



INFORMATION SHEET

G085v04

Free Trade Agreement amendments

March 2007

In this information sheet, we set out the main changes to Australian copyright law intended to comply with the Australia US Free Trade Agreement (AUSFTA). For a detailed discussion of the changes required by AUSFTA, see our publication *Australia-US Free Trade Agreement Amendments*.

For information about the changes to duration of copyright, and a chart showing the periods of protection before and after AUSFTA amendments came into effect, see our information sheet *Duration of copyright*. Information about changes to the technological protection measures (TPMs) provisions is contained in our information sheet *Copyright Amendment Act 2006*. For a more detailed discussion about, among other things, the policy issues relating to copyright owners' use of technological measures see our publication *Technology, contracts and paracopyright*.

We update our information sheets from time to time. Check our website www.copyright.org.au to make sure this is the most recent version, and for other information such as our training program.

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.

Key points

- Most of Australia's copyright obligations in the AUSFTA were implemented by the *US Free Trade Agreement Implementation Act 2004* (Cth) (Implementation Act). The amendments made by that Act came into effect on 1 January 2005.
- The remainder of Australia's copyright obligations in the AUSFTA, relating to circumvention of technological protection measures, were implemented by the *Copyright Amendment Act 2006* (Cth) (2006 Amendment Act). These amendments came into effect on 1 January 2007.
- The period of copyright protection has been extended for most material: however, amongst others, the extended period of protection does **not** apply to material in which copyright had expired before 1 January 2005.
- Australia has not yet complied with its obligation to ratify the *World Intellectual Property Organization Copyright Treaty* (WCT) and the *World Intellectual Property Organization Performances and Phonograms Treaty* (WPPT). As a result, among other things, provisions giving performers moral rights in their sound performances have not yet commenced.

Background

In early 2004, the governments of Australia and the United States concluded the AUSFTA. Chapter 17 of AUSFTA deals with intellectual property, and contains a number of provisions relating to copyright. There were also three exchanges of letters between the governments of Australia and the US, which clarify certain intellectual property obligations. The text of AUSFTA, and explanatory materials, are available from the Department of Foreign Affairs and Trade website, <http://www.dfat.gov.au/>.

Chapter 17 requires Australia to make a number of changes to the Copyright Act, and to become a party to two international treaties: the WCT and the WPPT. The texts of the WCT and WPPT are available from the World Intellectual Property Organization website, <http://www.wipo.org/>.

Australian law already complied with most requirements of the WCT, following the Digital Agenda amendments to the Copyright Act that came into effect in March 2001. The remaining obligations concerned performers and the period of protection for photographs.

There were two Parliamentary inquiries into AUSFTA: one by the Joint Standing Committee on Treaties (JSCT) and the other by the Senate Select Committee on AUSFTA. Information about both inquiries, including the reports from them, is available from the Australian Parliament's website, <http://www.aph.gov.au/>.

The Implementation Act was passed in August 2004. Schedule 9 of that Act made a number of changes to the Copyright Act, intended to meet most of the requirements of Chapter 17 of the AUSFTA relating to copyright. Further amendments, mostly concerning liability of internet service providers, were made in the *Copyright Legislation Amendment Act 2004* (Cth), which was passed on 7 December 2004. The amendments required to provisions about technological protection measures were made in the 2006 Amendment Act. The Acts are available from <http://www.comlaw.gov.au/>.

Additional rights for performers

The amendments relating to performers' rights are intended to comply with the requirements of the WPPT. The Government had committed to complying with the WPPT before the commencement of negotiations on AUSFTA, and had drafted (but not introduced) legislation to give effect to this commitment.

The WPPT deals only with **audio** recordings of performances, as there was no agreement on standards for audiovisual recordings at the time the WPPT was concluded. Subsequent attempts to conclude a treaty on audiovisual recordings have been unsuccessful.

Limited rights for performers were introduced into the Copyright Act in 1989. They essentially require consent for the recording of a live performance, and give performers rights in relation to **unauthorised** recordings. With one limited exception, performers have no rights under these provisions to control use of **authorised** recordings.

Performers' copyright in sound recordings

The AUSFTA amendments give performers the possibility of exercising some rights in relation to authorised recordings. In the absence of an agreement to the contrary, the first owners of copyright in a sound recording of a performance are the performer (including a conductor) who contributes to the sounds of a recorded live performance and the person who owns the recording medium (the master). This is an unusual mechanism for granting performers' rights. It has been adopted in the US, but most other countries grant performers a separate right.

Performers have very limited rights in relation to recordings made before 1 January 2005, and are not entitled to exercise these rights where this would interfere with the rights of those who already owned copyright in those sound recordings.

Even for future recordings, performers' rights are likely to be very limited in practice as a result of a number of the provisions. In particular, performers will not own a share in the copyright in the sound recording if:

- the performance was in the course of their employment; or
- the recording was commissioned (for example, a record company engages a production studio to produce a master recording).

Performers' moral rights

The AUSFTA amendments also enacted moral rights for performers in relation to both live and recorded performances (**audio** only). These rights will come into effect when the WPPT comes into force in Australia (this has not yet occurred), and will only apply to performances and recordings of live performances that take place on or after that date. A performer's moral rights will be the right:

- to be attributed as the performer;
- not to have a performance falsely attributed; and
- not to have a performance treated in a way that prejudices his or her reputation.

These rights may be held by groups of performers (such as bands, choirs and orchestras). In such cases, attribution may be given to the group rather than to the individual performers.

Duration of copyright protection

There are two sets of provisions dealing with duration of copyright protection in the Implementation Act. One set deals with photographs and relates to compliance with the WCT, and the other deals with all material protected by copyright and relates to the extension of the period of protection under the AUSFTA.

Duration of copyright in photographs

Until 1 January 2005, photographs were protected for a shorter period than other artistic works under Australian copyright law. However, the WCT requires photographs to be protected for the life of the photographer plus at least 50 years. Australia had committed to making this change to the Australian Copyright Act before commencing negotiations on AUSFTA.

As a result of the AUSFTA amendments, photographs that were still protected by copyright on 1 January 2005, or created on or after that date, are protected by copyright until 70 years from the end of the year of the photographer's death. This is longer than the requirement under the WCT, but is the duration required under AUSFTA.

Duration of copyright generally

In general, material that was previously protected for the life of the creator plus 50 years is now protected for life plus 70 years, and material that was previously protected for 50 years from first publication is protected for 70 years from the end of the year of first publication.

AUSFTA did not require any changes to the rules on duration of copyright where State, Territory or Commonwealth governments own copyright. The period of copyright for broadcasts and published editions has also not been affected AUSFTA.

No revival of copyright under the AUSFTA amendments

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 has been **no revival** of copyright in material that was in the public domain by that date. There was a compensation scheme in relation to material that was the subject of a particular agreement and in which copyright would have expired but for the AUSFTA amendments. The application of the scheme was very narrow and has now expired.

Electronic rights management information

The Copyright Act contains sanctions against removing and altering rights management information (that is, information connected to copyright material and providing certain information about it). These provisions came into effect in March 2001, and were intended to comply with the provisions in the WCT and WPPT dealing with this matter.

Under the AUSFTA amendments, the definition of "electronic rights management information" was expanded to cover information that appears "in connection with a communication, or the making available, of" copyright material. The sanctions against distributing material from which rights management information has been removed or altered were also expanded: the previous requirement that distribution of such material would only be an infringement if the distribution was "for the purpose of trade" was removed.

Criminal offences

The AUSFTA obligations required some changes to the criminal offences for copyright piracy. These include a new offence where a person causes infringement on a commercial scale, even though that person makes no financial gain.

Encoded broadcasts

The AUSFTA obligations required some changes to the provisions dealing with decryption of encoded broadcasts, including the introduction of a civil action against a person who uses a decryption device for a non-commercial

purpose. The Attorney-General's Department conducted a review of these provisions: for the Discussion Paper go to <http://www.ag.gov.au/broadcastreview>.

Reproductions of copyright material

Under the previous law, copyright owners had the exclusive right to reproduce a work "in material form", defined as "any form (whether visible or not) of storage from which the work ... can be reproduced". The definition was considered by the High Court in *Sony v Stevens*, which held that the reproduction of a computer game in the Random Access Memory (RAM) of a Sony PlayStation console was not a "reproduction in material form" because the game could not ordinarily be reproduced from the RAM of the Playstation. However, as a result of AUSFTA, the relevant provisions of the Copyright Act were changed.

The AUSFTA amendments introduced a new definition of "material form", which omits the requirement that the work can be reproduced from the form of storage. The definition of "copy" is amended in a similar way. This means that material may be "reproduced" if it is held in a form of storage (such as RAM), even though it may not be possible to reproduce it from that form of storage.

However, a new exception provides that there is no infringement of copyright 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 DVD.

The exception does not, however, apply to infringing material, such as on a pirate DVD. The practical effect is that, since 1 January 2005, copyright may be infringed simply by:

- playing an infringing copy of a DVD, computer game or CD-ROM; or
- playing a DVD, computer game or CD-ROM that was imported without the copyright owner's permission, even where importing the item did not infringe copyright (for example, because it was a legitimate copy made in another country, and imported for personal use).

Limitations on remedies available against carriage service providers

The AUSFTA amendments introduced new provisions that 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 that in the *Telecommunications Act 1997* (Cth). In everyday language, a CSP would include an Internet Service Provider (ISP). A CSP may be liable for copyright infringement in relation to something it does itself, and for "authorising" others using its facilities or services.

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 condition may be required to take certain action – such as disabling access and terminating an account – but not to pay compensation.

The liability of a CSP is 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 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 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 there is an incentive to do so because of the consequent limitations on liability.

The legislation does not set out all details of the conditions; some details are left to Regulations to the Copyright Act. For example, requirements relating to an industry code are not set out in the Act.

Circumvention of technological protection measures

“Technological protection measures” (TPMs) are technological mechanisms used by copyright owners to prevent or inhibit either or both:

- unauthorised access to copyright content (access-control TPMs); and
- unauthorised use of copyright content (copy-control TPMs).

The meaning of TPM was at issue in the *Sony v Stevens* case. That case involved a mechanism in Sony Playstations intended to prevent infringing copies being **played**. The High Court held that the mechanism was not a TPM because it did not prevent infringing copies being made.

The AUSFTA requires Australia to give more extensive protection for TPMs than previously provided. However, Australia was given until 1 January 2007 to implement these obligations.

The pre-AUSFTA Australian TPM regime essentially prohibited the unauthorised manufacture, provision, sale, hire, promotion, advertising, marketing, distribution or importation for trade purposes of a device or service whose purpose was to circumvent a TPM, but there was no sanction for the person who **used** a circumvention device or service. In addition, the Copyright Act allowed the manufacture and supply of circumvention devices and services for certain “permitted purposes”. These included certain activities by libraries, educational institutions and governments, and certain activities relating to computer programs (including reverse engineering to produce inter-operable products).

As a result of changes to the Copyright Act by the Copyright Amendment Act 2006, and new regulations to the Copyright Act, the Copyright Act now includes sanctions against manufacturing, importing, and supplying devices and providing services to circumvent copy-control TPMs. There are also sanctions against:

- circumventing an access-control TPM;
- manufacturing, importing, or supplying a device to circumvent an access-control TPM; and
- providing a service to circumvent an access-control TPM.

A review was undertaken in 2005 concerning whether it would be appropriate for Australia to create exceptions to TPM liability additional to those specifically allowed under the AUSFTA. The resulting report was tabled on 1 March 2006. For further information about, and links to, the review, go to <http://www.copyright.org.au/U26110/>.

There are now limited circumstances in which a circumvention device may be legally manufactured, imported or supplied, or a circumvention service provided. These circumstances are much more limited than the pre-2007 provisions. The provisions allow a person to circumvent an access-control TPM to get access to copyright content in certain situations. Some of these situations are set out in the Copyright Act; others are set out in regulations to the Copyright Act. However, there are no provisions allowing the importation or supply of circumvention devices, or the supply of circumvention services, in relation to access-control TPMs.

Further information

For further information about copyright, and about our other publications and training program, see our website – <http://www.copyright.org.au>.

If you meet our eligibility guidelines, a Copyright Council lawyer may be able to give you free preliminary legal advice about an issue that is not addressed in an information sheet. This service is primarily for professional creators and arts organisations but is also available to staff of educational institutions, libraries and governments. For information about the service, see <http://www.copyright.org.au/advice> or our information sheet *Australian Copyright Council: who we are, what we do*.

Information from the Arts Law Centre of Australia may also be of interest to you: see <http://www.artslaw.com.au> or telephone (02) 9356 2566.

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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.

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