



Digital Agenda amendments: an overview

March 2006

On 17 August 2000, the Federal Parliament passed a range of amendments to the Copyright Act, in the Copyright Amendment (Digital Agenda) Act 2000. The majority of these came into effect on 4 March 2001. A consolidated version of the Copyright Act, including the Digital Agenda amendments, may be found at: http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/.

In this information sheet, we give a brief overview of the Digital Agenda amendments to the Copyright Act. We give more detailed information in our book *Digital Agenda Amendments*. We also discuss in this information sheet the amendments to the Copyright Act made under the Australia–US Free Trade Agreement (AUSFTA) that are relevant to the Digital Agenda amendments. For more information, see our information sheet *Free Trade Agreement amendments* and our book *Australia–US Free Trade Agreement Amendments*.

For information about our other information sheets, publications and training program, see our website <http://www.copyright.org.au> or contact us (see contact details at the bottom of the page).

The purpose of this information sheet is to give general introductory information about copyright. If you need to know how the law applies in a particular situation, please get advice from a lawyer.

We update our information sheets from time to time. Check our website to make sure this is the most recent version.

Key Points:

The major areas of change brought about by the Digital Agenda (DA) amendments were as follows:

- a “broad-based technology-neutral” right of communication to the public was introduced, which both subsumes and extends the previous broadcast and cable rights;
- special exceptions for libraries and educational institutions were extended in light of the digital environment;
- provisions dealing with the circumvention of technological protection measures and broadcast decoder devices were introduced (further protections of such measures are required under the AUSFTA);
- provisions allowing copyright owners to take action in relation to tampering with electronic rights management information were introduced (the civil remedies and criminal penalties were further extended by the AUSFTA);
- a statutory licence requiring payment of equitable remuneration for the retransmission of free-to-air broadcasts was introduced; and
- specific provisions dealing with when Internet Service Providers and telecommunications carriers are liable for infringement of copyright were introduced (these have been further amended following the AUSFTA).

Right of communication to the public

The right of communication applies to “active” communication, such as broadcasting and cable transmission, and to “passive” communication, such as making material available to be viewed or downloaded (for example, on a website). The new right both subsumes and extends the old rights to “broadcast” by wireless means, and to transmit by cable to subscribers.

The DA amendments include transitional provisions to help with the interpretation of licences, contracts, arrangements or assignments entered into **before 4 March 2001**.

Extension of special exceptions

The Act allows educational institutions and libraries to deal with copyright material for specified purposes without permission. Generally, if a work is available for purchase, only a “reasonable portion” may be copied. For a literary, dramatic or musical work published as an edition of 10 or more pages, a “reasonable portion” is 10% of the number of pages in the edition, or a chapter.

The DA amendments clarified that educational institutions and libraries may digitise printed material and reproduce and communicate digital material, for the same purposes as they could photocopy. A “reasonable portion” of a **dramatic** work in electronic form is 10% of the number of words; for a published **literary** work in electronic form (other than a computer program or an electronic compilation, such as a database) it is:

- 10% of the number of words in the work; or
- if the work is divided into chapters, one chapter.

Educational institutions and libraries are also generally entitled to “communicate” material for specific purposes. In some cases, a notice to the person receiving or accessing the material is required. For example, where a **library** wants to email, fax or otherwise “communicate” material to a client for research or study, it must ensure that the notice in Schedule 4 of the Copyright Regulations is included with the communication. The regulations may be found at http://www.austlii.edu.au/au/legis/cth/consol_reg/cr1969242/sch4.html.

Educational institutions should use similar notices, set out in Schedule 11AC of the Copyright Regulations. Full details of which notice to use, and when, are contained in the publications listed below.

Libraries are also entitled to make available **on their premises** material they have acquired in digital form, and to reproduce and communicate material to staff on the premises for administrative purposes.

The DA amendments extended the protection provided to a library (including libraries within educational institutions) in relation to copying and recording equipment it provides (such as photocopiers, scanners, computer terminals, and audio and video recording equipment), where this equipment might be used to infringe copyright. As a result of the amendments, if a library has particular notices near such equipment, it is not liable for authorising an infringement by someone who uses the equipment, merely on the basis that it has provided the equipment. The wording for the notices, which must be reproduced at A4 size, is set out in Schedules 3 and 9 of the Copyright Regulations. The wording of the notices is also set out in our information sheet *Notices on photocopiers & other equipment*.

For detailed information about the provisions, see our books *Libraries & Copyright; Educational Institutions: Text, Images & Music*; and *Educational Institutions: Digital & AV Resources*.

Technological protection measures (TPMs)

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.

There are also criminal penalties and civil remedies for manufacturing or dealing in devices designed to enable the unauthorised reception of encoded subscription broadcasts (for example, decoders designed to allow unauthorised reception of pay TV signals).

As a result of the AUSFTA, Australia is required to make certain amendments to the Copyright Act. Changes that are required are:

- sanctions against the use, manufacture and supply of devices designed to circumvent TPMs that control access (whether or not that access control is for the purposes of inhibiting or preventing infringement);
- sanctions against the use of a circumvention device or service to get access to copyright material;
- the “permitted purposes” for which a circumvention device or service may be supplied will be replaced with more limited exceptions; and
- a procedure will be introduced under which a person may 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”.

Australia is required to implement these amendments by 1 January 2007.

Two committees have been appointed to consider the way the amendments should be implemented in Australian law. For information, and links to the enquiries, go to <http://www.copyright.org.au/U26110>.

Rights Management Information

The DA amendments introduced sanctions against tampering with electronic rights management information, 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.)

As a result of amendments made under the AUSFTA, the definition of “electronic rights management information” has been expanded. The sanctions against distributing material from which rights management information has been removed or altered have been expanded by removing the requirement that distribution of such material be for the “purpose of trade”.

Retransmission of free-to-air broadcasts

The DA amendments allow pay TV operators to retransmit free-to-air broadcasts in return for payment of equitable remuneration to the copyright owners. Screenrights has been declared to be the collecting society for the purposes of the retransmission scheme.

Screenrights has made an application to the Copyright Tribunal to set a retransmission royalty rate. This application commenced on 18 October 2004 with hearings in April 2005. A decision is expected early in 2006.

Liability for authorising infringement (carriage or internet service providers)

A person who authorises an infringement by another person is also liable for the infringement. The DA amendments introduced a list of factors to be taken into account when determining whether a person is liable for authorising an infringement by another person. These factors are based on existing case law.

For broadcasts, the person liable for the communication is the person providing the broadcasting service. For other communications, the person liable is the person responsible for determining the content of the communication.

However, a person who provides physical facilities by which copyright material is communicated is not liable for infringement of copyright solely because they provided those facilities. An example of such a person is a carriage service provider (CSP), which includes internet service providers (ISPs).

The Australia–US Free Trade Agreement amendments

As a result of amendments made under the AUSFTA, new provisions limit the remedies a court may award for infringement of copyright by a CSP, if the CSP meets certain conditions. (“Carriage service provider” is defined to have the same meaning as in the Telecommunications Act 1997.)

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 service providers in the United States.

A CSP which meets the conditions may be required to take certain actions, such as disabling access and terminating an account, but not to pay compensation. In order 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 that relate 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, however, this system is an incentive to do so because of the consequent limitations on remedies available in relation to infringements.

The Attorney-General's Department is currently reviewing the "safe harbour" provisions, including whether or not educational institutions should be made eligible to rely on them.

Other changes

Other aspects of the DA amendments included:

- a new definition of "computer program";
- amendments relating to the meaning of "reproduction" which confirmed that a digitised version of non-digitised material is a reproduction, and vice-versa (this definition has been further amended by the AUSFTA. For further information see page 4 of our information sheet *Free Trade Agreement amendments* in the section entitled "Reproductions of copyright material");
- amendments to the special exceptions relating to computer programs. These allow copying of computer programs for "normal use", studying the ideas behind a computer program, making interoperable products, correcting errors, testing security and making backup copies;
- a provision defining who owns copyright in a broadcast protected by copyright;
- an exception allowing the reproduction of copyright material for the purposes of simultaneously broadcasting in analogue and digital form, as required by the Broadcasting Services Act 1992; and
- an exception allowing the making of temporary reproductions as part of the technical process of communicating a work or audio-visual (AV) item.

Review

When introducing the amendments, the government undertook to review them after three years. It appointed the law firm Phillips Fox to write a report for the review. For information on the review, go to <http://www.ag.gov.au/DigitalAgendaReview>.

Many of the recommendations in the report have been superseded by the AUSFTA. However, some continue to be relevant. These relate to:

- "Active caching": the review recommended that the educational statutory licence be amended to allow educational institutions to make active caches for educational purposes in return for equitable remuneration to the copyright owner; and
- Educational institutions and AV material: the review recommended that educational institutions be entitled to copy AV material from the internet if the material has previously been broadcast.

These issues have also been raised in submissions to the Attorney-General's current inquiry on whether Australia should adopt a broad "fair use" exception to infringement. For information on the inquiry, go to <http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/Publications> (scroll down to "Copyright – review of fair use exception").

Further information

For further information about copyright, see our website – <http://www.copyright.org.au/> – or contact us.

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Australian Copyright Council

The Australian Copyright Council is a non-profit organisation whose objectives are to:

- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



The Australian Copyright Council has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body, through its Policy, Communication and Planning Division.

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