
COPYRIGHT REFORM : COPYRIGHT AMENDMENT (DIGITAL AGENDA) ACT 2000

On 17 August 2000 the Copyright Amendment (Digital Agenda) Bill 2000 passed the Senate and the House of Representatives. The Digital Agenda Bill received Royal Assent on 4 September 2000, and became the Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000. The Digital Agenda Act is intended to commence on 4 March 2001.

WHY REFORM THE COPYRIGHT ACT?

Digital technology and the growth of computer networks such as the Internet have posed challenges to the protection and enforcement of copyright throughout the world. Creators and owners of copyright material need to protect their copyright on the Internet. Users of copyright material, such as libraries and educational institutions, are concerned about being able to maintain reasonable access to copyright material in a digital environment. Carriers and Internet service providers (ISPs) are worried about facing uncertain liability for copyright infringements which are committed by third parties whilst using their facilities.

The development of new communications technologies has exposed gaps in copyright protection under the *Copyright Act 1968* (the Act). For example, the Act currently only grants copyright owners limited, technology-specific transmission rights, eg, the right to broadcast only extends to 'wireless' broadcasts, and the existing cable diffusion right does not extend to sound recordings or television and radio broadcasts. Further, copyright owners currently do not have effective rights in relation to the use of their copyright material on the Internet.

WHAT ARE THE AIMS OF THE DIGITAL AGENDA ACT?

The Copyright Amendment (Digital Agenda) Act 2000 (the CADA) implements major reforms to the Act in order to update Australia's copyright regime to take into account the rapid development of new technologies. It ensures that copyright law will continue to promote creative endeavour whilst allowing reasonable access to copyright material through new communications technologies. The CADA is a key component in the Government's commitment to encouraging the growth of the information economy.

The objectives of the Act are to:

- ensure the efficient operation of copyright industries in the online environment through promoting financial rewards for creators and investors, providing a practical enforcement regime, and providing access to copyright material online;
- to promote certainty for communications and information technology industries;
- to provide reasonable access and certainty for the end users of copyright material online;
- to ensure cultural and educational institutions can access copyright

material online on reasonable terms including the provision of adequate remuneration to creators and investors; and

- to ensure that the technical processes which form the basis of the operation of the Internet are not jeopardised.

DID THE GOVERNMENT CONSULT WITH INTERESTED PARTIES?

The process of developing and implementing the Government's Digital Agenda reforms involved an extensive consultation process. Numerous opportunities were provided for interested parties to provide written submissions and participate in the consultation process.

Appendix A sets out a history of the development of the CADA, and the opportunities for consultation which were provided.

WHAT ARE THE MAIN REFORMS IN THE DIGITAL AGENDA ACT?

There are 5 key elements of the Government's Digital Agenda reforms:

1. A new exclusive right of communication to the public;
2. Updating, and appropriately extending to the digital environment, the exceptions to the exclusive rights of copyright owners (including educational and other statutory licences);
3. The introduction of new enforcement measures;
4. Limiting and clarifying the liability of carriers and carriage service providers (including ISPs) for third party copyright infringements; and

5. The introduction of a statutory licence scheme for the retransmission of free-to-air broadcasts.

THE NEW RIGHT OF COMMUNICATION TO THE PUBLIC

The centrepiece of the CADA is a new broadly-based, technology-neutral right of communication to the public. The new right is an exclusive right in literary, musical, artistic and dramatic works, sound recordings, films and broadcasts. The only category of copyright material not to receive the new right is that of published editions.

The CADA defines "communicate" as meaning to make available online or electronically transmit (whether over a path, or combination of paths, provided by a material substance or otherwise) a work or subject-matter.

The new right replaces and extends the existing technology-specific broadcasting right. The current definition of "broadcast" refers only to wireless broadcasts. The CADA repeals this definition, and substitutes an extended, technology-neutral definition which means a communication to the public within the meaning of the *Broadcasting Services Act 1992*. This new definition will include cable transmissions, and replaces the limited right to transmit to subscribers of a diffusion service. The new right also encompasses the making available of copyright material online, such as uploading material onto an Internet server.

The communication right is not limited to specific technologies. The definition of "communicate" makes it clear that an electronic transmission may occur via a combination of delivery mechanisms. For example, an Internet communication may travel across copper wires, optic fibre

cables and microwaves. The new right does not, however, cover the physical distribution of copyright material in a tangible form (such as the distribution of hard copies of books).

The CADA also defines "to the public", to clarify that to communicate to the public includes the public within or outside Australia. This will allow Australian copyright owners to control the communication from Australia of material directed to overseas audiences.

EXCEPTIONS TO THE EXCLUSIVE RIGHTS OF COPYRIGHT OWNERS

The CADA includes an important package of exceptions to the new right of communication to the public, and introduces some new exceptions in relation to other rights. As far as possible, the exceptions replicate the balance struck between the rights of owners and users that has applied in the print environment. The CADA also maintains most of the existing exceptions in the Copyright Act in relation to broadcasting, and does not extend them to the new communication right.

The key areas of reform are:

1. fair dealing;
2. libraries and archives;
3. educational statutory licences;
4. temporary reproductions; and
5. simulcasting.

Fair dealing

The Copyright Act permits dealings with copyright material without the permission of, or payment to, copyright owners, for the purposes of research and study, criticism and review, reporting the news,

and professional legal advice. These are collectively known as the 'fair dealing' exceptions.

The CADA provides that the existing fair dealing exceptions will apply to the new communication right, and provides guidance on determining how the exceptions will apply in the digital environment. For example, in relation to the research and study exception, the CADA clarifies what will be a "reasonable portion" of works in electronic form.

Libraries and archives

Libraries and archives are currently permitted to make reproductions of copyright material for library users for the purposes of research and study, and for other libraries for certain purposes.

The Government believes that libraries and archives must be able to use new technologies to provide access to copyright material for the general community. However this access must be provided in a way which will not unreasonably prejudice the interests of copyright owners.

The CADA extends the existing exceptions for library copying to the electronic reproduction and communication of copyright material. However, it also provides important restrictions on the ability of libraries to exercise the exceptions in relation to works in electronic form. For example, a library may only request an article or a portion of a work in electronic form from another library if that portion or article is not available within a reasonable time at an ordinary commercial price. This is to ensure that the exercise of the inter-library loan exceptions will not unreasonably conflict with the emerging markets of copyright owners.

Educational statutory licences

The educational statutory licence in Part VA of the Copyright Act currently allows educational institutions to copy transmissions (such as wireless broadcasts or cable television transmissions) without the permission of underlying copyright owners, subject to the payment of remuneration. This statutory licence is amended by the CADA to refer to the new broader definition of "broadcast", and extended to encompass the new right of communication to the public. This will enable educational institutions to communicate broadcasts they have copied, subject to the payment of equitable remuneration.

Part VB of the Copyright Act provides educational institutions with a statutory licence to make copies of works subject to the payment of equitable remuneration. The CADA extends this scheme to apply to the reproduction and communication of works in electronic form. The reforms establish 2 separate schemes. One applies to hard copy material, and the other to works in electronic form. Existing limits on copying will apply generally to the new scheme (as appropriately amended to take into account differences in the digital environment). The new scheme is drafted broadly enough to encompass future technological developments. It is a flexible scheme which relies upon the agreement of the relevant parties.

The CADA also amends the existing statutory licences for institutions assisting persons with a disability to the reproduction and communication of copyright material in electronic form.

Temporary reproductions

Many temporary or incidental reproductions are made in the course of the technical processes of exercising the

new communication right. The CADA introduces a new exception to the exclusive right of reproduction for temporary reproductions made as part of the technical process of making a communication. This exception is intended to include temporary reproductions made in the course of browsing or viewing copyright material online, and in certain types of caching. It is designed to ensure that the technical processes which underpin new technologies, such as the Internet, are not jeopardised.

The exception is limited to temporary reproductions made in the course of non-infringing communications, and involves reproductions which have little or no independent economic significance.

Simulcasting

As a result of the introduction of digital television in Australia, the *Broadcasting Services Act 1992* (BSA) contains provisions which require certain broadcasters to simulcast in both analog and digital form for a period of time. The CADA introduces a new exception to ensure that broadcasters do not infringe copyright in underlying works when a copy of a broadcast is made solely for the purposes of complying with these legislative requirements.

"Simulcasting" is defined to mean simultaneously broadcasting in both analog and digital form in accordance with the requirements of the BSA, or any other legislative provisions governing digital broadcasting.

ENFORCEMENT MEASURES

The CADA introduces strong new enforcement measures to assist copyright owners in enforcing their rights in the digital environment. Specifically, the CADA provides new enforcement regimes for:

- circumvention devices and services;
- rights management information; and
- broadcast decoding devices.

Circumvention devices and services

The CADA provides civil remedies and criminal sanctions against the manufacture, commercial dealing, importation, making available online, advertising, marketing and supply of a circumvention device or service used to circumvent technological protection measures such as program locks. The actual use of a circumvention device or service is not specifically proscribed.

A “circumvention device” is defined as a device (including a computer program) having no, or only a limited commercially significant purpose or use other than the circumvention, or facilitating the circumvention of, a technological protection measure. This definition will include non-physical devices such as software tools, and is designed to ensure that general purpose electrical equipment, such as video recorders and computers, does not fall within the definition.

The CADA also provides a corresponding definition of “circumvention service”.

The new provisions will operate to provide copyright owners and their exclusive licensees with an effective means of enforcing their rights in an online environment, and combating online piracy. However in order to preserve the existing balance in the Copyright Act between the interests of owners and users, the new enforcement provisions will allow for the operation of some of the existing exceptions to the exclusive rights of copyright owners. These limited exemptions are referred to in the CADA as ‘permitted purposes’.

A person will be able to manufacture or supply a circumvention device or service if the person receives a declaration that it is required for a permitted purpose. A declaration must include certain specified information, including a statement that the copyright material the person wishes to access is not readily available in a form not protected by a technological protection measure. The CADA also introduces new penalties in relation to false declarations.

The permitted purposes specified in the CADA are the reproduction of computer programs to make interoperable products, to correct errors and for security testing, activities covered by libraries (including Parliamentary libraries) and archives exceptions, the use of copyright material for the Crown, and activities covered by the statutory licences for educational institutions and institutions assisting persons with a disability under Part VB of the Copyright Act.

Rights Management Information

The CADA also introduces new criminal offences and civil remedies regarding the intentional removal and alteration of electronic rights management information (RMI), or the commercial dealing with copyright material where the RMI has been removed.

RMI refers to specified information attached to or embodied in a copy of a work or other subject-matter, or any numbers or codes which represent such information electronically. This would include technology such as digital watermarks. RMI typically includes details about the copyright owner, and terms and conditions of use of the copyright material.

Broadcast decoding devices

The CADA also introduces new remedies and offences in relation to the

manufacture, sale and other dealings with broadcast decoding devices that facilitate unauthorised access to encoded broadcasts. The provisions do not prevent the personal use of such devices, but a civil remedy is provided for the use of a decoding device for a commercial purpose (for example the unauthorised reception of an encoded sporting event in a hotel or pub).

A broadcast decoding device is defined to mean a device that is designed or adapted to enable a person to gain access to an encoded broadcast without the authorisation of the broadcaster, by circumventing, or facilitating the circumvention of, the technical means or arrangements that protect access in an intelligible form to the broadcast.

LIMITATIONS ON LIABILITY FOR CARRIERS AND ISPs

One of the aims of the CADA is to clarify, and in certain circumstances limit, the liability of carriers and ISPs for copyright infringements committed by third parties whilst using their facilities.

The CADA provides that a person will only be *directly* liable for copyright infringements involved in a communication where they have determined the content of that communication. Therefore a carrier or ISP will not be directly liable for an infringing communication where a third party has determined the content. In certain cases, however, a service provider may be found to have *authorised* an infringement by a user of its service.

The CADA provides that a person will not be held to have authorised a copyright infringement merely by providing the facilities involved in the infringement. It also provides a list of factors for a court to consider in determining whether authorisation has occurred. These include:

- the extent (if any) of the person's power to prevent the infringement;
- the nature of any relationship between the service provider and the infringer; and
- whether the service provider took any reasonable steps to prevent the infringement. This may include compliance with an industry code of practice.

RETRANSMISSION STATUTORY LICENCE

The CADA introduces a new statutory licence scheme which will provide remuneration of underlying copyright owners for the retransmission of free-to-air broadcasts. Currently, retransmitters such as pay-TV operators, are able to retransmit free-to-air broadcasts without the permission of the broadcaster or underlying copyright owners, and without any payment to either type of rights holders.

The new statutory licence does not, however, apply to the retransmission of broadcasts over the Internet. Therefore retransmitters will be required to negotiate on a voluntary basis with all underlying rights holders in a broadcast before retransmitting it via the Internet. This is a result of concerns that Internet retransmissions will have an adverse effect on existing program licensing arrangements.

OTHER KEY AMENDMENTS

Other key reforms introduced by the CADA involve:

- computer software;
- the provision of additional penalties and damages for the unauthorised digitisation of copyright material; and
- the provision of transitional arrangements.

Computer software

In 1999 the Government introduced amendments to the Copyright Act to allow the reproduction of computer software for the limited purposes of error correction, security testing, normal use or study, making interoperable products and making a back-up copy.

Also in 1999, the High Court ruled in *Data Access Corporation v Powerflex Services* that a compression or 'look-up' table in a computer program was a literary work in its own right. The practical result of this decision was that tables or compilations incorporated in computer programs may not be able to be reproduced under the computer software exceptions.

The CADA ensures that wherever a person is entitled to reproduce a program under the exceptions, that person is also permitted to reproduce any literary work incorporated in, or associated with a program, that is essential to the effective operation of a function of that program.

The CADA also provides a new general definition of "computer program", which means a set of statements of instructions to be used directly or indirectly in a computer in order to bring about a certain result.

Unauthorised digitisation

The CADA recognises that the copyright owner's exclusive right of reproduction includes the right to digitise their copyright material (reproduction includes conversion into or from a digital or other electronic machine-readable form).

In addition, the CADA amends the Copyright Act to provide for increased financial penalties in offences involving unauthorised digitisation, and the potential for increased damages for copyright infringements involving this activity.

Transitional provisions

The transitional arrangements in the CADA provide that where copyright owners have previously licensed or assigned the wireless broadcasting right, they will not be automatically taken to have assigned or licensed the new broadcasting right, which includes cable broadcasts. The provisions apply similarly where the copyright owner had only previously dealt with the cable diffusion right. Neither will they be taken to have assigned or licensed the broader elements of the new communication right, ie. making available online. This is in order to allow copyright owners to gain the full benefit of the new and expanded rights introduced by the CADA.

One of the reasons for a delayed commencement of the CADA is to allow parties sufficient time if re-negotiations of existing arrangements are required.

Importantly, the default provision in the CADA is subject to any contrary intention. An assignment of all rights may be taken as evidence of a contrary intention. Such an intention may also be found outside the express terms of the agreement. For example, a contrary intention to assign

more that wireless broadcasting rights could be found from the conduct of the parties, the agreement negotiations, or from accepted industry practice.

WHERE CAN I GET MORE INFORMATION?

For copies of the CADA and the Explanatory Memorandum, visit <http://www.aph.gov.au>

If you wish to speak to someone in the Attorney-General's Department please contact:

Mr Simon Cordina,
Principal Legal Officer, Intellectual Property
Branch on (02) 6250 6608,
simon.cordina@ag.gov.au

If you would like more information on copyright generally, visit <http://www.law.gov.au>, or subscribe to the Attorney-General's Department Copyright E-News at http://www.law.gov.au/copyright_eneews

APPENDIX A - CHRONOLOGY OF DIGITAL AGENDA ACT

July 1997	Discussion Paper released "Copyright Reform and the Digital Agenda: Proposed transmission right, right of making available and enforcement measures". Call for public submissions.
30 April 1998	Government decision on Digital Agenda reforms.
26 February 1999	Release of Exposure Draft Copyright Amendment (Digital Agenda) Bill 1999 (Digital Agenda Bill) and Commentary for public comment.
March 1999	Working groups held on Enforcement Measures, Exceptions and Carrier/ISP Liability
2 September 1999	Digital Agenda Bill introduced into House of Representatives.
3 September 1999	Digital Agenda Bill referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee).
11 September 1999	LACA Committee publishes Terms of Reference and invites written submissions.
September - October 1999	LACA Committee public hearings in Sydney, Canberra and Brisbane
6 December 1999	Advisory Report of the LACA Committee on the Digital Agenda Bill tabled in the House of Representatives.
27 June 2000	Second Reading Debate on Digital Agenda Bill in House of Representatives.
28 June 2000	Digital Agenda Bill, including Government and Opposition amendments, passed the House of Representatives
17 August 2000	Digital Agenda Bill, including Government and Opposition amendments, passed the Senate and the House of Representatives.
4 September 2000	Digital Agenda Bill received Royal Assent to become the Copyright Amendment (Digital Agenda) Act 2000, Act No. 110 of 2000 (Digital Agenda Act).
4 March 2001	Commencement date of Digital Agenda Act.