

Media Law Conference
Wednesday 25 October 2006, Sydney Marriott Hotel

Copyright Update

Libby Baulch, Australian Copyright Council¹

Introduction

Given the recent introduction of the Copyright Amendment Bill 2006, this paper focuses on the aspects of that bill most relevant to the media. These include new copyright exceptions for time-shifting, format-shifting, parody and satire. The paper concludes with reference to the proposed international treaty for broadcasters and a recent case on moral rights.

Copyright Amendment Bill 2006

The Copyright Amendment Bill 2006, introduced into Parliament on 19 October, covers:

- private copying of music, newspapers and books from “personal collections” into other “formats” (“format-shifting”);
- recording of TV and radio programs to view privately at a later time (“time-shifting”);
- non-commercial use of copyright material by educational institutions, libraries and other cultural institutions;
- copying by, and for, people with a disability;
- parody and satire;
- enforcement;
- unauthorised reception of pay tv signals; and
- the jurisdiction of the Copyright Tribunal.

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee, which is to report to Parliament by 10 November 2006. The government intends the bills to be passed by the end of the year.

Inquiries preceding the bill

Some of the exceptions in the bill originate in the reports of the two Parliamentary inquiries into the Australia–US Free Trade Agreement (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.²

The reports from each of the inquiries expressed some concerns about the consultation process for those affected by the copyright provisions in the AUSFTA, the extension of the term of copyright protection, and the implications of the AUSFTA for educational institutions, libraries and cultural institutions. They recommended that the government consider the introduction of a “fair use” defence similar to that in US copyright law.

As a result of concerns raised by the Parliamentary inquiries, 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”.³

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.⁴ 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 format shifting, time-shifting, libraries, educational institutions, cultural institutions, people with a print disability and parody and satire. Some of the other amendments in the bill result

¹ The view in this paper are those of the author and not necessarily those of the Australian Copyright Council.

² The JSCT report is available at www.aph.gov.au/house/committee/jsct/usafra/report.htm. The Senate Select Committee’s report is available at www.aph.gov.au/senate/committee/fretrade_ctte/index.htm.

³ There is a link to the policy from www.copyright.org.au/U27089.

⁴ There is a link to the issues paper and submissions from www.copyright.org.au/U25871.

from the government's response to the review of the Digital Agenda amendments conducted by a consortium headed by Phillips Fox.⁵

Format-shifting

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

- the source copy 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 (but not podcasts);⁶ and
- videotapes (but not DVDs).

The exception would not apply if the person:

- has already made a copy in that format;
- sells, lets for hire, offers for sale or hire, or distributes "for the purposes of trade or otherwise"; or
- disposes of the original to another person.

Whether or not subsequent disposal of the copy for a non-commercial purpose would render the copy infringing depends on whether the disposal would be "distributing" it. The bill expressly allows the loan of the copy to a member of the lender's family or household, which suggests that lending to other people is not allowed. Disposing of the original by destroying it or discarding it so it cannot be used by anyone else appears to be allowed.

Meaning of "format-shift"

The meaning of "format-shift" is different for each type of material covered.

Subject matter	Format of original	Format of copy
books, newspapers and periodical publications	any format	a copy that embodies the work in a form different from the form in which the work is embodied in the original
photographs	hardcopy	electronic form
	electronic form	hardcopy
sound recordings	record embodying a sound recording ⁷	a copy in which sounds are embodied in a different format to that of the original
cinematograph film	videotape of cinematograph film in analog form	electronic form

⁵ There is a link the government's response, and to the report, from www.copyright.org.au/U26783.

⁶ The exception does not apply if "the record was ... made by downloading over the Internet a digital recording of a radio broadcast or similar program".

⁷ A "record" is currently defined to mean "a disc, tape, paper or other device in which sounds are embodied". The bill would introduce a new definition: "*record* includes a disc, tape, paper, **electronic file** or other device in which sounds are embodied" [emphasis added] (Schedule 3, clause 2).

Review of extension to other audiovisual material in two year's time

In its media release of 14 May 2006, the government said:

The Government is mindful consumers may want to use technology to copy audiovisual material (eg. DVDs they have bought) to other devices as well. The Government will monitor the implementation of the scope of the format shifting exception to review in two years' time, whether the scope can be expanded to digital audio-visual materials in a way which complies with our international obligations.

Copying music to an iPod from a CD

The government's media release of 22 September says the amendment will:

[legalise] 'format shifting' of material such as music, newspapers, books – meaning people can put CDs they own onto iPods or MP3 players

Copying music from a CD to an iPod involves putting the CD into a computer's CD reader, running a conversion program such as iTunes which converts the music file from a format such as AIFF to a compressed format (mp3) and saves that to the computer's hard disk, then copying the mp3 file onto the iPod. The process results in two mp3 versions of the music track: one on the computer and one on the iPod. You can listen to the mp3 on the computer, and you can listen to it on the iPod.

The exception, however, does not allow the making of two copies in the same format. It does not apply if:

at the time the user makes the ... copy, he or she has not made, and is not making, another copy that embodies sounds in a format substantially identical to the format in which they are embodied in the [copy being made]

The other reason that the exception would have limited practical application to copying music from a CD to an iPod is that the copy must be made to use instead of the original.

The result is that the exception would allow you to make an mp3 version of music from a CD on a computer, to listen to instead of the CD version, but not to copy the mp3 file onto an iPod.

This is not the intended result and it reveals the lack of clear justification for the exception. The format-shift exception for music has been driven by a view in government that if you pay \$30 for a CD, then you should be allowed to copy the contents of the CD onto your computer and onto your iPod for free.

The bill, however, has much broader application and is drafted with reference to current technology. Such an approach – based on particular technology – can mean that the exception becomes outdated, or applies in an unanticipated way, as a result of technological developments. File compression such as mp3 is currently used to overcome limitations in storage and bandwidth. As those limitations decrease, the need for compression decreases. In the future the storage capacity of portable music players may be such that people could store the number of music tracks they want by copying direct from a CD without the intermediate conversion process.

Making a backup CD or CD for the car

The legislation would not – and is not intended to – allow the making of a backup copy of a CD in the same format as the original. A person could, however, copy their music collection onto a computer in mp3 format to use instead of the original, and keep the original CDs as a backup.

Music tracks in mp3 format can be copied onto a CD, but this results in two mp3 copies and so is excluded from the exception. In addition, many CD players, including those in cars, may not play mp3 format music.

Application to music downloads

The government's media release of 14 May about its (then) proposed amendments included the following in a series of questions and answers about the application of the government's proposed amendments:

3. *Can I copy a music download to a CD or MP3 player?*

Yes, if you have purchased a legitimate copy and it is permitted by the purchase agreement.

It is difficult to see that the legislation would have much application to legitimate music downloads, given the vast majority are governed by contract.

Application to copy-protected CDs

As discussed later in this paper, the Copyright Amendment Bill will include prohibitions on circumventing certain technological protection measures (TPMs), and prohibitions on manufacturing and supplying circumvention devices and services. The provisions apply differently depending on whether the TPM is an access-control TPM or a copy-control TPM. The prohibition on circumvention applies only to access-control TPMs – that is, a TPM intended to prevent unauthorised access to content. Whether or not the prohibition applies to a copy-protected CD depends on whether the technology can be characterised as an access-control TPM. This is unlikely if the technology prevents the music being copied but allows it to be played.

Manufacture and supply of devices and services to circumvent copy-control mechanisms is, however, prohibited.

As discussed below, where a mechanism is an access-control TPM, there is a procedure enabling the granting of exemptions to allow people to circumvent to make a non-infringing use. Applications under this procedure for exemption from circumvention liability to make private use copies allowed by the bill would seem likely in the future.

The relationship between private copying and TPMs has been the subject of much debate in Europe, largely because most EU countries allow private copying subject to the payment of levies on copying equipment and/or blank recording media. The consumer expectation of access to material to make private copies is greater in Europe than it may be here, once the bill comes into effect, because of the payment of the levies.

The new provisions may not have much effect on whether or not people copy to time-shift or format-shift, but they may have an effect on the efficacy of TPMs if they form the basis of exemptions to circumvention liability.

Time-shifting

The only current provision relating to time-shifting applies to the copyright in a broadcast but not to underlying works, so effectively only applies to live broadcasts with no underlying copyright content (such as music).

The new exception for time-shifting 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.

Retention of the recording

The government's media release says the exception will:

[make] it legal for people to tape TV or radio programs in order to play them at a more convenient time. Consumers will no longer be required to immediately delete recordings of TV and radio programs after one use. However, this does not mean consumers can build libraries of TV and radio programs.

The first sentence indicates that the government has altered its policy since its media release of 14 May 2006, which included the following question and answer:

How long can I keep the recording?

The recording must be deleted after one use. It will not be possible to use the recording over and over again.

The exception would allow a person to record a television or radio program “solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast was made”.

There is no time limit on how long after the broadcast the person may view the recording – it could be years. There is no obligation to destroy the recording at any time. There is also no express limit on the number of times the recording can be watched.

The Explanatory Memorandum to the Bill, at para 6.3, says:

Whilst the exception does not require immediate deletion of the television or radio program after watching or listening to it, the exception does not permit a person to record a broadcast and keep it indefinitely in a collection of films or sound recordings for repeated use.

This intention is not reflected in the drafting. At the time the recording is made, it must be made for the purpose of watching or listening to the material at a more convenient time. If, after making the copy, the person decides to retain it for repeated viewing, the recording remains a non-infringing copy. It only becomes infringing if the person makes a commercial use of it or distributes it.⁸

No payment to copyright owners

Unlike private copying provisions in other countries, there is no provision for payment to copyright owners. The government has rejected proposals to introduce levies on recording media and recording equipment such as those which apply in other countries, including the US.

The government has taken the view that the exceptions comply with Australia's international treaty obligations, including the "three-step test", which requires that copyright exceptions:

- apply to certain special cases;
- do not conflict with a normal exploitation of the material, and
- do not unreasonably prejudice the legitimate interests of the rights holder.

The government appears to have taken the view that there is no market in time-shift or format-shift copies. The availability of past episodes of *McLeod's Daughters* from the Ninemsn website would seem to indicate otherwise; you can download them for \$1.95.⁹ In relation to newspapers and magazines, the bill would allow someone to digitise articles even if they are available online. For music, the collecting society AMCOS is in a position to offer a format-shift licence on behalf of composers and music publishers.

"Non-commercial" use by certain organisations and people

This new exception would allow 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) and other international treaties.¹⁰

The purposes are:

- maintaining or operating a library or archives;
- giving educational instruction;
- obtaining a copy of material in a form which assists a person with a disability; and
- 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 government has taken the unusual step of including international treaty language in a domestic statute. The three-step test is intended to apply to exceptions to copyright infringement in legislation. It is not intended to apply to the behaviour of an individual user. The application of the test to legislation may yield a different result to the application of the test to a single use. An exception which allows free use of copyright material may, when relied on by many people, unreasonably prejudice the rights holder. A use by one person in reliance on the exception may not. It is not clear why the government

⁸ As for format-shift copies, the bill expressly allows lending to members of the lender's family or household, which suggests that lending to others is not allowed.

⁹ video.ninemsn.com.au/catchuptv

¹⁰ Article 13. There is a similar test in the Berne Convention and in the WCT and WPPT.

chose to introduce this test rather than a test similar to that in the US fair use exception, or the similar test for fair dealing (by reproduction) for research or study in the Australian Copyright Act.

In any event, it is clear that the exception would be unlikely to apply to a use licensed by a copyright owner. The exception would therefore encourage a “licence it or lose” approach by copyright owners.

The new exceptions would not apply if another exception or statutory licence applies to the use:

Subsection (1) does not apply if, because of another provision of this Act:

- a) the use is not an infringement of copyright; or
- b) the use would not be an infringement of copyright assuming the conditions or requirements of that other provision were met.¹¹

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, most of which require payment by educational institutions to a collecting society.

Parody and satire

There is no definition of “parody” or “satire” in the bill, so these terms will have their dictionary meaning.

The Macquarie Dictionary defines “parody” as:

1. a humorous or satirical imitation of a serious piece of literature or writing. 2. the kind of literary composition represented by such imitations. 3. a burlesque imitation of a musical composition. 4. a poor imitation; a travesty.¹²

And “satire” as:

1. the use of irony, sarcasm, ridicule, etc in exposing, denouncing, or deriding vice, folly etc. 2. a literary composition, in verse or prose, in which vices, abuses, follies etc are held up to scorn, derision, or ridicule. 3. the species of literature constituted by such composition.

Broadly, parody relates to a particular work, whereas satire relates to characteristics of a person or society.

Parody

The exception – at least in relation to parody – has been included because of cases in the US where parody has been allowed under the fair use exception. In deciding not to introduce a fair use defence, the government has decided to introduce a defence to cover one of the activities covered by fair use. The best known parody case in the US is the Supreme Court decision in *Campbell v Acuff Rose*, involving the Roy Orbison song “Pretty Woman”. A parodic version was allowed, even though it was commercial. In another well-known case – *Suntrust v Houghton Mifflin* – the Court of Appeals 11th Circuit allowed the publication of a parody of *Gone with the Wind* called *The Wind Done Gone*.¹³

The US cases on parody have been about use of part of a work, with additional new material, to create a parodic version which is a “transformative work”.

The application of the new exception to the fact situations of the US cases may or may not have the same result as the US cases. It is not clear whether or not Australian courts’ application of the “three-step test” would have the same results as the application of the four-step test in the US fair use defence:

1. the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;

¹¹ Proposed new s200AB(6)

¹² The Macquarie Dictionary defines “burlesque”, used as an adjective, as “involving ludicrous or debasing treatment of a serious subject”.

¹³ There is a useful summary of fair use cases on parody at fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-c.html

3. amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.¹⁴

In addition, a parodic use in Australia may be “derogatory treatment” of the work parodied, and give rise to a claim for breach of moral rights by the author of the parodied work. The new parody exception applies only to copyright infringement; it does not provide a defence to infringement of moral rights. Having said that, it is likely that in cases where the parody defence was available to a copyright infringement claim, a court would find that any infringement of moral rights was reasonable and therefore defensible.

Satire

My understanding is that satire is not covered by the fair use defence in the US. If the exception in the bill is intended to be based on US law, it is not clear why satire it has been included.

Neither is satire covered by a special exception in countries of the European Union. Article 5.3(k) of the European Union Information Society Directive allows EU members to have exceptions in their domestic legislation for the purpose of caricature, parody or pastiche, but there is no reference to satire.

The Macquarie Dictionary has the following definitions of “caricature” and “pastiche”:

caricature: a picture, description, etc, ludicrously exaggerating the peculiarities or defects of persons or things.

pastiche: 1. a work of art, literature, or music consisting of motifs borrowed from one or more masters or works of art. 2. the mixing within one artistic production of styles, colours, etc., especially in imitation of established styles.

Relationship to other defences

As noted above, the new exception will not apply if another exception applies to the activity, or would apply if the conditions of that exception were met.

This means that the application of other exceptions, such as fair dealing for reporting news and fair dealing for criticism or review, must be excluded before the new exception becomes relevant. Both those defences require “sufficient acknowledgement” (an issue which was raised, but not pursued in the Panel case, discussed below).

If a person used copyright material without permission and without acknowledgement, and sought to rely on the parody defence, the copyright owner may argue that the parody defence is not available because the criticism or review defence would have applied if there had been acknowledgement.

Would the parody/satire exception have affected the outcome in the Panel case

It is interesting to speculate whether the new exception would have assisted Channel Ten in the Panel case – that is, would the exception apply to any of the excerpts which were held not to be fair dealing for criticism or review or reporting news. It is also interesting to speculate whether the availability of the new exception may have led the court to adopt a narrower interpretation of the fair dealing exceptions.

The Panel case – *Network Ten v TCN Channel Nine* – involved the recording and rebroadcasting, as part of Channel Ten’s program *The Panel*, of excerpts from 20 Channel Nine programs.

At first instance, Conti J held that none of the excerpts was a substantial part of the broadcast from which it was taken. His Honour went on, however, to hold that if this were not the case, a fair dealing defence applied in relation to 11 of the 20 broadcasts. Channel Nine appealed in relation to Conti J’s finding on the meaning of broadcast and approach to assessing “substantial part”, and in relation to His Honour’s finding of fair dealing in relation to seven of the excerpts. Channel Ten appealed Conti J’s rejection of fair dealing in relation to four of the excerpts.

¹⁴ This test is similar to the five-step test for fair dealing for research or study in s40(2).

The Full Court held that rebroadcasting any part of Channel Nine's broadcasts infringed copyright, no matter how small. It went on to consider Conti J's findings on fair dealing, upholding them in relation to seven of the excerpts at issue in the appeal, and overturning his decision in relation to the remaining four.

The case was appealed to the High Court in relation to the meaning of "broadcast" and "substantial part", but not in relation to fair dealing. The High Court overturned the Full Court's decision and held that "broadcast" means "programme". The case was remitted to the Full Court to determine which of the excerpts, not covered by fair dealing, was a "substantial part" of Channel Nine's broadcast having regard to the High Court's decision. The Full Court held that six of the 11 excerpts at issue constituted a substantial part of the program from which it was taken. Each excerpt was between 0.04% and 1.48% of the program from which it was taken.

The defence of parody is similar to that of criticism or review in the sense that it relates to comment on the work or works of an author. However, while the defence of criticism or review may apply to criticism of the ideas behind a work rather than of the work itself, and may apply to criticism or review of a work other than the one reproduced, it seems the parody defence is limited to comment on the work reproduced. The parody aspect of the defence may therefore not have assisted Channel Ten.

Satire, on the other hand, as noted above, has much broader application as it is not limited to comment on a particular work. It is not clear how widely this exception would be interpreted by the courts. However, I would have thought that at least some aspects of episodes of *The Panel* could be characterised as "satire" in the sense of ridiculing folly. Establishing purposes would just be the first step, though. The criteria of the three-step test would also need to be met.

Communication by clicking a hyperlink

One of the amendments in the bill deals with who is liable for a communication to the public. A communication may be by "making available" (for example, on a website), or by electronic transmission. Under the current law, a communication is "taken to be made by the person responsible for determining the content of the broadcast" (s22(6)).

The Bill would introduce a new paragraph (6A) to s22:

To avoid doubt, for the purposes of subsection (6), a person is not responsible for determining the content of a communication merely because the person takes one or more steps for the purpose of:

- a) gaining access to what is made available online by someone else in the communication; or
- b) receiving the electronic transmission of which the communication consists.

The "Explanatory Note" in the Bill says:

Example: A person is not responsible for determining the content of the communication to the person of a web page merely because the person clicks on a link to gain access to the page.

The Explanatory Memorandum says:

Although it was never intended that a person doing no more than merely accessing copyright material online could be considered to be exercising the communication right in relation to what was accessed, some have argued that this interpretation is possible.

This is an apparent reference to an argument made by Copyright Agency Limited in relation to students directed to view certain online material by their educational institution, and whether such viewing requires the payment of equitable remuneration by the institution under Part VB of the Copyright Act.

This issue was considered in *Universal v Cooper*.¹⁵ That case involved a website with links to infringing mp3 files on remote servers. The website proprietor was held liable for authorising infringements by people who clicked the links on his site and downloaded infringing mp3 files. The decision has been appealed. There was also some discussion of the issue in *Universal v Sharman* (the Kazaa case).¹⁶

¹⁵ *Universal Music Australia Pty Ltd v Cooper* [2005] FCA 972, available from www.austlii.edu.au/au/cases/cth/federal_ct/2005/972.html

¹⁶ *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242, available from www.austlii.edu.au/au/cases/cth/federal_ct/2005/1242.html

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.

Unauthorised reception of pay tv signals

The bill includes new criminal penalties for receiving and subsequently dealing with encrypted broadcasts and subscription broadcasts. The amendments implement the government's response, in June 2005, to submissions on the government's discussion paper *Protecting Subscription Broadcasts*.¹⁷

Technological protection measures

Currently, there are criminal penalties and civil remedies for making, importing and supplying devices and services which circumvent technological protection measures (TPMs). Supply of a circumvention device or service is allowed for certain "permitted purposes". These include certain activities relating to libraries, educational institutions, governments, and computer programs.

The meaning of "technological protection measure" was considered by the High Court in *Stevens v Sony*. The case concerned a mechanism in Sony Playstations that prevented the playing of unauthorised copies of computer games. The court held that the mechanism was not a "technological protection measure" as it did not prevent or inhibit infringement.¹⁸

The TPM provisions in the Bill, intended to meet obligations in the Australia–US Free Trade Agreement (AUSFTA):

- introduce a new definition of "technological protection measure" and a definition of "access-control technological protection measure";
- introduce sanctions against the manufacture and supply of devices and services designed to circumvent access-control TPMs;
- introduce sanctions against the circumvention of a TPM to get access to copyright material;
- replace the "permitted purposes" for which a circumvention device or service may be supplied with more limited exceptions; and
- introduce 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 definition of "access control technological protection measure" in the Bill differs from that in the Exposure Draft version of the Bill, which was problematic in a number of respects.

The drafting is intended to exclude from protection access-control mechanisms which are not related to the exercise of copyright, and mechanisms used for region coding.

These exclusions reflect recommendations made House of Representatives Legal and Constitutional Affairs Committee (LACA Committee) in its report on technological protection measures released on 1 March 2006.¹⁹

¹⁷ There is a link to the discussion paper at www.copyright.org.au/U25987. There is a link to the government's announcement of its position at www.copyright.org.au/u26688.

¹⁸ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58. There is a link to the case from www.copyright.org.au/U26150.

The first area of exclusion relates to the government's concern about some US cases involving TPMs: *Lexmark v Static Control 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 and data maintenance services).

Exemption from circumvention liability

The AUSFTA allows certain exemptions to liability for manufacturing and supplying TPMs, which are reflected in the bill. In addition, the AUSFTA allows exemptions to circumvention liability – that is, liability for circumventing a TPM – which meet all of the following criteria:

- the circumvention is of an access control technological measure;
- the use of the work is non-infringing;
- 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.²⁰

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. Very limited exemptions have been granted as a result of those inquiries.

Under the bill, 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 bill allows exemptions considered before the legislation comes into effect. This is intended to allow exemptions recommended by the LACA Committee, whose report included recommendations for exemption from circumvention liability in a range of circumstances. 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.

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.

¹⁹ There is a link to the report from www.copyright.org.au/U26626.

²⁰ Articles 17.4.7.4(7)(e)(viii) and 17.4(7)(f).

The amendments give effect to the government's response to the CLRC report *Jurisdiction and Procedures of the Copyright Tribunal* (2002),²¹ and to recommendations in the *Review of intellectual property legislation under the Competition Principles Agreement* by the Intellectual Property and Competition Review Committee (2000).²²

1% cap on payment for broadcasting sound recordings

The government's media release of 14 May 2006 announced that the government would repeal the 1% cap on royalties payable by broadcasters to owners of copyright in sound recordings. The media release said:

The one per cent cap was adopted in 1968 to protect radio broadcasters because they faced special economic difficulties at that time. Sound recording owners (mainly record companies and artists) and radio broadcasters, who operate in a profitable and robust industry, should be able to negotiate a market rate without legislative intervention. If they can't agree on fees, they can put their case to the independent Copyright Tribunal, like any other copyright owners and users.

Under the current law, the royalties payable by broadcasters (other than the ABC) for broadcasting sound recordings is capped at 1% of broadcasters' gross earnings. The government's decision to repeal the 1% cap followed the release of an issues paper seeking comments in February 2005.²³

It was expected that the Copyright Amendment Bill would repeal the 1% cap and replace it with an obligation to pay equitable remuneration, determined by the Copyright Tribunal in the absence of agreement between the parties. This amendment is not, in fact, included in the bill; it is not clear why.

Possible changes to the Copyright Act 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); and
- CLRC *Crown Copyright* report (April 2005)

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

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

- orphaned works (works whose copyright owner cannot be identified and/or located); 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 users of copyright against "contracting out" of their entitlement to rely on certain exceptions to copyright infringement, such as fair dealing for research or study.²⁴ 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.

21

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

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

23 There is a link to the discussion paper from www.copyright.org.au/U25649.

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

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 2005.²⁵

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.

International developments: new treaty for broadcasters

A new international treaty for broadcasters is being developed through the World Intellectual Property Organization (WIPO). The treaty is aimed at signal piracy. It appears that it will apply to "traditional" broadcasters and cablecasters; a US proposal for it to also cover "webcasting" was recently rejected. The adoption of a treaty will be considered at a diplomatic conference organised by WIPO in July or December 2007.

The WIPO meetings to discuss the treaty have raised issues about the basis and nature of copyright in broadcasts. These issues were considered by the High Court in the Panel case. The case involved interpretation of particular provisions of the Copyright Act, but the court discussed the history of the copyright in broadcasts and the interest to be protected. In the High Court's view, the interest sought to be protected by the broadcast copyright is that in the cost and skill in assembling and preparing and transmitting programs to the public.

One disappointing aspect of the way the Panel case was run, from an observer's point of view, was that the only copyright subject matter at issue was the copyright in the broadcast. There was no claim for infringement in the underlying rights in any of the programs at issue. What would have been interesting is whether the findings of substantial part by the Full Court of the Federal Court would have been the same for the underlying film of each program as they were for the broadcasts. The reasoning suggests that they would have been. That means that, by virtue of broadcasting, the broadcaster gets a copyright interest that is as valuable as the copyright in the broadcast content.

Moral rights

Moral rights are the rights of authors of copyright material to be attributed, not be falsely attributed, and not to have their work treated in a derogatory manner. The rights are not assignable, and are exercisable by an author in relation to a work even if copyright is owned by someone else.²⁶ The rights were introduced in 2000.

There has been a recent decision on the moral rights provisions – *Meskenas v ACP Publishing Pty Ltd* – a decision of the Federal Magistrates Court in early 2006.²⁷

The case involved a photograph of Princess Mary of Denmark sitting in front of a portrait of the late Dr Victor Chang, which was on display at the Research Institute Sydney. The photograph was published in *Woman's Day*, a magazine published by ACP Publishing. The painting was by Vladas Meskenas (a patient of Dr Chang's), but the caption in the magazine attributed it to Jiawei Shen (an artist commissioned to paint Princess Mary's portrait).

Mr Meskenas contacted ACP, and met with representatives from the magazine. He sought a retraction and an apology. ACP agreed to publish an apology, but the undertaking was not followed through despite 90 phone calls to ACP from Mr Meskenas's son. ACP did finally publish an apology a year later, but reversed the image of the portrait, which further upset Mr Meskenas. Mr Meskenas sued ACP for copyright infringement, false attribution and failure to attribute.

Raphael FM rejected the copyright claim, because the painting was a portrait which Mr Meskenas had agreed to paint in lieu of payment for his treatment. Under s35(4) of the Copyright Act, copyright in commissioned portrait vests in the commissioning client unless there has been an agreement to the contrary.

However, Raphael FM held that Mr Meskenas was entitled to sue for both failure to attribute and false attribution, but that he was not entitled to separate damages for each claim. His Honour held that each claim was made out, and that false attribution was determined objectively; it was not necessary to show that the respondent intended the false attribution.

²⁵ For links to more information, go to www.copyright.org.au/U25867.

²⁶ For further information, see the Australian Copyright Council's information sheet Moral rights, available from www.copyright.org.au/introduction, and more detailed publication *B114 Moral Rights*.

²⁷ [2006] FMCA 1136. Case available from www.austlii.edu.au/au/cases/cth/FMCA/2006/1136.html.

His Honour awarded \$1,100 for the false attribution and for the failure to attribute together. He based the sum on the amount that he would have awarded had the claim been one for copyright infringement.

He went on, however, to award \$8,000 in aggravated damages for the distress to the applicant resulting from ACP's handling of his claim. He based that sum on the sum he would have awarded under s115(4) of the Copyright Act had the claim been one for copyright infringement.

Copyright Amendment (Indigenous Communal Moral Rights) Bill

The Government announced in its legislative program for 2006 that it would introduce a Copyright Amendment (Indigenous Communal Moral Rights) Bill. This followed promises made by the Government in 2003 and 2004 to give Indigenous communities rights similar to those of individual creators when a community's cultural material is embodied in new copyright works. At this stage, however, it seems unlikely that a bill will be introduced this year.