



## **Article for Copyright World**

### ***Copyright issues for the proposed Australia/US Free Trade Agreement***

Libby Baulch, Australian Copyright Council, October 2003

Earlier this year, Australia and the United States entered negotiations aimed at reaching a bilateral free trade agreement (FTA) between the two countries. The negotiations are scheduled for completion by December 2003, an earlier completion time than originally anticipated.

Five rounds of negotiations have been scheduled: March, May, July, October and December 2003. Following the July round, additional intersessional negotiations on intellectual property issues were scheduled to take place before the October round, indicating the progress on the intellectual property issues had been slower than anticipated in the July round.

This article outlines copyright issues which have been raised in relation to the proposed FTA.

#### **The main copyright issues**

The United States government has indicated a number of copyright issues it would like to see addressed in the FTA. A number of these issues were identified in letters in November 2002 from the United States Trade Representative, Bob Zoellick, to the US Congress, stating the President's intention to start negotiations for a FTA with Australia.<sup>1</sup>

Those issues were:

- Australia's ratification of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT);
- "establishment of standards that build on the foundations established in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement) and other international intellectual property agreements such as the WIPO Copyright Treaty and Performances and Phonograms Treaty";
- enhancement of "protection of intellectual property in new areas of technology,

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<sup>1</sup> The letters are available from <http://www.ustr.gov/new/fta/australia.htm>.

such as internet service provider liability”; and

- strengthening of enforcement procedures “such as increasing criminal penalties so that they are sufficient to have a deterrent effect on piracy and counterfeiting”.

A further indication of US aspirations for its FTA with Australia is given by its recently concluded FTAs with Singapore and Chile.<sup>2</sup> The Intellectual Property Chapters of these include obligations relating to:

- accession to the WCT and the WPPT;
- an exclusive right to authorise reproductions in any manner or form, including “temporary storage in electronic form”;
- a right to authorise retransmission of broadcasts over the Internet;
- a term of protection of the author’s life plus 70 years, 70 years from first publication or 70 years from creation (depending on the type of material);
- transfer and exercise of rights;
- circumvention of technological protection measures, and rights management information;
- government use of computer software;
- performers and phonogram producers;
- decoders for satellite broadcasts;
- enforcement of copyright, including an entitlement to elect pre-established damages, that “shall be in an amount sufficiently high to constitute a deterrent to future infringements and with the intent to compensate the right holder for the harm cause by the infringement”; and
- liability of Internet Service Providers.

There has been little official indication, on the other hand, of the Australian government’s agenda for copyright issues in the free trade agreement.

One major concern has been raised by Australian copyright owners: the provisions in the US Copyright Act relating to “home-style” public performances. These were subject to an adverse ruling by a World Trade Organization panel in June 2000 in response to a complaint brought by the European Union (Australia was an observer to the dispute).<sup>3</sup>

The remainder of this article looks in more detail at some of the issues listed above.

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<sup>2</sup> The agreements are available from <http://www.ustr.gov/new/fta/index.htm>.

<sup>3</sup> The decision is available from [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_subjects\\_index\\_e.htm#bkmk31](http://www.wto.org/english/tratop_e/dispu_e/dispu_subjects_index_e.htm#bkmk31).

## Accession to the WCT and WPPT

Australia was not a signatory to the WCT or WPPT, and has not acceded to either treaty.<sup>4</sup> The Government has, however, taken steps to put Australia in a position to accede to both treaties. The Digital Agenda Act 2000 amended the Copyright Act to meet many of the standards in the WCT and WPPT. These included:

- the introduction of a right of communication to the public, comprising a right to electronically transmit and a right to make available;
- sanctions against the circumvention of technological protection measures and broadcast decoder devices; and
- sanctions against tampering with rights electronic management information.

The Government has undertaken to introduce legislation to address the two major remaining issues: the rights of performers under the WPPT, and the period of protection for photographs under the WCT. A Bill dealing with these issues is currently being drafted, and is listed for introduction into Parliament before the end of 2003.

The Australian Copyright Act provides some rights to performers, intended to comply with the Rome Convention<sup>5</sup> and with the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), but falls short of the WPPT requirements. The current legislation is almost exclusively concerned with bootlegging (unauthorised recordings of live performances), and does not cover moral rights or the use of authorised recordings.<sup>6</sup>

The period of protection for photographs is currently 50 years from first publication for photographs taken on or after 1 May 1969, and 50 years from creation from photographs taken before 1 May 1969. The WCT requires the same period of protection as for other artistic works (usually life plus 50 years).

The Digital Agenda Act is currently being reviewed by a consultant appointed by the Government.<sup>7</sup> The consultant is due to report to the Government by the end of 2003, and the Government proposes to engage in a further review process during the first three months of 2004. The free trade negotiations are not being taken into account by the consultant, although many of the issues being reviewed are likely to be the subject of negotiation. These issues include circumvention of technological protection measures, temporary reproductions and Internet service provider liability.

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<sup>4</sup> The treaties, and the Agreed Statements for them, are available from <http://www.wipo.int/copyright>.

<sup>5</sup> *Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* 1961.

<sup>6</sup> There is one limited provision relating to use of an authorised recording, relating to use in a sound-track of a recording not authorised for that purpose.

<sup>7</sup> The Consultant is the law firm Phillips Fox. Information about the review is available from [http://www.phillipsfox.com/whats\\_on/Australia/DigitalAgenda/DigitalAgenda.asp](http://www.phillipsfox.com/whats_on/Australia/DigitalAgenda/DigitalAgenda.asp) (last viewed 15 October 2003; at that time the submissions were not available from the website to users of Macintosh browsers but were available on request from Phillips Fox).

## Reproduction, including temporary storage

Under the Australian Copyright Act, owners of copyright in works (literary, dramatic, musical and artistic works) have the exclusive right to reproduce the work in material form.<sup>8</sup> “Material form” is defined to include “any form (whether visible or not) of storage from which the work ... can be reproduced”.<sup>9</sup>

Owners of copyright in cinematograph films and sound recordings have an exclusive right to make a copy of the film or sound recording.<sup>10</sup> For films, a “copy” is “any article or thing in which the visual images or sounds comprising the film are embodied”.

The scope of the right to reproduce and the right to copy has been considered in some recent cases.

In *Sony v Stevens*, a Full Court of the Federal Court considered whether there was a reproduction of a computer program or copy of a film in the Random Access Memory (RAM) of a Playstation console when a computer game was played.<sup>11</sup> Two of the three judges (agreeing with the judge at first instance) were of the view that there was no reproduction or copy; one judge thought there was

In *Australian Video Retail Association v Warner*,<sup>12</sup> the court held that there was no reproduction in RAM when a DVD is played in a DVD player, although for reasons different from those in the Sony case. On the other hand, *Microsoft v Business Boost*,<sup>13</sup> an interlocutory decision, held that there was a serious question to be tried as to whether the launching of computer program into RAM was a reproduction in material form.<sup>14</sup>

As a result of the *Sony* and *Warner* decisions, it has been argued that Australian law is now out of line with international practice. Application for special leave to the High Court has been made in the *Sony* case, and it may be that this issue will be given further consideration by the High Court if leave is granted.

Apart from the apparent limitations of the reproduction right following the *Sony* and *Warner* cases, the Digital Agenda Act introduced exceptions to allow “temporary reproduction ... as part of the technical process of making or receiving a

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<sup>8</sup> Section 31

<sup>9</sup> Section 10(1) (definition of “material form”).

<sup>10</sup> An owner of copyright in a broadcasts also have the exclusive right to make a copy of a film or sound recording of the broadcast. For judicial consideration of the copyright in broadcasts, see *TCN Channel Nine Pty Ltd v Network Ten Pty Limited* [2002] FCAFC 146; [www.austlii.edu.au/au/cases/cth/FCAFC/2002/146.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2002/146.html). The High Court has heard an appeal from that decision, but has not delivered its judgment.

<sup>11</sup> *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002) 55 IPR 497; <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2002/906.html> (first instance); <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/157.html> (Full Court decision).

<sup>12</sup> *Australian Video Retailers Assoc Ltd v Warner Home Video Pty Ltd* (2002) IPR 242; [www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2001/1719.html](http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2001/1719.html).

<sup>13</sup> [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1999/1384.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1384.html).

<sup>14</sup> *Microsoft Corp v Business Boost Pty Ltd* [1999] FCA 1384; [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/1999/1384.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/1999/1384.html).

communication”.<sup>15</sup> The exceptions do not apply to infringing communications.

The Explanatory Memorandum to the Digital Agenda Bill stated that the exception is intended to include “the browsing (or simply viewing) of copyright material, including copyright material that involves the production of sound “certain caching”.<sup>16</sup> The exception would not, however, seem to cover “deliberate” caching such as proxy caching or forward caching.

There is an argument that such caching is impliedly licensed in the absence of a direction to the contrary by the copyright owner. The issue was discussed in the report of the Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (September 2000).<sup>17</sup> The Committee recommended that the provision be amended if there is evidence that it does not sufficiently cover caching.<sup>18</sup>

On the other hand, the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee), in its report on the Digital Agenda Bill, recommended that the exceptions be omitted from the Bill altogether, and that the Government consider adopting the approach in the US legislation whereby remedies for temporary copies were limited.<sup>19</sup> The recommendation was rejected by the Government.

The issue is being reviewed again as part of the Digital Agenda Act review.

## **Retransmission, including over the Internet**

Before the Digital Agenda Act amendments came into effect in March 2001, it was not an infringement of copyright to retransmit an authorised broadcast.<sup>20</sup> This meant that pay television operators could retransmit free-to-air broadcasts without the licence of, or payment to, owners of copyright in the primary broadcast (including owners of copyright in the “underlying rights”).<sup>21</sup>

Now there is a statutory licence which allows a retransmitter (such as a cable television station) to retransmit a free-to-air broadcast, provided it has the consent

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<sup>15</sup> Section 43A and 111A.

<sup>16</sup> Revised Explanatory Memorandum to Digital Agenda Bill 2000, para 69.

<sup>17</sup> The report is available at [www.ipcr.gov.au/finalreport1dec/welcome.html](http://www.ipcr.gov.au/finalreport1dec/welcome.html). The Government’s response is available from <http://www.law.gov.au/www/securitylawHome.nsf/Alldocs/RWPA6C3825011D8A8B1CA256C330000CF9A>.

<sup>18</sup> Page 113.

<sup>19</sup> The LACA Committee, in its report on the Digital Agenda Bill, concluded that such an exception is not necessary. In the Committee’s view there “are strong principles of public policy that militate against the imposition of any penalty for infringement through the making of temporary reproductions” and that “courts would act on those principles” (para 6.49); see also Recommendation 35 at para 6.53.

<sup>20</sup> Sections 25(3) and 199(4): the latter was repealed by the Digital Agenda Act. An owner of copyright in a television or sound broadcast (as distinct from the owners of copyright in the material contained in the broadcast, such as films and music) has the exclusive right to re-broadcast by wireless means, but not the right to retransmit by cable (section 87).

<sup>21</sup> See *Amalgamated Television Services v Foxtel Digital Cable Television* (1996) 34 IPR 274.

of the free-to-air broadcaster and it undertakes to pay equitable remuneration to the relevant collecting society or societies representing the “underlying rights owners” whose material is retransmitted.<sup>22</sup> The retransmission must be simultaneous (or at the equivalent local time) and unaltered. In other cases, a retransmission will be a communication to the public requiring authorisation from all copyright owners.

## **Term of protection**

The period of copyright protection in Australia is generally the life of the author plus 50 years, or 50 years from first publication. The US argues that the new global standard is life plus 70 years, given its adoption in US and in the European Union. Australia has taken the view that the global standard is that required by the multilateral treaties: life plus 50 years.

A report by the Allen Consulting Group analysing the economic costs and benefits of extending the term of protection in Australia has recently been released.<sup>23</sup> The report was commissioned by the Motion Picture Association, supported by other copyright owner organisations. The report concludes that the benefits and costs of extending the term of protection are likely to be finely balanced at the moment, but that the case for extending the term is supported by two factors: the need to strengthen copyright protection to counteract increased piracy resulting from technological developments, and the benefits over the longer term of harmonisation with Australia’s major trading partners.

In its free trade agreements with Singapore and Chile, the US achieved a commitment to extend the term of copyright protection.

## **Ownership and transmission of rights**

The US negotiators may seek to include a provision dealing with first ownership and transfer of copyright. These issues are addressed in the United States’ free trade agreements with Singapore and with Chile – although the wording in each case is different and the implications of the provision in the Singapore treaty are not clear.<sup>24</sup>

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<sup>22</sup> The “underlying rights owners” are the owners of copyright in any works, films or sound recordings included in the broadcast. The exclusive rights of an owner of copyright in a broadcast now include the right to rebroadcast it and to communicate it to the public (section 87(c)). The collecting society Screenrights ([www.screen.org](http://www.screen.org)) has been authorised by the Attorney-General to administer the statutory licence.

The LACA Committee, in its report on the Digital Agenda Bill, recommended that film directors be included among the class of “underlying rights holders” entitled to receive remuneration under the proposed scheme for the retransmission of broadcasts (Recommendation 28). The Government did not accept the recommendation at the time, but has subsequently announced that it will introduce amendments to the Copyright Act to recognise the creative contribution of film directors. A Bill intended to give effect this announcement is being drafted, and is listed for introduction before the end of 2003.

<sup>23</sup> The report is available from <http://www.allenconsult.com.au>

<sup>24</sup> Article 16.1 paragraph 6 of the US/Singapore treaty, and Article 17.7 paragraph 2 of the

Under Australian law, copyright usually first vests in an author unless the work is created by an employee in the course of employment, or the author assigned the future copyright in writing. Copyright in works by freelancers thus usually first vest in the author, unless the author has assigned the future copyright. The position in the US is different: where a work created by a freelancer can be characterised as a “work for hire”, copyright first vests in the client rather than the author.

The different approaches become important when considering the entitlement to control, and receive income for, uses of a work beyond the uses covered by the contract of engagement. A freelance author is in a better position under Australian law to retain rights which are not necessary for the project for which he or she was engaged. Entitlement to income collected by copyright collecting societies is an example.

### **Circumvention of technological protection measures**

The Australian Copyright Act includes civil remedies and criminal penalties relating to circumvention of technological protection measures.<sup>25</sup> As noted above, these are intended to be consistent with the requirements of the WCT and the WPPT.

The US has raised concerns about the level of protection:

- the definition of “technological protection measure” covers measures intended to inhibit infringement of copyright (“copy controls”), but not measures intended to control access to copyright material (“access controls”);
- the provisions relate to the manufacture, importation and supply, but not use, of circumvention devices and services; and
- the provisions allow supply for certain “permitted purposes”, including library use, educational use, government use and decompilation of computer programs.

The anti-circumvention provisions were the subject of a decision of a full court of the Federal Court in *Sony v Stevens* (referred to above in relation to reproduction in RAM).<sup>26</sup> The case concerned a device in Sony Playstations which prevented the use of infringing copies of computer games. The Full Court, reversing the court at first instance, held that the device was a “technological protection measure”, as it was intended to inhibit infringement of copyright by rendering an infringing copy unusable.

As noted above, the more controversial aspect of the case was the view of two of the three judges in the Full Court decision (agreeing with the judge at first instance) that there is no reproduction or copy of a game in the RAM of the Playstation console when the game is played. This issue is relevant to the US concerns about

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US/Chile treaty.

<sup>25</sup> Section 116A.

<sup>26</sup> *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2002) 55 IPR 497 (first instance); <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/157.html> (decision of Full Court).

coverage of access control. If the storage in RAM of a copyright work results in a reproduction in material form, then the existing definition of technological protection measure may apply as a “de facto” access control in some cases. If not, then the difference between the Australian provisions and those of the US (which expressly cover access controls) are greater.

## **Government use of computer software**

The Australian Copyright Act includes provisions which allow the use of any copyright material by, or on behalf of, a Commonwealth or State government department or agency, for the services of the Commonwealth or a State.<sup>27</sup> In some cases, payment is made to a copyright collecting society, and in others (including for computer software) the copyright owner must be notified, and is entitled to negotiate terms or seek a determination from the Copyright Tribunal. These provisions apply even for material which is commercially available.<sup>28</sup>

## **Enforcement**

The US has raised concerns in relation to a range of enforcement issues, including an entitlement to elect pre-established damages (required under the US/Singapore FTA) and greater powers for Customs officials to seize imported goods suspected of infringing copyright.

The Copyright Amendment (Parallel Importation) Act 2003, which came into effect on 13 May 2003, introduced a number of new provisions relating to enforcement of copyright. These included provisions relating to proving existence and ownership of copyright, and provisions granting jurisdiction to the new Federal Magistrate’s Court to hear copyright cases.<sup>29</sup> Some of the provisions gave effect to recommendations in the report of the LACA Committee on copyright enforcement, *Cracking Down on Copycats*. The Government tabled its response to that report in June 2003.<sup>30</sup> Of the 23 recommendations in the report, the Government rejected 13. The remainder were accepted, sometimes only in part or in principle, or deferred for further consideration.

There is no provision for election of pre-established damages in the Australian legislation. There is, however, provision for a court to award damages additional to compensatory damages, having regard to the flagrancy of the infringement, the need to deter similar infringements and the conduct of the defendant following the infringement.

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<sup>27</sup> Section 183.

<sup>28</sup> A recommendation by the Copyright Law Review Committee (CLRC) in its 1995 report on computer software to limit the application of the government use provisions to computer software has not been acted upon. The CLRC’s report is available from [www.law.gov.au/clrc](http://www.law.gov.au/clrc).

<sup>29</sup> There has since been a copyright case heard by the Federal Magistrate’s Court: *Universal Music v Hendy Petroleum* [2003] FMCA 373 (5 September 2003), available from [www.austlii.edu.au/au/cases/cth/FMCA/2003/373.html](http://www.austlii.edu.au/au/cases/cth/FMCA/2003/373.html)

<sup>30</sup> The report and the Government’s response are available from [www.aph.gov.au/house/committee/laca/PREVINQ.htm](http://www.aph.gov.au/house/committee/laca/PREVINQ.htm)

## **Liability of Internet Service Providers**

There are no provisions in the Australian Copyright Act similar to the detailed provisions in the US Copyright Act dealing with the liability of Internet service providers. The Australian Act was amended by the Digital Agenda Act to introduce factors for determining whether a person has infringed copyright, intended to reflect the position at common law.<sup>31</sup> The impetus for these amendments was to provide more “certainty” for Internet Service Providers, but they apply generally and are not confined to ISPs. A provision intended to exempt carriers and carriage service providers, based on Agreed Statements in the 1996 WIPO treaties, was also introduced.

There is a view in Australia that the US provisions are too complex and technology specific, and have failed to meet the problem of peer to peer file-sharing. Copyright owners and ISPs are negotiating a code of conduct dealing with subscriber infringement, and this is currently seen as a more flexible and effective way of dealing with ISP liability issues (provided there is a successful outcome to the negotiations). Copyright owners have sought a legislative framework for negotiation and review of, and compliance with, the code.

## **Other issues**

There are some other issues about which US copyright interests have raised concerns. These include:

- the provisions in the Australian Copyright Act which allow parallel importation of certain articles containing copyright material;
- the provisions in the Australian Copyright Act which allow decompilation of a computer program to produce an interoperable product; and
- the meaning of “market power” in the Trade Practices Act, as it relates to markets for copyright products.

### **Parallel importation**

Under Australian law, importation of an article containing copyright material, for commercial purposes, may require the copyright owner’s licence.<sup>32</sup> The application

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<sup>31</sup> Three matters have to be taken into account, under section 36(1A), when considering liability for authorisation of infringement:

- (a) the extent (if any) of the person’s power to prevent the doing of the act concerned;
- (b) the nature of any relationship existing between the person and the person who did the act concerned;
- (c) whether the person took any reasonable steps to prevent or avoid the doing of the act, including whether the person complied with any relevant industry codes of practice.

<sup>32</sup> Sections 37 and 102 of the Copyright Act 1968 (Cth). Under these provisions, the unlicensed importation of articles infringes copyright if the importer knows, or ought to know, that the making of the article in Australia by the importer would infringe copyright. Distribution of unauthorised imports infringes copyright under sections 38 and 103.

of these provisions to “parallel” imports (that is, articles made without infringing copyright in the country of manufacture) have been subject to a number of reviews over the last 25 years, including by the Copyright Law Review Committee, the Prices Surveillance Authority (now part of the Australian Consumer and Competition Commission) and the Productivity Commission. Opponents of parallel importation restrictions argue that the restrictions result in higher prices and reduced availability. Proponents argue that allowing parallel imports reduces incentives for marketing and distribution, and makes it harder to control imports of pirate products.

As a result of recommendations from these inquiries, parallel importation is now allowed in some cases:

- books not published in Australia within 30 days of first publication overseas, books which the Australian rights owner is unable to supply within 90 days, and books imported to meet certain special orders;<sup>33</sup>
- sound recordings,<sup>34</sup>
- articles which are not primarily carriers of copyright material, but have “accessorial” copyright material on, for example, their labels, packaging, written instructions, warranties or instructional videos (for example, toys, bottles of beverages and footwear),<sup>35</sup>
- computer programs and computer games;<sup>36</sup> and
- “electronic books”, “electronic magazines” and “electronic sheet music”.<sup>37</sup>

Articles which are still subject to parallel importation restrictions include:

- books published in Australia within 30 days of first publication overseas, and available for supply;<sup>38</sup>
- printed periodicals and sheet music;
- feature films, videos and DVDs; and
- artworks not covered by the “accessories” provisions.

The United States has consistently opposed legislative changes which allow parallel importation in Australia, and has made numerous submissions to the Australian Government on the issue. However, the Australian Government has

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<sup>33</sup> Section 44A, introduced in 1991.

<sup>34</sup> Section 44D, introduced in 1998

<sup>35</sup> Section 44C, introduced in 1998; came into effect in 2000. There are also specific provisions relating to certain agricultural and veterinary products.

<sup>36</sup> Section 44E, introduced in 2003

<sup>37</sup> Section 44F, introduced in 2003.

<sup>38</sup> The Bill preceding the 2003 amendments which allowed parallel importation of computer software and other electronic products would also have allowed parallel importation of all books. These provisions were omitted from the final version of the Bill, following opposition from non-government parties in the Parliament.

made a strong commitment to allowing parallel imports, confirmed by its introduction of amendments to allow parallel importation of computer software and other works electronic form earlier this year while the free trade negotiations were in progress. It is regarded as unlikely that Australia would commit to reinstating the parallel importation provisions. It is also worth noting that the issue is not covered in the US/Singapore FTA, and Singapore continues to allow parallel imports.

### **Decompilation of computer programs**

In 1999, the Copyright Act was amended to allow the decompilation of computer programs to produce interoperable products, and to deem a purported contractual exclusion of this entitlement to have no effect.<sup>39</sup> The amendments implemented a controversial recommendation by the Copyright Law Review Committee (CLRC) in its 1995 report on computer software.<sup>40</sup> The amendments are now under review as part of the Digital Agenda review.

### **Definition of “market power”**

In *Australian Competition and Consumer Commission v Universal Music Australia Pty Limited* the Federal Court held that a company with a 15% market share could nevertheless have “market power” for the purposes of the Trade Practices Act (Cth) 1974.<sup>41</sup> The decision raised concerns that a company’s exercise of its copyright rights could put it at risk of breaching the Trade Practices Act in a much greater range of cases than prior to the decision. The concerns were largely allayed by the decision of the Full Court of the Federal Court on appeal. The Full Court overturned the trial judge’s decision, and held that neither of the respondents held a substantial degree of power in the relevant market –the market for wholesale recorded music in Australia – at the relevant time.<sup>42</sup>

## **Conclusion**

The end of 2003 is an ambitious deadline for conclusion of the FTA, and it is by no means clear that this deadline will be met. While a range of copyright issues has been raised (mainly by the US) for possible inclusion in the treaty, it is difficult to gauge at this stage which of these will make it to the final text of the treaty, let alone what that text will look like. Even if a treaty is concluded, its provisions will not be self-executing under Australian law. Treaties are subject to a Parliamentary review process before Australia becomes a signatory, and, if it does, legislation to

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<sup>39</sup> Sections 47D and 47H. The latter section was further considered in the CLRC report *Copyright and Contract*, which recommended that contractual provisions inconsistent with other “fundamental” exceptions in the Copyright Act should also be deemed to have no effect. That report is available from [www.law.gov.au/clrc](http://www.law.gov.au/clrc).

<sup>40</sup> Available from [www.law.gov.au/clrc](http://www.law.gov.au/clrc).

<sup>41</sup> <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/federal%5fct/2001/1800.html>

<sup>42</sup> The Full Court did, however, uphold the trial judge's finding that both companies had engaged in exclusive dealing, contrary to section 47 of the Trade Practices Act, and increased the penalties. The Full Court’s decision is available at <http://www.austlii.edu.au/au/cases/cth/FCAFC/2003/193.html>

give effect to treaty obligations must be passed by the Parliament.<sup>43</sup> There are many controversial copyright issues being proposed for inclusion in the agreement and even if an agreement is reached, there is likely to be vigorous debate in Australia about its implementation into domestic law.

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<sup>43</sup> Treaties to which Australia is proposing to become a party, including bilateral treaties, are automatically referred to the Joint Standing Committee on Treaties for review: see further [www.aph.gov.au/house/committee/jsct/index.htm](http://www.aph.gov.au/house/committee/jsct/index.htm). Once Australia has become a party, any legislation necessary to give effect to its obligations must be passed by both houses of the Commonwealth Parliament.