



COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



HOUSE OF REPRESENTATIVES

**COPYRIGHT AMENDMENT
(DIGITAL AGENDA) BILL 1999**

Second Reading

SPEECH

Tuesday, 27 June 2000

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

SPEECH

Date Tuesday, 27 June 2000
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Questioner
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Source House
Proof No
Responder
Question No.

Mr PYNE (Sturt) (6.20 pm)—The Copyright Amendment (Digital Agenda) Bill 1999 represents one of the most comprehensive reform packages to Australian copyright law since the enactment of the Copyright Act 1968. I have spoken in this House on several occasions about copyright, and specifically about the relationship between copyright and parallel importing. In previous debates in this House, and in particular the debate over parallel importing, the opposition has had some difficulty in comprehending the general concept of copyright. Copyright, in that debate, is regarded as a non-tariff barrier to trade. But of course it is not that. Copyright is broadly understood to be a form of property that is founded on a person's creative skill and endeavour. Copyright is designed to prevent the unauthorised use of a creator's work or idea, and confers an economic right on the owner which includes the right to sell, copy, publish, broadcast and publicly perform the copyright material.

Traditional notions of copyright have been, and will continue to be, challenged by advancements in technology and communications and by the extraordinary expansion of the Internet. There are now a number of new 'acts' which can be done in relation to material in electronic form. Old copyright laws could not possibly have anticipated the emergence of MP3 files, CD burners and the freewheeling ethos of the Internet. Digitisation has had a profound impact on the information economy. Apart from its performance features, digitisation has created new opportunities for the use, storage and transmission of information. Digitisation has turned copyright law on its head. It is now so cheap and easy to copy any type of information and to disseminate it on the web that existing copyright laws are being exposed as inadequate.

The transmission, storage and copying of music clips via the Internet is a case in point. It is also an excellent example of how technology and its relationship with copyright evolves. A short time ago web sites existed that stored pirated copies of music in the MP3 format, which allowed CD-quality songs to be quickly distributed online. The majority, if not all, of these web sites were shut down by music industry lawyers. The functions that these web sites were serving were quickly replaced by the Napster program. Napster started out as a community college of students just over a year ago. It has now developed into a real threat to the international sound recording industry. Using Napster, music fans are able to simply type in the name of a band or song and the program searches the computer programs of Internet users who are online worldwide and automatically downloads the request from the quickest available source. In return, other Internet users who are online can download any music that is stored on your computer. Typically, it is possible to access up to a half a million pieces of music using the Napster program. Now there is a new program called Wrapster, which allows any program, not just music, to be listed on the Napster network and swapped among users. One report indicates that there are as many as 70,000 new copyright-infringing MP3 music files appearing every month on the web.

The Recording Industry Association of America launched a copyright infringement suit against Napster last December and, in recent developments, the band Metallica employed the services of an Internet private detective service to compile the Internet addresses of people who used the Napster service over one weekend. The detectives returned with an astonishing list of 317,000 names. The band has also launched legal proceedings against Napster—naturally. The people behind Napster are unlikely to take these challenges lying down. They have already revealed that they have employed the services of the lawyer who led the United States government's successful case against Microsoft's anti-trust structure. In that case, due to go before the Federal Court in San Francisco next month, the Recording Industry Association of America will contest that 'over 10 million Napster users are sharing tens of millions of copyrighted music files'. The industry further contends that Napster is guilty of contributing to copyright infringement because it knows of the practice, profits from it and has the technology to detect it. The industry supports its claims by producing a survey that shows that 22 per cent of Napster users said that, because of Napster, they did not buy CDs anymore or that they bought fewer CDs.

But conflicting evidence has emerged from the Digital Media Association that indicates that 59 per cent of Napster users claim that downloading music had led them to later purchase the music retail. Other studies and anecdotal evidence show that, in the United States, CD sales are down by as much as 24 per cent in university towns, where Napster software is most popular. Some affected music retailers in those towns have already shut their doors.

Mr Emmanuel Candi, who would be well-known to people in this House, who is the Executive Director of the Australian Recording Industry and who does an excellent job advocating for his industry, was recently quoted as saying that the industry hoped that, by the end of the year, they would have the technology to make illegally copied recordings self-destruct. There are also arguments for the use of technologies such as encryption, digital signatures and digital watermarks and for improvements in the policing and enforcement of copyright statutes. But these will probably only be bandaid approaches. The fact is, whenever there is a battle between copyright and technology, technology is likely to be the winner. As soon as Internet users have enough bandwidth, there could be global anarchy as Internet users freely exchange feature movies in DVD format, computer software, CDs, and just about everything else that can be digitised.

So how do we as legislators meet the challenge of the digital age? A recently published book entitled *The Infinite Digital Jukebox*, written by Chris Gilbey, argues that online music is driving the digital revolution faster than the industry has the capacity to react. Gilbey points out that musicians can use this in their favour by publishing on the Internet themselves rather than dividing their revenues with traditional record companies. Gilbey is not a lone voice. Some commentators such as Graeme Philipson of the *Age* subscribe to the theory that copyright 'will prove to be a temporary phase in human history' and that it 'is an aberration and technology will ensure its demise'. Philipson appears to advocate the dismantling of copyright laws and regulations on the basis that they are futile in preventing the unfettered transferral of information. One of Philipson's columns likens large cartels to gatekeepers controlling the flow of information in the digital age.

Philipson's argument is a brave one, one that may yet prove to be correct as the Internet continues to develop. Alan Kohler seemed to concur when he wrote in the *Australian Financial Review*:

The Internet has slipped under their guard. For the music industry, it is already no longer a question of whether the companies can keep control of their system. It's a question of whether they can get it back. It looks doubtful.

Peter Cochrane, the head of research for BT Labs in Martlesham in the United Kingdom argues that:

the ancient paradigm—

of copyright

has now moved into the world of software and is often an impediment to progress.

As legislators we are required to attempt to strike a balance between the creators of an idea and the users of that idea. Laws need to ensure that those who create something are not denied reward. Indeed, it is a basic tenet of liberal philosophy that individuals are rewarded for high endeavour. I am yet to be convinced that dismantling copyright laws will protect and maintain incentives for the idea makers in our society.

In the United States, Congress tried to resolve some of these issues with the Digital Millennium Copyright Act 1998. Among its more significant provisions, the legislation makes it illegal, from later this year, to break through passwords, encryption and other technological defences that companies erect around their Internet content. The bill presently before the House contains similar provisions. The influential Washington think tank, the Progressive Policy Institute, has also called for legislation to force companies such as Napster to hand over the names of their subscribers so that the users themselves can be sued. There is little doubt that technological advances in the digital age threaten the delicate balance that exists between the rights of copyright owners and the rights of copyright users. The provisions of this bill will help meet this challenge and its impact will be to attempt to ensure that copyright law continues to promote creative endeavour while simultaneously allowing reasonable access to copyright material in the digital environment. This bill and the Copyright Amendment (Computer Programs) Act 1999 are key features of the coalition government's strategy to develop a legal framework that encourages online activity whilst promoting the expansion of the information economy. The provisions of the bill currently before the House are consistent with new international standards to improve copyright protection in the online environment. These standards were established in the 1996 World Intellectual Property Organisation's Copyright Treaty and the Performances and Phonograms Treaty. Australia was an active participant at the diplomatic conference that agreed to the World Intellectual Property Organisation treaties. The enactment of this bill will be a significant step towards harmonising Australia's—

Sitting suspended from 6.30 p.m. to 8.30 p.m.

Mr PYNE—Before I was so rudely interrupted, I was talking about the WIPO treaties that the government was involved with. I was about to say that the enactment of this bill will be a significant step towards harmonising

Australia's copyright regime with the obligations embodied in the treaties. One of the central principles of the 1996 WIPO treaties is the necessity to extend to the digital environment the balance that exists between the rights of copyright owners and the rights of users in the print environment. Accordingly, this bill introduces a new, broadly based, technology neutral right of communication to the public. The new right will exist as an exclusive right in literary, dramatic, musical and artistic works, as well as in sound recordings, films and broadcasts. The new right of communication to the public extends the existing technology specific broadcasting right that applies to wireless broadcasts and replaces the limited cable diffusion right.

The right of communication will include the making available of copyright material online, which will have the effect of providing protection to material made available through on-demand, interactive transmissions. The new right will improve protection for industries that publish or distribute copyright material on the Internet and will also protect copyright material included in cable pay TV broadcasts. Being a technology neutral right, it will also mean that the development of new technologies such as Internet broadcasting will not require repeated technology specific changes to the Copyright Act.

To ensure the efficacy and workability of this new initiative, this bill also provides several exceptions to the new right of communication to the public. The exceptions provided for in the bill reflect the balance that has been struck in the print environment between the rights of owners of copyright and the rights of users. The existing exceptions for fair dealing will apply to the new right of communication to the public. The fair dealing exceptions permit the use of copyright material for purposes including research or study, criticism or review, and reporting news. Existing exceptions also need to be extended for libraries and archives to the reproduction and communication of copyright material in electronic form. The definition of 'archives' is being clarified in this bill to include museums and galleries that satisfy various requirements which are presently specified in the act. These measures will allow libraries, museums and galleries to take advantage of the exceptions in the bill that apply to archives. These exceptions promote reasonable access to copyright material in electronic form whilst simultaneously protecting new commercial markets for online material.

The government's copyright reforms also extend the existing statutory licences in the Copyright Act for copying by educational institutions to the reproduction and communication of copyright material in electronic form. The new statutory scheme for the electronic use of copyright material by these institutions is drafted in broad terms to give it flexibility to allow it to adapt to future advancements in technology. In those circumstances where agreement between the relevant parties cannot be reached, the Copyright Tribunal has new jurisdiction to determine these matters.

This bill establishes a similar statutory licence for the electronic use of copyright material by institutions assisting persons with print and intellectual disabilities. In drafting this legislation, it has been a paramount consideration of the government that the technical processes which form the basis of the operation of new technologies, such as the Internet, are not jeopardised. This bill allows for exceptions for temporary copies made in the course of the technical processes of making or receiving a communication, including the browsing of copyright material online.

The provisions of this bill are supported by workable enforcement measures in response to the problems posed for copyright owners by new technologies. The first is the provision of criminal sanctions and civil remedies against persons who manufacture, deal in, import, distribute or make available online devices, or provide services, for the circumvention of technological protection measures designed to inhibit the infringement of copyright. Examples of such measures include password protection and computer program locks. Similar to the American legislation, the new enforcement measures are subject to important exemptions which will allow a person to undertake the proscribed activities for specific permitted purposes.

The second new enforcement regime is the provision of criminal sanctions and civil remedies against the intentional tampering with or removal of electronic rights management information. Rights management information usually includes details about the copyright owner and the terms and conditions on which the use of the material is or will be permitted. It is intended to include, for example, digital watermarks which are attached to or embodied in copyright material in electronic form.

The third enforcement regime will provide criminal sanctions and civil remedies against persons who manufacture, deal in, import, distribute or make available online devices for the unauthorised reception of encoded subscription broadcasts. Such devices include decoders which allow the unauthorised reception of pay TV signals. These provisions will enable subscription broadcasters to control the reception of their encoded broadcasts.

The new economy holds enormous potential for Australia. In a recent article by Lenore Taylor in the *Australian Financial Review*, President Bill Clinton's former Internet adviser, Ira Magaziner, was quoted as saying:

I think Australia could emerge as one of a handful of countries that lead the world in Internet technology and business.

He goes on to explain:

... while Australia did not have the scale nor the incentive to lead in the manufacturing age, the Internet age is a natural for Australian business. It requires educated people, intellectual capital and entrepreneurship, all of which Australia has in abundance.

New technology is changing rapidly. If Australia is going to stay ahead of the pack, we need to ensure as legislators that we nurture the new economy and do not tie it down with unworkable outdated regulations. The provisions of this bill contemporise copyright law in Australia and strike a balance between copyright owners and copyright users. I am pleased to say that there is an inbuilt review in the bill. As I was discussing with my friend the member for Bonython, I have no doubt that in a few years time it will be a very necessary aspect of this legislation, because this is an area that changes so rapidly and so dramatically that it is almost impossible to keep pace with new technology.

In its legislation, the government attempted to ensure that there are inbuilt methods to stay abreast of technology. For that reason, there are wide definitions and gaps that will allow future interpretation so that the parliament does not have to necessarily return this legislation. I am sure the review in a couple of years time will find that there will need to be more changes. I am sure it will also find that the government made the right changes with respect to this bill. I am glad that the Labor Party are generally supporting the tenets of this bill. They have moved some amendments, some of which the government will consider; others which the government has already indicated it will reject. I hope that, when this bill gets to the Senate, it will find few hurdles placed in its path so that it can be implemented into law as quickly as possible. I commend the bill to the House.