



INFORMATION SHEET

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Access to copyright material in Australia & the US

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In this information sheet, we discuss the relationship between provisions allowing access to copyright material under Australian copyright law, and provisions allowing access under US copyright law. This issue has been the subject of debate following the signing of the Australia–US Free Trade Agreement (AUSFTA) in 2004.

See also our information sheets, *Fair Dealing; Fair Use: Some myths and misconceptions; and Free Trade Agreement Amendments*; and our publications *Fair Use: Issues and Perspectives; Fair Dealing in the Digital Age; and Australia-US Free Trade Agreement Amendments*.

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

Key points

- Neither Australian nor US copyright owners are required to grant access to their copyright material, and both countries have sanctions in place to prevent the circumvention of technological protection measures.
- Both Australia and the US allow copyright material to be copied or disseminated without the copyright owner's permission, in certain circumstances.
- There is no general exemption for private copying in either Australia or the US, although private copying may be permitted in particular circumstances.
- In Australia, relevant exceptions include those allowing "fair dealing" for limited purposes. In the US, the exceptions include "fair use", which is open-ended. In practice, however, broadly similar outcomes are achieved by each country's overall copyright regime.
- Both Australia and the US have provisions that allow certain uses of copyright material by libraries without permission or payment. The Australian provisions may be broader and more certain.
- Both Australia and the US have provisions that allow certain uses of copyright material by educational institutions without permission. The scope for free copying by these institutions may be greater in the US, but, in other respects, the Australian provisions are broader and more certain.
- Currently, the technological protection measures in Australia and the US differ. However, Australia is obliged to change its provisions so that they are more like those of the US. It must do this by 1 January 2007.

Context

Copyright law objectives

Australian copyright law is contained in the *Copyright Act 1968* (Cth) and court decisions about the Copyright Act. The Copyright Act does not contain a statement of its objectives. However, the purpose of copyright law was described in the report preceding the current Copyright Act:

The primary end of the law on this subject is to give to the author of a creative work his just reward for the benefit he has bestowed on the community and also to encourage the making of further creative works. On the other hand, as copyright is in the nature of a monopoly, the law should ensure, as far as possible, that the rights conferred are not abused and that study, research and education are not unduly hampered.¹

By contrast, there is, in effect, a statement in the US Constitution of the purpose of copyright law:

The Congress shall have the Power ... To promote the Progress of Science and useful Arts, by securing, for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.²

The “copyright balance”

It is often said that copyright law must achieve a “balance” between the benefits to society of rewarding and encouraging creative activity, and the benefits to society of access to material for socially desirable purposes such as research and education.

The Australian Copyright Act contains a large number of provisions that allow use of copyright material for a variety of purposes. These are often referred to as exceptions to copyright infringement. In some cases, use can be made without payment. For example, there are provisions that allow “fair dealing” for a range of purposes including research and study, and there are provisions that allow libraries to copy and supply material to their clients and to other libraries. Other provisions require payment of “equitable remuneration”. These are referred to as “statutory licences”, which allow, for example, copying and communication of material by educational institutions.

The US Copyright Act also contains provisions that allow use of copyright material without permission. In some areas, US law allows a use without permission where permission would be required under Australian law. For example, US law allows private copying of music using digital devices (subject to payment of a levy) and allows recording of television programs for “time-shifting” (provided there is no adverse effect on the market). In Australia, on the other hand, while this may change in the near future, these activities usually infringe copyright. In other areas, US law requires permission where permission is not required under Australian law. This is the case for many activities of libraries and educational institutions, particularly relating to digital material.

Obligations under international treaties

Australia and the US are parties to a number of international treaties that deal with copyright. Most other countries in the world are also party to one or more of these treaties. The treaties require certain standards of copyright protection, and protection of material from other countries which are party to the treaties. Australian material is thus effectively protected in most countries overseas, and most foreign material is protected in Australia in the same way that Australian material is protected.

The treaties allow countries to limit the rights of copyright owners provided the limitation or exception:

- applies in special cases;
- does not conflict with a normal exploitation of the work; and
- does not unreasonably prejudice the legitimate interests of the creator/rights holder.³

This is sometimes referred to as the “three-step test”.

¹ *Report of the Committee appointed by the Attorney General of the Commonwealth to consider what alterations are desirable to the Copyright law of the Commonwealth*, AGPS, Canberra, 1959 (the “Spicer Report”) at p8, para 13. See also the Copyright Council’s publication *Ownership of Copyright* and the Copyright Law Review Committee’s report, *Copyright Reform: A Consideration of Rationales, Interests and Objectives*, Office of Legal Information and Publishing, Canberra, February 1996, for a more detailed discussion of the justifications for copyright.

² US Constitution Article 1, § 8.

³ This test appears in the Berne Convention, the Agreement on Trade Related Aspects of Intellectual Property (TRIPS), the World Intellectual Property Organization Copyright Treaty (WCT) and the World Intellectual Property Organization Performances and Phonograms Treaty (WPPT).

Some history

“Digital Agenda” amendments

There have been many reviews of copyright exceptions and the “copyright balance” in Australia. In one of the more recent reviews, the Copyright Law Review Committee (CLRC) in 1998 made a number of recommendations for changes to the exceptions in its report *Exceptions to the Exclusive Rights of Copyright Owners*.⁴ One of these recommendations was the introduction of an “open-ended” fair dealing exception, intended to operate in a similar way to the fair use provision in the US.

At that time, there was no formal response from the government to these recommendations, but in 2000 it introduced the Digital Agenda amendments to the Copyright Act, which included a range of new exceptions allowing libraries and educational institutions to digitise hardcopy material, and to copy and communicate digital material. These provisions were reviewed in 2003 by a consultant engaged by the government, and the consultant’s report was released in 2004.⁵ In May 2006, while indicating its more general proposals to reform copyright law, the government also gave its response to the 2004 consultant’s report on the digital agenda amendments. Among other things, the government has said that it intends to make changes for libraries, archives and collecting institutions in relation to certain online activities, and to clarify aspects of the rights granted to copyright owners, such as the communication right, for instance, to ensure that it does not extend to Internet browsing.

Copyright and contracts review

The CLRC also conducted a separate inquiry, in 2001, into the extent to which people enter contractual arrangements that may limit what they may otherwise be able to do under the copyright exceptions. There is currently a provision in the Copyright Act that deems ineffective a contractual provision that purports to exclude or modify the effect of certain exceptions applying to computer programs, including decompilation to produce an interoperable produce. In its report, released in October 2002, the CLRC recommended that similar provisions be introduced in relation to contractual provisions purporting to exclude or modify exceptions relating to fair dealing and to libraries.⁶ The government has not yet responded to the recommendations in this report. The Australian Democrats’ unsuccessful amendment to the AUSFTA Bill included a provision addressing this issue.

After the AUSFTA

The AUSFTA includes a range of provisions that required changes to the Australian Copyright Act. These included changes to the period of copyright protection (in general, from author’s life plus 50 years to life plus 70 years), when a technological protection measure may be circumvented, penalties for copyright infringement, and the responsibilities of carriage service providers for infringements by people using their services.

In general, the AUSFTA does not require changes to the Australian copyright exceptions, nor hamper Australia’s ability to review and change copyright exceptions consistent with its exercise of its international treaty obligations (under the Berne Convention, for example). All the existing copyright exceptions, including those allowing fair dealing, library use and educational use, apply during the extended period of protection. The AUSFTA does, however, further limit the circumstances in which a circumvention device or service may be supplied or used.

Some have argued that implementing the AUSFTA obligations will unreasonably restrict access to, and use of, copyright material, and unreasonably shift the “copyright balance” to favour copyright owners at the expense of users. Some have argued that Australia should therefore introduce a fair use exception, similar to that in the US Copyright Act.

In August 2004, the *US Free Trade Agreement Implementation Act 2004* (FTA Act) was passed. Schedule 9 of this Act was intended to meet all the obligations in the AUSFTA relating to copyright, except those relating to circumvention of technological protection measures. Australia has until 1 January 2007 to implement the anti-circumvention provisions. (The text of the AUSFTA is available from <http://www.dfat.gov.au>. The two parliamentary reports on the AUSFTA (by the Joint Standing Committee on Treaties and the Senate Select Committee on the AUSFTA) are available from <http://www.aph.gov.au>, as is the FTA Bill and accompanying documents (including explanatory memorandum and Australian Democrats’ amendments). The FTA Act is available from <http://www.comlaw.gov.au>.)

4 <http://www.agps.gov.au/clrc>.

5 <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations>.

6 <http://www.agps.gov.au/clrc>.

The FTA amendments came into effect on 1 January 2005. An amendment to the FTA Act introduced by the Australian Democrats, intended to introduce an exception similar to the fair use exception in the US, was not passed. However, in its 2004 election policy relating to the arts, the Australian Government expressed its intention to consider the issue of copyright exceptions and the public's access to copyright material. In May 2005, the government released an issues paper *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other copyright exceptions in the Digital Age*, and called for submissions. The government announced its intention to make some changes to Australian copyright law in relation to access to copyright material in May 2006, and aims to have draft legislation available for stakeholder comments in the second half of 2006.

“Accessible” material and “locked” material

Any person can use the information and ideas from copyright material without infringing copyright. Copyright protects the way information and ideas are expressed – for example, in writing, or as a diagram. Copying the way information or an idea is expressed may infringe copyright, but using the information or idea does not.

Where a person has access to copyright material, there are copyright exceptions in Australia and the US that govern the copying and dissemination of it without the need to obtain the copyright owner's permission. In Australia, these include provisions allowing “fair dealing”, supply by libraries to clients and other libraries, and use by educational institutions. In the US, the copyright exceptions cover “fair use” and certain library activities. We discuss these provisions in more detail below.

These copyright exceptions govern the use of accessible material; they do not require a copyright owner to provide access. A work may not be accessible, or not easily accessible, for a variety of reasons. It may be unpublished, or published in only limited numbers. Material in digital form may be inaccessible to some because it is “locked” by a technological protection measure, such as password protection.

In both Australian and US copyright law, there are sanctions relating to circumvention of technological protection measures. We also discuss these in more detail below.

Fair dealing/fair use

Australia

Under Australian law, “fair dealing” with copyright material does not infringe copyright if it is done for any of the following purposes:

- research or study;
- criticism or review;
- reporting news; or
- professional advice by a lawyer, patent attorney or trade marks attorney.

In most cases, you need to assess two things: whether the use is for one of the above purposes, and whether the use is fair. If you are reproducing copyright material for research or study, copying the following is deemed to be fair:

- 10% of the number of pages, or one chapter, of text or music published in an edition of 10 or more pages;
- 10% of the number of words from the digital version of a published text work.

In other cases, whether or not reproducing or copying something for research or study is fair is usually determined having regard to the following five factors:

- the purpose and character of the dealing;
- the nature of the work;
- the possibility of obtaining the work within a reasonable time at an ordinary commercial price;
- the effect of the dealing on the potential market for, or value of, the work; and
- in a case where part only of the work is copied, the amount and substantiality of the part copied in relation to the whole work.

The application of these factors broadly corresponds to the application of the three-step test from the international treaties. Partly for this reason, these factors are likely to be relevant to assessing whether use for other fair dealing purposes, such as criticism or review, is fair.

For further information, see our information sheet *Fair dealing*, and our publication *Fair Dealing in the Digital Age*.

US

In the US, a person may make a “fair use” of copyright material without infringing copyright. Section 107 of the US Copyright Act lists purposes for which a fair use may be made: criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Unlike the position in Australia, however, the list is not exhaustive, so a person can make a fair use for a purpose other than one of the listed purposes.

Purposes not listed in the Act, but which have in the past been held to be fair use, include: parody; recording a television program for “time-shifting” purposes; and “intermediate” copying of a computer program to produce an interoperable product.

Whether or not a use is fair is determined by reference to four factors, which are almost identical to four of the five factors in Australian law for assessing whether copying something for research or study is fair:

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- the nature of the copyright work;
- the amount and substantiality of the portion used in relation to the copyright work as a whole; and
- the effect of the use upon the potential market for or value of the copyrighted work.

In addition, the courts in the US have regard to the §8 of the US Constitution when assessing whether or not a use is fair. As a result, a use that is “productive” or “transformative” is more likely to be fair than one that adds nothing to the material used. The doctrine of “productive” or “transformative” use, developed in a long line of US court decisions, may be difficult to import into Australia.

Relationship between “fair use” and “substantial part”

Under Australian law, use of part of a work can infringe copyright if the part is “substantial”. For copyright purposes, whether or not a part is “substantial” depends on its quality rather than its quantity. A small part may be “substantial”. Courts can take into account the purpose for which a copyright work has been used when determining whether the use is substantial. If the second work, in which part of the first is used, competes with the first, this may affect whether the part used is regarded as “substantial”.

In practice, reference to the purpose for which a work is used can mean that there may be a similar outcome, although by different means, for a particular case under Australian law and under US law. In a parody case, for example, an Australian court may find no infringement because the part used is not substantial, having regard to the purpose, and a US court may find that there is no infringement because it is fair use.

Private copying

There is no general exemption for private copying in Australia or in the US. There are, however, circumstances in which private copying may not infringe copyright.

Australia

In some cases, private copying for a particular purpose – such as research or study – may be covered by a copyright exception. In most cases, however, private copying of audio and audiovisual material will infringe copyright, including for “time-shifting”, “space-shifting” or “device-shifting”.

In 1989, the Copyright Act was amended to allow private copying using blank audio tapes, subject to payment of a levy on the tapes. The amendments were held by the High Court to be a tax, however, and therefore inconsistent with the requirements of the Australian Constitution (which requires tax legislation to be separate

from other legislation). The amendments are therefore no longer part of the Copyright Act. The reintroduction of the levy as a tax was proposed by the government in the early 1990s, but not followed through.⁷ The government has, however, announced that it will amend the Copyright Act shortly, to allow some of these uses. The proposals include:

- allowing “consumers to record most television and radio programs to view or listen to ... later”. Programs recorded under this exception cannot be watched or listened to more than once. Nor will the exception permit anyone to record a program to show in class or to give or sell to someone else;
- allowing a person “who has purchased a legitimate copy of some categories of copyright material to make a copy in a different format”. You won’t be allowed, though, to make a copy for someone else, get someone else to make a copy for you, or to make a copy from an item bought by someone else.

None of the proposals are yet law, but may be passed by parliament either later this year or in early 2007.

US

In the US, as a result of amendments introduced by the *Digital Home Recording Act 1992*, private copying of music using analogue or digital recording media or equipment is allowed. There is a levy payable on digital recording media and equipment, and digital recording equipment must have a serial copyright management system. Under these provisions, certain private copying may be covered by the exemption, but not subject to payment of the levy. This is the case where analogue recording media and devices are used, and for recordings made using equipment that does not meet the definitions in the provisions.⁸

Private copying may also be covered by the fair use provision in some circumstances. Recording television programs for time-shifting purposes was held by the US Supreme Court in 1984 to be fair use, because it did not have a detrimental effect on the market. It should be noted, however, that it is not clear that the Supreme Court would reach the same decision, as video and TVon-demand become a reality.

Libraries

Australia

In Australia, libraries and archives are entitled to use copyright material, without permission and without payment, for a variety of purposes. These include:

- supply to clients for their research or study;
- supply to other libraries to add to their collections; and
- various “internal” purposes, such as preservation and replacement.

These exceptions extend to allowing libraries to digitise hardcopy material, and to copy and electronically communicate digital material. However, in general, only a portion of commercially available material can be copied and communicated by libraries.

The government has announced its intention to amend the Copyright Act shortly to allow “flexible dealing” for “non-commercial uses by libraries, museums and archives”. By way of example, the government stated that this may allow a museum to include “extracts of historical documents in materials for visitors”. The government also announced that it proposes to extend the preservation provisions and to allow works in collections to be reproduced to educate or train volunteers of the library or archive. Again, none of these proposals are yet law.

For more information, see our information sheets *Copyright reforms: government’s May 2006 proposals* and *Libraries & copyright*, and our publications *Libraries & Copyright* and *Libraries: Managing Licences for Digital Resources*. See also the Centre for Copyright Studies publication *A Comparative Study of Library Provisions: From Photocopying to Digital Communication*.

⁷ For further information, see the discussion paper “Remuneration for Private Copying in Australia: A Discussion Paper”, available from <http://www.copyright.org.au>. See also the documents on the Screenrights’ website <http://www.screen.org> relating to private copying.

⁸ In a 1999 case, a US court held that the portable “Rio” player, which could play MP3 files transferred to it from a computer, was not subject to payment of the levy or the serial copyright management system requirement: *RIAA v Diamond Multimedia Systems* (US Appeals Court, 9th Cir., O’Scannlain J, 15 June 1999).

US

Section 108 of the US Copyright Act allows certain activities by libraries without permission or payment. Libraries may also rely on the fair use provision, but with less certainty.

Generally, in relation to photocopying, the provisions are interpreted by libraries with reference to the guidelines developed at the request of Congress (CONTU guidelines). The position in relation to digital copying is far less clear, as, unlike for photocopying, there are no guidelines, which have met with general approval.

For further information, see US Copyright Office *Circular 21: Reproductions of Copyrighted Works by Educators and Librarians*, available from <http://www.copyright.gov>.

Australia v US

Both Australia and the US have specific provisions that allow libraries to do certain things with copyright material without permission and without payment. The provisions operate in a substantially similar way in many areas in relation to hardcopy material. In the US, the fair use provision may also apply, but the scope of its application is uncertain.

The Australian provisions are more certain, and would appear to have wider scope in relation to digital material. In particular, the Australian provisions expressly allow the digital delivery of material to clients and other libraries. In addition, the Australian provisions allow supply of certain published material to other libraries for inclusion in their collections, including in digital form.

Educational institutions

Australia

Educational institutions are entitled to copy and communicate educational material for their educational purposes, including by photocopying, digitising, recording from radio and television, and copying and communicating digital material. In most cases, the educational institution must undertake to pay equitable remuneration to a copyright collecting society. The collecting society must meet criteria in the Copyright Act and be authorised by the Attorney General. The amount of remuneration can be agreed between the institution and the collecting society, or determined by the Copyright Tribunal.

In some cases, an educational institution can use material for free: for example, 1% or 2 pages of a published work.

In general, the provisions allow only a portion of commercially available material to be copied and communicated. Entire television and radio programs may be recorded, however, whether or not they are commercially available.

The government has announced its intention to amend the Copyright Act shortly to allow “flexible dealing” for “non-commercial uses by educational institutions for the purposes of teaching”. An example given was “a school [putting] an out-of-date VHS documentary onto DVD”. These proposals are not yet law. The government also proposes to make some other changes to the law, including:

- to clarify that a communication to show or play something in class is not a “communication to the public”;
- to treat digital anthologies as equivalent to hardcopy anthologies; and
- to allow the recording and communication of “audio-visual versions of copyright material from free-to-air broadcasts that are available subsequently on the internet”.

For more information, see our information sheet *Copyright reforms: government’s May 2006 proposals*, and our publications *Educational Institutions: Text, Images & Music*, *Educational Institutions: Digital and AV Resources* and *Educational Institutions: Copyright Compliance Resources*.

US

As noted above in the discussion on fair dealing and fair use, the fair use defence under US law expressly refers to use of copyright material for “teaching (including multiple copies for classroom use)”. Whether or not the use is

fair is determined according to the four factors set out above including “the nature and purpose of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes”.

Guidelines about the scope of fair use in educational institutions were developed in 1975, under which the application of fair use was more limited than may initially appear. The guidelines include limits on the amount of a work, which may be copied, on copying from term to term, and on the cumulative effect.

In particular, US educational institutions generally do not rely on fair use to make course packs ahead of time, as the “multiple copies for classroom use” provision is generally interpreted to apply to “last minute” copying rather than planned copying of materials.

Many institutions still use the 1975 guidelines, but the extent to which fair use can be relied on in the digital environment remains uncertain. In addition, an attempt to develop similar guidelines for digital material failed, and there is a great deal of uncertainty about the application of fair use to digital material.

For further information, see US Copyright Office *Circular 21: Reproductions of Copyrighted Works by Educators and Librarians*, available from <http://www.copyright.gov>.

Australia v US

Broadly speaking, there may be greater scope for free copying in educational institutions in the US under the fair use defence, but the circumstances in which material may be copied without permission is much more limited. When comparing the provisions in Australia with those in the US, the more limited range of material available without permission, the uncertainty about what is covered and associated compliance costs, and the cost of getting clearances for material not covered, must be taken into account.

Access to “locked material”: circumvention of technological protection measures

Under both Australian and US law, there are provisions that deal with access and use of material protected by a technological protection measure (TPM), such as a digital “lock” requiring a password.

Australia

Under current Australian law, the manufacture and supply, but not the use, of a circumvention device or service, is prohibited by the Copyright Act. A circumvention device or service may be supplied for certain “permitted purposes”. These permitted purposes include copying and supply of material by libraries, copying and supply of material by educational institutions, use of material by governments, and certain activities relating to computer programs, including decompilation for interoperability.

The AUSFTA requires Australia to amend some of its current copyright provisions so that they are more similar to some aspects of US copyright law. In particular, Australia will need to introduce sanctions against circumventing a TPM to gain access, and will need to limit the exceptions for circumvention.

Australia has until 1 January 2007 to make these amendments.

US

The technological protection measures in the US apply differently to measures that control access to a work (access control), and measures that prevent copying of a work (copy control).

Circumventing an access control is prohibited, but circumventing a copy control is not. The rationale is that a person who has access to a work may be able to rely on fair use, and should be able to overcome a copy-control mechanism to do so, but not an access-control mechanism (because fair use is not a defence to unauthorised access). Making or selling either type of measure is generally prohibited.

There are some limited exceptions relating to libraries and educational institutions (to enable them to decide if they want authorised access to a work), reverse engineering to achieve interoperability, protection of minors, personal privacy and security testing.

In addition, there is a process of application via the US Copyright Office for an exemption to allow circumvention to get access in special circumstances. To date, only six classes of exemption have been granted: two in 2000 and four in 2003. The US Copyright Office is currently conducting its third anticircumvention rulemaking proceeding.

Further information

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

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.

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, through its Policy, Communication and Planning Division.

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