming the view that there was 'no problem'.

The weight of evidence provided for in submissions, and the views of specific lobbying groups, in particular the Australian Digital Alliance and the Australian Libraries Copyright Committee (the former having been established in 1998, and the latter in 1994), were very significant.

Influential too were views of the profession itself including the Law Council of Australia.

It is too early to predict Government response to the report, and there is in any case the now urgent task of preparing appropriate responses to the three year review of the Copyright Act changes of 2001.

But this inquiry was a world first. The report itself is well researched, and could well become a textbook in itself. The capacity of libraries to have a voice, to influence the outcome, and to reinforce the clear link between the public good of information access and the 21st century role of libraries in the digital age was critical.

Endnotes

ⁱ COMMONWEALTH OF AUSTRALIA. *Exposure draft and commentary - copyright amendment (digital agenda) bill*, 1999 p3

ⁱⁱ COPYRIGHT LAW REVIEW COMMITTEE, *Copyright and contract*, Commonwealth of Australia, Canberra, 2002; p221 (URL source <http://www.law.gov.au/clrc>)

ⁱⁱⁱ *Ibid* pp4,5

^{iv} *Ibid* pp10,11