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Major Copyright Reforms and Software IPR Protection in Australia

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Introduction

There have been a number of important recent changes to Australian copyright law affecting software and digital content. The most recent changes resulted from Australia's obligations under the Australia–US Free Trade Agreement (AUSFTA), concluded in May 2004. Before that, important changes were made by the Copyright Amendment (Digital Agenda) Act (Digital Agenda Act), which came into effect in March 2001.

Further amendments are about to be introduced into the Australian Parliament, and are likely to be in force by the end of 2006. These include changes relating to technological protection measures, private copying, non-commercial uses by certain institutions and enforcement. In addition, there have been some important recent court cases on digital content.

Digital Agenda amendments

The main changes introduced by the Digital Agenda Act affecting computer software and digital content were:

- a “broad-based technology-neutral” right of communication to the public, covering electronic transmission and making available of digital content;
- sanctions against the manufacture and supply of devices and services for circumventing technological protection measures (TPMs);
- sanctions against tampering with electronic rights management information (ERMI);
- provisions relating conversions of material from non-digital to digital form, and from source code to object code, and vice-versa;
- exceptions for temporary “technical” reproductions;
- the “extension” into the digital environment of special exceptions for libraries and educational institutions;
- provisions dealing with liability for infringement, including the liability of Internet Service Providers; and
- a new definition of “computer program”, and changes to exception for computer software.¹

The first three areas of change were intended to meet the requirements of the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) as it applies to phonograms. Australia has not yet acceded to either of these treaties, but is obliged to do so under the AUSFTA and under the Australia–Singapore Free Trade Agreement.

There were provisions in the AUSFTA affecting TPMs, ERMI and ISP liability, and I will deal with those issues below in the discussion of the AUSFTA.

Reproduction and copying: non-digital to digital, source code to object code, and vice versa

The Digital Agenda amendments introduced provisions which confirm that converting a work either to, or from, a digital or other machine-readable form is an exercise of the reproduction right in the work.² They also introduced provisions

¹ There is more information in the Australian Copyright Council's information sheet *Digital Agenda amendments*, available for download from www.copyright.org.au/reform, and in the Council's more detailed book B109 *Digital Agenda amendments*.

which confirm that an object code version of a computer program originally expressed in source code is a reproduction of the program, and conversely that a source code version of a computer program originally expressed in object code is a reproduction of the program.³ These amendments follow recommendations in the 1995 report of the Copyright Law Review Committee (CLRC) on computer software. The CLRC was concerned that without such amendments, a court may find that these conversions are not reproductions, because they are not “objectively similar” to the work from which they are derived.

There are similar provisions which are intended to confirm that a sound recording or film is “copied” if it is converted into, or from, a digital or other machine-readable form.⁴

There are also “legislative notes” intended to confirm that references to the conversion of material into a digital or other electronic machine-readable form include the first digitisation of that material.

Temporary “technical” reproductions

As a result of the Digital Agenda amendments, copyright is not infringed by making a reproduction as part of the technical process of making or receiving a communication, provided:

- the reproduction is temporary; and
- the communication does not infringe copyright.⁵

A “technical process” suggests something done by a computer program or a machine without human intervention.

The Digital Agenda Act states that one of its objectives is to “ensure that the relevant global technical standards which form the basis of the new communication and information technologies, such as the Internet are not jeopardised”.⁶ In a similar vein, the Explanatory Memorandum to the Digital Agenda Bill stated that one of the objectives of the Bill was to “ensure that copyright laws do not jeopardise the underlying technical processes that are integral to the operation of the Internet, such as certain kinds of caching”.⁷ The Explanatory Memorandum also states that the exception is intended to cover activities such as browsing copyright material on the Internet and the type of caching that a computer automatically does when one visits websites.

For material viewed online, the special exception would appear to cover the temporary reproduction in RAM necessary to view the material online, and probably the caching of material by the browser software.

The exception would not, however, seem to cover “deliberate” caching such as proxy caching or forward caching. There is, however, an argument that such caching is in some cases impliedly licensed in the absence of a direction to the contrary by the copyright owner. The draft Copyright (Exceptions, Enforcement and Other Measures) Bill, discussed below, includes a provision intended to allow active caching by educational institutions.

Definition of “computer program”

Computer programs have been protected as “literary works” in Australian copyright law since 1984. The Digital Agenda amendments introduced a new definition, based recommendations by the Copyright Law Review Committee (CLRC) in its 1995 report *Computer Software Protection*:⁸

a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.⁹

² Section 21(1A).

³ Section 21(5).

⁴ Section 21(6).

⁵ Sections 43A and 111A.

⁶ Section 3.

⁷ Page 7.

⁸ Available at www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Computer_Software_Protection.

⁹ Section 10(1).

The CLRC's reasons for its recommendation were as follows:

The Committee is of the view that any definition of "computer program" should not be unduly restrictive of future developments in programming languages and should be clearly comprehensive in its coverage. The Committee is mindful that the position adopted in Australia in relation to the extent of the protection afforded to computer programs should, as far as possible, be consistent with that adopted by our major trading partners. The Committee believes that the US definition, by using the words "to be used directly or indirectly in a computer", covers programs written in source code, object code and microcode. Accordingly, it disposes of any uncertainty whether protection is limited to when the program code is visible. Also, the inclusion of the word "statements" clearly extends the scope of the definition to cover programs written in declarative programming languages. The definition omits any requirement that the computer be digital. Finally, while the definition does not include a reference to "expression of" preceding "a set of statements or instructions", the Committee believes that the requirement of originality for copyright to subsist in a work in s.32(1) of the Act would result in the expression-idea dichotomy being applied to computer programs thus defined, as it is to any other work. Furthermore, the Committee notes that the definitions of other items constituting works, eg "drawing", which is a form of artistic work and which includes "diagram, map, chart or plan", do not include "expression of".¹⁰

Special exceptions for use of computer software

Exceptions allowing the use of computer programs for particular purposes came into force in 1999. They were intended to implement recommendations in the CLRC's *Computer Software Protection* report. These exceptions relate to:

- "normal use" of a computer program;
- studying the ideas behind a computer program;
- making interoperable products;
- correcting errors;
- testing security; and
- backup copies.

The Digital Agenda amendments made some changes to these exceptions, including a change intended to ensure that the exceptions apply to data used by a computer program, as well as to the program itself.

Digital Agenda Review report

In April 2003, the government announced that it had engaged a consortium headed by law firm Phillips Fox to conduct a review of the Digital Agenda amendments. The Government released the Phillips Fox report in April 2004, and released its response to the recommendations in the report in May 2006.¹¹ Some of the provisions in the draft Copyright Amendment (Exceptions, Enforcement and Other Measures) Bill, discussed below, implement government responses to the Digital Agenda Review report.

Australia-US Free Trade Agreement

The governments of Australia and the United States (US) announced in November 2002 that they would begin negotiations on a free trade agreement between the two countries. The first round of negotiations was held in Canberra in March 2003.¹²

¹⁰ Para 6.32.

¹¹ For a link to the report, go to www.copyright.org.au/U26783.

¹² See www.ag.gov.au/agd/WWW/eneWSCopyrighthome.nsf/Page/eNews_Issue_28_-_April_2003#2.

In May 2004, the governments signed the Australia–US Free Trade Agreement (AUSFTA). Chapter 17 of the agreement deals with intellectual property, and contains a number of provisions relating to copyright. There are also three exchanges of letters (“side letters”) between the two governments which clarify certain intellectual property obligations.¹³

Chapter 17 required Australia to make a number of changes to the Copyright Act, and to become a party to the WCT and WPPT. Australian law already complied with most requirements of the WCT following the Digital Agenda amendments to the Copyright Act, which came into effect in March 2001. The remaining obligations concerned performers and the period of protection for photographs. Before the AUSFTA negotiations began, the Australian government had undertaken (in a 2001 election commitment) to amend the Copyright Act to meet the obligations in the WIPO treaties relating to performers’ rights and photographs. Legislation giving effect to that commitment had been drafted, but not introduced when the AUSFTA negotiations began. That draft legislation was subsequently incorporated into the AUSFTA amendments.

Amendments to the Copyright Act intended to implement the AUSFTA (AUSFTA amendments) were passed in August 2004 and December 2004.

On 1 January 2005, most of the AUSFTA amendments came into effect. The amendments most relevant to computer software and digital content relate to:

- liability of carriage service providers;
- reproduction of copyright material (including temporary reproduction);
- electronic rights management information; and
- criminal offences.

Other amendments relate to:

- extension of the period of copyright protection;
- performers’ rights; and
- encoded broadcasts.

The amendments relating to performers’ moral rights have not yet come into effect. They will come into effect when Australia accedes to the WPPT.

Chapter 17 also requires Australia to make changes relating to technological protection measures, but Australia has until 1 January 2007 to implement these changes. Draft amendments intended to meet these requirements are discussed below.

The Chapter did not require the US to make any changes to its Copyright Act.

Parliamentary inquiries into the AUSFTA

There were two parliamentary inquiries into the AUSFTA: one by the Joint Standing Committee on Treaties (JSCT) and the other by the Senate Select Committee on the Australia–US Free Trade Agreement.¹⁴ Each of the inquiries dealt with the copyright provisions in the AUSFTA.

The reports from each of the inquiries expressed some concerns about the consultation process for those affected by the AUSFTA, the implications of the extension of the term of protection, and the implications of the AUSFTA for educational institutions, libraries and cultural institutions.

¹³ The text of the AUSFTA, and explanatory materials, are available from www.dfat.gov.au/trade/negotiations/us.html.

¹⁴ The JSCT report is available at www.aph.gov.au/house/committee/jsct/usafta/report.htm. The Senate Select Committee’s report is available at www.aph.gov.au/senate/committee/fretrade_ctte/index.htm.

Fair use review

As a result of concerns raised by the Parliamentary inquiries into the AUSFTA, the government announced in its 2004 pre-election arts policy (“Strengthening Australian Arts”) that it would review “whether Australian copyright law should include an exception based on the principles of ‘fair use’ that would facilitate the public’s access to copyright materials in the digital environment”.¹⁵

The government released an issues paper – *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* – in May 2005, and sought submissions.¹⁶ As a result of the inquiry, the government decided not to introduce an equivalent to the US fair use defence, but instead to introduce some new exceptions to copyright infringement. These new exceptions relate to libraries, educational institutions, cultural institutions, people with a print disability and parody and satire. The draft Copyright Amendment (Exceptions, Enforcement and Other Measures) Bill – discussed below – includes these new exceptions.

The AUSFTA amendments

Liability of carriage service providers: “safe harbour” provisions

The Digital Agenda amendments introduced changes intended to clarify the liability of carriage service providers. These included the introduction of a list of factors, based on case law, for determining whether a person is liable for authorising an infringement of copyright by another person. The amendments also introduced a new defence to authorisation liability: a person who provides physical facilities by which copyright material is communicated is not liable for authorising an infringement of copyright merely because another person uses those facilities.¹⁷

The AUSFTA amendments introduced new provisions which limit the remedies a court may award for infringement of copyright by a carriage service provider (CSP), if the CSP meets certain conditions. “Carriage service provider” is defined to have the same meaning as in the Telecommunications Act. A CSP may be liable for copyright infringement in relation to something it does itself, and for authorising infringements by people who use its facilities or service.

The amendments do not affect whether or not a CSP is liable for infringement, but rather the consequences of that liability. In this respect, the new provisions are similar to the “safe harbour” provisions for CSPs in the US.

In general, a CSP which meets the conditions may be required to take certain action – such as disabling access and terminating an account – but not to pay compensation.

The remedies available against a CSP are limited in relation to four categories of activity, provided the conditions applying to that category of activity are met. The categories are:

- Category A: providing facilities for transmitting, routing or providing connections;
- Category B: caching by automatic process;
- Category C: storing material on a CSP system at the direction of a user; and
- Category D: referring users to an online location.

In relation to all categories of activity, to limit the remedies for infringement, the CSP must adopt and reasonably implement a policy that provides for termination, in appropriate circumstances, of the accounts of repeat infringers. In addition, if there is a relevant industry code in force, the CSP must comply with the relevant provisions of that code relating to accommodating and not interfering with standard technical measures used to protect and identify copyright material. There is no requirement for a CSP to adopt any particular policy or industry code, but rather an incentive to do so because of the consequent limitations on liability.

¹⁵ There is a link to the policy from www.copyright.org.au/U27089.

¹⁶ There is a link to the issues paper and submissions from www.copyright.org.au/U25871.

¹⁷ Sections 39B and 112E.

The application of these provisions was considered in *Universal v Cooper* and in *Universal v Sharman*, discussed below under *Court decisions*.¹⁸

Reproduction in “material form”

Reproducing a work “in material form” requires the copyright owner’s permission, unless a special exception applies. Before the AUSFTA amendments, “material form” was defined to mean a form of storage from which the work could be reproduced. In *Sony v Stevens* (discussed below), the High Court held that the storage of a computer program in the RAM of a Playstation console did not reproduce the program in “material form” because the program could not be reproduced from the RAM.¹⁹

The AUSFTA amendments introduced a new definition of “material form”: now it means any form of storage, whether or not the work can be reproduced from it.

The practical effect of the change is limited, however, by a new exception which provides that there is no infringement if the reproduction is “incidentally made as part of a technical process” of using a non-infringing copy of a work. This exception is intended to allow the “normal use” of non-infringing material, for example by playing a CD-ROM. It does not, however, apply to infringing material, such as a pirated CD-ROM.

Extension of electronic rights management information provisions

The Digital Agenda amendments introduced sanctions against tampering with electronic rights management information (ERMI), and against distributing or commercially dealing with material whose rights management information has been tampered with. Rights management information is information attached to or embodied in digital material that identifies the material and its author or copyright owner, or which relates to the terms or conditions of use of the material.

The AUSFTA amendments amended the definition of “electronic rights management information” to cover information that appears “in connection with a communication, or the making available, of” copyright material. The AUSFTA amendments also expanded the sanctions against distributing material from which ERMI has been removed or altered (for example, knowingly selling or importing such material).²⁰ Previously, distribution of such material would have been an infringement only if the distribution was “for the purpose of trade”. This is no longer a requirement.

Criminal penalties

The AUSFTA amendments included a new offence where a person causes infringement on a commercial scale, even though that person makes no financial gain.²¹ This offence applies where a person engages in conduct which:

- results in one or more infringements of copyright; and
- has a substantial prejudicial impact on the copyright owner; and
- occurs on a commercial scale.

Factors in determining whether infringements are on a commercial scale include:

- the volume of infringing articles;
- the value of infringing articles; and
- any other relevant matter.²²

¹⁸ *Universal Music v Cooper* [2005] FCA 972 (14 July 2005). There is a link to the case from www.copyright.org.au/U26043.

¹⁹ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

²⁰ Sections 116C and 132(5E).

²¹ Section 132 (5DB).

In addition, all offences which previously related to activities conducted “by way of trade” or “for the purposes of trade” were amended so that they now also apply to activities conducted “with the intention of obtaining commercial advantage or profit”.

According to the Explanatory Memorandum to the FTA Implementation Bill:

It is intended that the expression ‘commercial advantage’ where used in the offences in the Act may include circumstances where a business has knowingly infringed copyright material for the purpose of commercial gain. It is also intended that the expression ‘profit’ where used in the offences in the Act may include circumstances where a person (whether a business entity or not) commits an infringement by knowingly selling copyright material.²³

The government is about to introduce further changes in relation to enforcement, as discussed below.

Duration of copyright protection

The AUSFTA amendments extended the period of copyright protection for most material to 70 years from the year of the author’s death or from the year of first publication.

The extended periods of protection only apply to material that was still protected by copyright on 1 January 2005, or created on or after that date. There was no “revival” of copyright in material which was in the public domain by that date.

Recent court decisions

Stevens v Sony – TPMS and reproduction in RAM

This case concerned whether or not access codes in Sony PlayStation computer games, intended to prevent the playing of unauthorised copies of the games, were “technological protection measures” for the purposes of the Copyright Act. The High Court held that the access codes were not TPMs because they do not prevent or inhibit infringement.²⁴

The High Court also held that the playing of the game did not result in the reproduction in “material form” of a computer program in the RAM of the PlayStation console, because the program could not be reproduced from the RAM. As noted above, the definition of “material form” was amended on 1 January 2005, but the litigation had commenced before that amendment came into force.

The Court also rejected the argument that the playing of the computer game resulted in a copy of a “substantial part” of a cinematograph film. It held that the evidence did not demonstrate that a substantial part of any film was copied.

Universal v Cooper – liability for linking

The proprietor of a website (Cooper) was held liable for authorising infringement by knowingly allowing others to place on his website hyperlinks to infringing material and by encouraging website users to access infringing files via the links.²⁵ The Court rejected, however, an argument that Cooper was responsible for the communication of infringing material to website users clicking on the links. It also rejected an argument that Cooper had infringed copyright by “exposing for sale or by way of trade” infringing music files on his website.

²² Section 132(5DC).

²³ Para 590.

²⁴ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58. There is a link to the case from www.copyright.org.au/U26150.

²⁵ *Universal Music v Cooper* [2005] FCA 972 (14 July 2005).

The Internet Service Provider (ISP) was also held liable for authorising infringements.

The Court considered whether the “safe harbour” provisions introduced by the AUSFTA amendments could apply to the ISP. The Court held that the amendments were not in force at the relevant time and do not apply retrospectively. Even if the safe harbour provisions had been in force, the ISP could not have relied on them because it received a financial benefit from the infringements (in the form of free advertising on the website), and because it failed to take action against the website proprietor despite knowing that infringements were taking place.

Cooper and the ISP have appealed the decision.

Universal Music v Sharman Networks (the “Kazaa” case) – peer-to-peer filesharing

In a decision delivered on 5 September 2005, the Federal Court held that Sharman had authorised infringement of copyright by users of its file-sharing software.²⁶ In reaching that conclusion, the Court found that Sharman’s warnings to users were ineffective, that it could have adopted technological measures to curtail infringement, and that, on the contrary, it had exhorted users to increase their file-sharing and to ignore copyright constraints.

The Court’s orders allowed Sharman to continue to distribute the file-sharing software if it adopted certain measures to curtail infringement of copyright. These measures would have required the record companies to provide to Sharman information about recordings in which they claim copyright.

Sharman appealed the decision but, on 27 July 2006, the parties announced that the action had been settled. The settlement also applied to legal actions relating to Kazaa in the US. The settlement agreement includes an undertaking by the Kazaa operators to introduce filtering technology to block access to infringing music files.²⁷

Amendments to be introduced in 2006

The government’s legislative program for 2006 includes the following Bills:

- Copyright Amendment (Technological Protection Measures) Bill (TPM Bill); and
- Copyright Amendment (Exceptions, Enforcement and Other Measures) Bill (Exceptions and Enforcement Bill).

As at 13 October 2006, these bills had been released in draft and were about to be introduced into Parliament. Draft regulations relating to technological protection measures had also been released. After the bills are introduced, they will be referred to the Senate Legal and Constitutional Affairs Committee, which will report to Parliament by 10 November 2006. The government intends both bills to be passed by the end of the year. The AUSFTA requires the TPM amendments to be in force by 1 January 2007.

TPM Bill

As a result of the Digital Agenda amendments, there are criminal penalties and civil remedies for making, importing and commercially dealing in devices and services which circumvent technological copyright protection measures (such as decryption software). There is an exception if the device or service is going to be used for various “permitted purposes”. A “permitted purpose” includes certain activities by libraries, educational institutions, governments, and decompilers of software. Organisations wishing to take advantage of these exceptions need to make a written declaration that the device or service is only to be used for the relevant purpose.

The TPM Bill is intended to meet Australia’s obligations relating to technological protection measures under the AUSFTA. The AUSFTA requires the following amendments to the Copyright Act:

²⁶ *Universal Music v Sharman Networks* [2005] FCA 1242 (5 September 2005). There is a link to the case from www.copyright.org.au/U26147.

²⁷ For links to more information, go to www.copyright.org.au/u27055.

- sanctions against the use, manufacture and supply of devices designed to circumvent TPMs that control access to copyright material;
- sanctions against the circumvention of a TPM to get access to copyright material;
- replacement of the “permitted purposes” for which a circumvention device or service may be supplied with more limited exceptions; and
- introduction of a procedure to determine whether or not a person should be allowed to circumvent a TPM in order to make non-infringing uses of copyright material, where the “actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative proceeding”.

“Access control technological protection measure”

The most controversial aspect of the draft amendments is the definition of “access control technological protection measure”. The draft definition would apply to a device, product or component (including a computer program) that is designed to prevent unauthorised access to work, but only if the access-control is designed:

to prevent or inhibit the doing of an act:

- (i) that is comprised in the copyright, and
- (ii) that would infringe copyright.

These would exclude from the definition an access-control measure if consumption or use of the copyright material, after access has been achieved, would not result in an act comprised in the copyright (such as reproduction or communication). Such an access-control measure may be used for a pay-per-view service, for example.

The draft definition would also exclude a measure intended to prevent or inhibit secondary infringement – such as importation for commercial purposes, distribution of infringing articles and authorisation of infringement.

The conditions are not required by the AUSFTA or by the WIPO treaties. The government has taken the view, however, that its approach is allowed by the AUSFTA.

The government’s intention is to exclude from protection access-control measures which are not directly connected with the exercise of copyright rights. In its explanatory material for the draft legislation, the government said the following:

The scope of the scheme is limited to preventing circumvention of TPMs designed to stop copyright piracy. The scheme will not cover TPMs which are not designed to prevent or inhibit people from infringing copyright. The scheme will not apply to TPMs solely designed for other purposes, such as market segmentation (eg region coding) or the protection against competition in aftermarket goods (eg spare parts) where the TPM does not have a connection with copyright.²⁸

The statement apparently refers to US cases involving TPMs such as *Lexmark v Static Components*, *Chamberlain v Skylink*, and *Storage Technology Corp v Custom Hardware Engineering Consulting Inc*. These cases all concerned access controls on computer programs, which were circumvented by competitors in order to develop a competing product or service. Access to the computer program in each case was not an end in itself; it was a means to an end of producing a competing product or service (recycled toner cartridges, universal garage door openers, data maintenance services).

The government’s statement also refers to its intention to exclude from protection access-control measures intended to enforce “region-coding” of computer games and DVDs.

Exemption from circumvention liability

The other controversial aspect of the government’s draft legislation are the proposed exemptions from circumvention liability.

The AUSFTA allows exemptions to circumvention liability which meet all of the following criteria:

- the circumvention is of an access control technological measure;
- the use of the work is non-infringing;

²⁸ www.ag.gov.au/agd/WWW/agdHome.nsf/Page/RWP04FC63D41045DEA5CA2571DF0021BCA3

- there is an actual or likely adverse impact on that non-infringing use; and
- that impact is credibly demonstrated.

In addition, any exemption must apply:

- to a class of works, performances or phonograms, and
- only to the extent that it does not impair
 - the adequacy of legal protection, or
 - the effectiveness of legal remedies

against the circumvention of effective technological protection measures.²⁹

The AUSFTA requires a legislative or administrative process, at least every four years, to consider applications for exemptions. In the US, the Copyright Office conducts an inquiry every three years. It has conducted inquiries in 2000, 2003 and 2006.

Under the Australian draft legislation, a person could apply to the Attorney-General for an exemption at any time, and the Attorney-General must respond within four years. In addition, the draft legislation allows exemptions considered before the legislation comes into effect. This is intended to allow exemptions recommended by the House of Representatives Legal and Constitutional Affairs Committee in its report on technological protection measures released on 1 March 2006.³⁰ The report included recommendations for exemption from circumvention liability in a range of circumstances. In addition, it recommended that technological measures intended to restrict the playing of DVDs and other items to particular regions (region coding) be excluded from protection under the Copyright Act.

Some of those recommendations are reflected in the draft regulations released for comment by the government. The draft regulations include exemptions relating to:

- interoperability with computer programs;
- educational purposes;
- courses of study;
- people with a print disability;
- libraries and archives;
- broadcasting sound recordings; and
- malfunctioning technological protection measures.

Exceptions and Enforcement Bill

The draft Exceptions and Enforcement Bill includes the exceptions which allow:

- private copying of music, newspapers and books from “personal collections” into other “formats” such as iPods and mp3 players (“format-shifting”);
- recording of TV and radio programs for private viewing (“time-shifting”);
- non-commercial use of copyright material by educational institutions, libraries and other cultural institutions;
- copying by, and for, people with a disability; and
- satire and parody.

The draft Bill also:

²⁹ Articles 17.4.7.4(7)(e)(viii) and 17.4(7)(f).

³⁰ There is a link to the report from www.copyright.org.au/U26626.

- introduces new enforcement provisions;
- expands the jurisdiction of the Copyright Tribunal; and
- removes the 1% cap on the royalties paid by broadcasters to record companies.

Format-shifting

The new exception for format-shifting would allow a person to make a copy of a work from something the person owns provided:

- the original is non-infringing;
- the copy is for personal use;
- the copy is in a “different format”; and
- the copy is to use instead of the original.

The exception would apply to:

- books, newspapers and magazines;
- photographs;
- sound recordings; and
- videotapes (but not DVDs).

The most controversial aspect of the exception is that there is no payment to copyright owners, and no protection for licensing of “format-shift” copies by copyright owners. The Australian government has rejected proposals to introduce levies on recording media and recording equipment such as those which apply in other countries.

The exception applies even if a licensed “format-shift” copy is available. The music collecting society AMCOS can offer a format-shift licence on behalf of composers and music publishers, but a person will be able to ignore the licence and make a free format-shift copy.

Time-shifting

The new exception will allow a person to record a television or radio program, on private premises, to watch or listen to at a later time. There is no limit on how long the person may keep the recording for, and no limit on how many times the person can view or listen to the recording.

As for format shifting, a person could rely on the exception even if a time-shift copy were available for purchase or under licence – for example as a digital download.

“Non-commercial” use by certain organisations and people

This new exception allows the use of copyright material for certain purposes provided the use meets criteria that are almost identical to the three-step test in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS).³¹

The purposes are:

- maintaining or operating a library or archives;
- giving educational instruction;
- obtaining a copy of work in a form which assists a person with a disability; and

³¹ Article 14. There is a similar test in the Berne Convention and in the WCT and WPPT.

- parody or satire.

In the first three cases, the use must not be made for the purpose of obtaining a commercial advantage.

In all cases, the use must:

- amount to a special case,
- not conflict with a normal exploitation of a work; and
- not unreasonably prejudice the legitimate interests of the owner of the copyright.

The Australian government has taken the unusual step of including the treaty language of the three-step test in a national statute.

The new exceptions do not apply if another exception or statutory licence applies to the use. This is particularly important in relation to educational instruction, as there are already many provisions allowing the reproduction and communication of material for educational purposes, but most of those provisions require payment by educational institutions to a collecting society.

Enforcement

The draft new enforcement provisions include:

- indictable, summary and strict liability offences in relation to range of infringing activities;
- evidentiary presumptions about copyright ownership, subsistence and originality based on labeling and other documentation associated with a copyright product;
- relief for likely infringements on a commercial scale resulting from unauthorised communication to the public; and
- extension of the liability for distribution of infringing articles to include electronic copies of works.

Copyright Tribunal

The Copyright Tribunal determines the rate of payment and other licence terms for statutory licences and for music performance licences administered by the music collecting society APRA (Australasian Performing Right Association). The amendments include an expansion of the Tribunal's jurisdiction to cover all licences offered by collecting societies. The amendments give effect to the government's response to the CLRC report *Jurisdiction and Procedures of the Copyright Tribunal* (2002),³² and to recommendations in the *Review of intellectual property legislation under the Competition Principles Agreement* by the Intellectual Property and Competition Review Committee (2000).³³

Possible changes in the future

The government has received two reports on copyright reform, to which it has not yet responded:

- CLRC *Copyright and Contracts* report (October 2002)
- CLRC *Crown Copyright* report (April 2005)

It is not clear when the government will respond to these reports. If the government agrees with recommendations in these reports, there will be further changes to copyright law in Australia in the future.

³²

www.ag.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Jurisdiction_and_Procedures_of_the_Copyright_Tribunal

³³ www.ipaustralia.gov.au/about/ipcr.shtml

In addition, the government announced in early 2006 that the Attorney-General's Department would conduct inquiries into the following:

- orphaned works; and
- legal deposit of digital material in certain libraries.

CLRC Copyright and Contracts report (October 2002)

In October 2002, the government released the CLRC's report *Copyright and Contract*. The report includes recommendations amend the Copyright Act to safeguard user's of copyright against "contracting out" of their entitlement to rely on certain exceptions to copyright infringement, such as fair dealing for research or study.³⁴ The Copyright Act currently includes a provision intended to prevent "contracting out" in relation to certain exceptions for computer software. Under the CLRC's recommendations, similar provisions would be introduced for other exceptions.

CLRC Crown Copyright report (April 2005)

The Government released the report of the Copyright Law Review Committee (CLRC) on government ownership of copyright in April 2005.³⁵

The Committee's report includes recommendations that the special provisions giving ownership of copyright to governments be repealed; whether or not a government owns copyright would be determined by the general provisions relating to copyright ownership. The Committee also recommended that materials such as judgments and legislation not be protected by copyright at all.

Orphaned works

In February 2006, the government announced that the Attorney-General's Department would conduct a review into "orphaned works" – works whose copyright owner cannot be identified and/or located. The review has not yet taken place.

Legal deposit of materials in digital form

In February 2006, the government announced that the Attorney-General's Department would conduct a review into whether there should be a requirement to provide copies of materials in digital form to certain libraries. Under the Copyright Act and legislation in Australian states, publishers must provide copies of printed material to the National Library and to certain state libraries. The review has not yet taken place.

Conclusion

There have been significant changes to Australian copyright law over the last five years, but there are likely to be more changes in the future as Australia responds to new challenges to copyright law from technological change and globalisation.

³⁴ For a link to the report, click www.copyright.org.au/27088.

³⁵ For links to more information, go to www.copyright.org.au/U25867.