



# Copyright Amendment (Digital Agenda) Act 2000

By **Peter Knight**, Partner and **James Noble**, Solicitor, Clayton Utz\*

- 🔗 **New copyright of communication to the public**
- 🔗 **Implications for ISPs and cable providers**
- 🔗 **Liability for mobile phone networks**

The Copyright Amendment (Digital Agenda) Act 2000 recently passed into law. In addition to resolving many previous drafting errors and anomalies introduced into the Copyright Act 1968 — the new Act has created a new, further-reaching copyright of communication to the public. This new right encompasses the existing broadcasting and cable diffusion rights, but clearly extends to dissemination of copyright material on the Internet. The Act now defines communicate to mean...

to make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter.

Clearly, like the activities of a conventional broadcaster or a provider of a cable diffusion service, the activities of an Internet Service Provider (ISP) fall within this fairly broad definition of the word communicate. To provide some protection in this regard, a defence has been provided. The new Act inserts ss 36(1A) and 101(1A), which provide:

In determining ... whether or not a person has authorised ... any act comprised in the copyright ... the matters that must be taken into account include the following:

- the extent (if any) of the person's power to prevent the doing of the act concerned
- the nature of any relationship existing between the person and the person who did the act concerned
- whether the person took any reasonable steps to prevent or avoid the doing of the act.

In addition, a new s 39B is inserted which states:

A carrier or a carriage service provider is not taken to have authorised any infringement of copyright in a work merely because he or she provides physical facilities used by a person to do something the right to do which is included in the copyright.

This seems reasonably to deal with the issue of authorisation. However, now that the owner of copyright has the exclusive right to communicate, it would seem clearly possible that an ISP or other carrier of communications to the public may be liable for direct infringement, not just authorisation. In respect of this issue, the Regulation Impact Statement issued with the Act states:

It is proposed that the person who is responsible for determining the content of a communication to the public is the person who directly exercises the right over that activity. This would mean that carriers and carriage service providers (including ISPs) who are not responsible for determining the content of the retransmission would not be directly liable for those transmissions.

This appears to be a reference to the new s 22(6), which states:

(6) For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.

Of this, the Notes on Clauses attached to the Regulation Impact Statement states:

[This] provision has the effect that communications carriers and Internet Service Providers will not be directly liable for communicating material to the public via their networks if they are not responsible for determining the content of that material and the Explanatory Memorandum makes the same statement.

Section 22(6) makes the new right of communication to the public exceptionally

narrow — potentially a narrower right than under the legislation prior to the amendment. It is not clear why a person who acquires material for redistribution by communication to the public, or knows of the content, but who does not determine content, should not be infringing the copyright in the content. For example, the hotel operator who acquires in-room videos from a provider of this service, or an ISP who commissions the provision of text, pictorial, video or sound recording content, perhaps from an overseas supplier, may well not be determining the content of that material before it is communicated. All these were liable before the new law was introduced. It was true that the Copyright Act needed to be amended to overcome the undesirable implications of the *APRA v Telstra* litigation, but this has surely exceeded what was required. Perhaps the view is that such a person would be authorising the direct infringement, and would not have the benefit of the new defences offered in respect of authorisation, but this seems a very odd approach.

On the other hand, the words other than a broadcast specifically distinguish how the new right of communication operates with respect to a broadcasting service. Under the new s 22(5), a communication to the public by way of a broadcast is taken to have been made by the person who provided the broadcasting service by which the broadcast was delivered. A person who makes a broadcast is therefore under a much stricter obligation than other communication service providers, as illustrated by the decision in the *Capital Television case*. This judgment confirmed that, irrespective of the level of knowledge of infringement that is imputed to an entity that provides a broadcasting service, it is nevertheless still the responsibility

of that entity to ensure that their material does not breach copyright. This, quite properly, places a fairly large onus on a broadcasting service to screen all material before it goes to air. One may wonder why the same burden is placed upon Internet Service Providers and cable providers to screen their material which is provided by third parties, other than customers which they cannot control.

Furthermore, in the *APRA v Telstra* litigation it was eventually decided that transmission by Telstra of music on hold over a mobile 'phone network, whether the source of that music was Telstra or one of the users of the mobile 'phone network (and whether such a user was Telstra's customer or not) was a broadcast. Whilst the definition of broadcast in the new law has been changed so it is restricted to conventional broadcasting activities, the decision in these proceedings is equally relevant now to communication to the public. Hence, in this regard, the amendments may not have gone far enough to protect the innocent carrier — with the result that operators of mobile 'phone networks may still be liable for copyright material transmitted over their networks notwithstanding the assurances in the Regulation Impact Statement.

It would have been so much easier and more obvious to extend the operation of the new authorisation defences to primary copyright infringement, in much the same way as precisely the same issue was addressed in the Singapore Copyright Act. Now we must wait to see how this unnecessarily obtuse drafting will be interpreted.

\* *This article first appeared in the Clayton Utz newsletter Technology and Intellectual Property Issues and is reproduced with permission.*



On CD & Internet

**TimeBase™**

Preferred Supplier  
to the ATO

**Present, Past  
and Future Law  
at the click  
of a button**



allows you to type in  
a date - present, past  
or future and see the  
law at that date

**Get a Free Trial  
to a TimeBase  
MALT Service**

**Corporations  
GST  
Income Tax**

call (02) 9261 4288  
or  
service@timebase.com.au

[www.timebase.com.au](http://www.timebase.com.au)