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FTA Shakes Up Copyright Law

Peter Knight, Paul Armarego & Francine Johnson, Clayton Utz

Peter Knight was formerly Senior Counsel - Asia Pacific Operations of Apple Computer Inc before joining Clayton Utz as a partner in the Technology and Intellectual Property group of the firm's Sydney office in 1991. Paul Armarego is a partner in the Government Services group in Clayton Utz's Canberra office specialising in technology and intellectual property. Francine Johnson is a solicitor in Clayton Utz, Sydney office and comes to law with experience as a software engineer.

Extensive changes to copyright law are being introduced by the *Australia-United States Free Trade Agreement* (**FTA**). Some of these amendments are implemented in the *US Free Trade Agreement Implementation Act 2004* (**Act**). The Act itself is brief with only 3 sections, but it attaches schedules relevant to the various areas of law amended by the Act, including among others customs, financial services, agricultural and veterinary chemicals, geographical indications for wine and life insurance. The copyright provisions are contained in Schedule 9.

This article looks principally at how the amendments in Schedule 9 of the Act affects the duration of copyright, digital agenda rights, ISP liability and copyright enforcement. Of course, the Act introduces other important changes to copyright, particularly in Parts 1 to 4 of Schedule 9, with provisions relating to performers' rights, including co-ownership of the copyright in sound recordings of performances and new "moral rights", known as the "rights of performership," which are very similar in all respects to the current moral rights of authors.

Extension of copyright protection

The FTA requires an extension of the general term of copyright from 50 years to "not less than" 70 years. This mirrors the US copyright extension in the *Sonny Bono Copyright Term Extension Act* (1998) and the duration of copyright under European laws. The Act will implement this requirement for all copyright material in a 2 step process. First, the copyright term for photographs, which is presently 50 years from the end of the year of publication, will be brought into line with other artistic works to be 50 years from the end of the year of the death of the author. This will be effective from 1 January 2005.[1] Secondly, if the FTA is ratified in due course, the term of copyright for all copyright material will be 70 years from the relevant starting point[2]. This

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will not, however, result in the revival of copyright that has already lapsed. The extension only applies to material in which copyright still subsists as at the date the relevant provisions of the legislation came into effect. It is a curiosity of the drafting of the legislation that the provisions governing the term of copyright in the *Copyright Act* 1968 (Cth) (the **Copyright** Act) are amended, so that they will appear without any explanation of the date from which the extended terms operate. This explanation can only be found in items 117 and 131 of Schedule 9 to the Act, along with any footnotes inserted in the consolidated Copyright Act in due course.

The Act introduces provisions in relation to agreements which have been entered before the date on which Royal Assent is given to the Act (16 August 2004) under which a person has agreed to do an act at a particular time that would, except for these provisions, infringe the copyright in copyright material "made in reliance on the copyright having ceased to subsist before that time." In essence, items 118 and 132 of Schedule 9 to the Act create a statutory licence permitting that person to do that act "at any time" (regardless, it appears, of whether the provisions of the agreement in question require such act to be performed only once or within a particular time). However, the copyright owner can prevent this if, before the person does perform the act, the owner of the copyright gives notice to the person and pays suitable compensation, as agreed or determined by the Copyright Tribunal.

Digital Agenda issues

The FTA contains a number of provisions relating to intellectual property standards in the treatment of digital copyright material, many of which have already been dealt with by the *Copyright Amendment (Digital Agenda) Act* 2000 (the **Digital Agenda Act**). However, under the FTA, Australia must modify these provisions further to come more into line with some aspects of the US *Digital Millennium Copyright Act* (1998).

Electronic rights management information.

If the FTA is ratified, Part 7 of Schedule 9 of the Act will make changes with respect to electronic rights management information. Electronic rights management information is electronic data that identifies, amongst other things, the work, the author of a work or the terms and conditions for the use of the work. Item 134 amends this definition in the Copyright Act, slightly extending it so that, in addition to being specifically "electronic", it not only may appear attached to or embodied in the relevant copyright material, but may also appear in connection with a communication or making available of the material (so dealing with an apparent deficiency in the definition relating to downloaded material). The new substantive provisions set out in items 135 to 145 provide that it will be a breach of copyright to remove or alter rights management information from a copy of a work or other subject matter, or to import, distribute or communicate that work or subject matter to the public knowing that the rights management information has been removed or altered, as well as providing new offences in relation to such conduct.

Technological protection measures

The FTA requires Australia to strengthen its laws in this area, for example, by broadening the definition of a technological protection measure to a measure that controls "access" to a protected work, rather than just preventing or inhibiting infringement. Such an amendment would correct a known defect in the Australian legislation, illustrated in the recent decision in *Kabushiki Kaisha Sony Computer Entertainment* v *Stevens*[3] ***(Sony v Stevens)*** in which the Full Bench of the Federal Court came to the opposite conclusion on the same provisions as Sackville J at first instance[4]. In addition, the FTA requires that new criminal offences be recognised for knowingly circumventing an effective technological protection measure which controls access to a copyright work, and calls for the removal of the knowledge element from the civil action of manufacturing or dealing in devices that are primarily for the purpose of circumvention of an effective technological measure.

The Act, however, does not currently address any of the technological protection measures requirements of the FTA. The current Australian position on technological protection measures are currently being reviewed as part of the review of the Digital Agenda Act, and is also the subject of an appeal to the High Court in the *Sony* v *Stevens* case. Further amendments may be expected in the future on this issue. The FTA allows Australia 2 years to consider further possible amendments in this area.

Reproduction

Part 10 of Schedule 9 to the Act also introduces a number of adjustments regarding reproduction. This includes yet another attempt to get the definition of "material form" right. This definition, first introduced in the *Copyright Amendment Act* 1984, has been amended over and over again, and now, finally, makes clear that a "material form" is any form of storage, regardless of .whether the copyright material can be reproduced from it; an equivalent amendment is made in respect of the definition of "copy" in section 10 of the *Copyright Act*. New sections 43B and 111B are introduced into the *Copyright Act* to clarify that the copyright in a work or other subject matter will not be infringed if a reproduction is made "incidentally ... as part of a technical process of using a copy" of the work or other subject matter, although these new expressions can hardly be regarded as a model of lucidity.

Conditional limitation on ISP liability

At present, ISPs' liability for copyright infringement is dealt with in a rather obscure way by the amendments to the *Copyright Act* introduced by the Digital Agenda Act. The FTA required amendments to provide a much more detailed hierarchy of conditional

limitations on ISPs' liability. The limitations on liability set out in the FTA require that a court should not be able to give monetary relief against an ISP, and that the court's ability to compel or restrain certain ISP actions, such as terminating accounts or disabling access to infringing copyright material, is to be restricted.

If the FTA is ratified, Part 11 of Schedule 9 (item 191) to the Act will implement the FTA requirements in a new Division 2AA of Part V of the Copyright Act, which applies equally to *all* "carriage service providers" (as defined in the *Telecommunications Act 1997*), not just ISPs. This sets out four "categories" of relevant activity:

Category A activity:

- acting as a conduit for copyright material including intermediate and transient storage of such material in the course thereof;

Category B activity:

- automatic caching of copyright material;

Category C activity:

- storing copyright material on their systems or networks at the direction of a user; and

Category D activity:

- linking users to online locations using information tools or technology.

Each type of activity is subject to different conditions to establish limits on ISPs' liability, which are set out in a large table that will be included in the new section 116AH. The conditions that must be satisfied for ISPs to enjoy limited liability become more stringent for each category from Category A to Category D. This reflects that the ISP has greater access to and control over the copyright material. However, the ISP will be presumed to have complied with these conditions if it can point to evidence suggesting its compliance. In addition, ISPs will not be required to monitor or investigate their systems and networks for copyright infringement, apart from that required by relevant industry codes. In particular, conditions for Category C activity and Category D activity require that ISPs do not receive a financial benefit directly attributable to the infringing activity, and expeditiously remove or disable access to material residing on its network or systems when they obtain actual knowledge of copyright infringement, or become aware of facts or circumstances from which copyright infringement is apparent. This may be achieved through a notices regime whereby the ISP reacts to effective notices of infringement issued by copyright holders, taking down alleged infringing material, as well as effective counter-notifications by those whose material is the subject of the notice, restoring alleged infringing material.

However, the Act does not implement the FTA obligation to allow a copyright owner who has given effective notice of copyright infringement to an ISP to obtain an order (possibly without the need for judicial authority) that the ISP provide information identifying the alleged infringer. Again, a recent decision indicates that effective remedies in this regard already exist in Australia, with suitable safeguards, under the Federal Court Rules.[5]

Encoded broadcasts

The FTA requires modifications to Australian laws for encoded broadcasts, presently set out in Part VAA of the Copyright Act. These are implemented in the Act by:

- expanding the infringement related to use of a decoding device to receive an encoded signal, to any receipt or use of the decoded signal where access has not been authorised by the broadcaster, regardless of a connection with trade or business and including further distribution of the signal;[6]
- expanding persons allowed to bring a civil action to any person who has an interest in the copyright in the broadcast or its content and the channel provider who supplies the broadcaster with the channel for broadcast;[7] and
- adding the criminal offences of use of decoding devices for trading with the intention of obtaining commercial advantage or profit and for further distribution, where access is gained without the authorisation of the broadcaster.[8]

The Act limits the new offence of distributing an encoded signal to cases where the distribution has affected prejudicially a person who may bring a civil action for use of a decoding device.[9]

Enforcement

There are two main ways in which the FTA requires Australia to strengthen enforcement of copyright infringement. First, the FTA sets out new criminal offences, including:

- wilful copyright piracy on a commercial scale, which is wilful infringement either on a significant scale or motivated by commercial advantage or financial gain; and
- the knowing transport or other disposition of false or counterfeit labels, documentation or packaging.

Secondly, the FTA requires greater powers under civil remedies to be given to the courts and ultimately the rights holder, including provision for orders for seizure and destruction of suspected counterfeit goods and related items (without compensation) and for the alleged infringer to provide information.

The Act only introduces the new criminal offence of wilful copyright piracy on a commercial scale.[10] Interestingly, the changes appear to have narrowed some current criminal offences. Those relating to trade now require a higher element of intention "of obtaining a commercial advantage or profit". The term "profit" excludes any advantage due to use of copyright material in the private sphere. The prosecution bears the burden of disproving such a possibility. In addition, the new offence of wilful copyright piracy on a commercial scale has a high bar for proof, requiring proof of a "substantial prejudicial impact on the copyright owner".

A question of balance

There is no doubt that the amendments proposed to the Copyright Act will

considerably increase the power of copyright owners. Should this change in economic power be balanced in some way? In a media statement by Senator Kate Lundy, Shadow Minister for Sport and Recreation, the Arts and Information Technology dated 4 August 2004, Senator Lundy proposed that the great benefits extended to copyright owners and performers by the Act should be balanced somewhat by an extension of the "fair use" doctrine, to permit domestic copying without infringement, which would bring the doctrine in line with what is already US law. This has been proposed before, first by the *Copyright Amendment Act* 1989 (which was found to be invalid on constitutional grounds) and again by the Copyright Law Review Committee in its Report "Simplification of the Copyright Act 1968 – Part 1" of September 1998, but has been ignored. This laudable suggestion has come into even sharper focus with the current debate regarding music and video downloads for domestic use.

1 Part 5 of Schedule 9; the implementation date is specified in section 2, table items 12 and 14

2 Part 6 of Schedule 9; the implementation date is specified in section 2, table items 15, 16, 17 and 18

3 [2003] FCAFC 157; (2003) 200 ALR 96; (2003) 57 IPR 161; (2003) AIPC 91-902

4 (2001) 116 FCR 490; (2001) ATPR 41-846; [2001] FCA 1379

5 *Sony Music Entertainment (Australia) Limited v University of Tasmania* [2003] FCA 532 (30 May 2004)

6 Item 169

7 Items 165 and 170

8 Item 174ff

9 See new section 135AS(IB) inserted by item 181

10 Item 154 in Part 8 of Schedule 9, inserting a new section 132DB

Society Contacts

New South Wales Society for Computers and the Law

	Name	Phone/Fax	Address
General Correspondence	Derek Neve (Secretary)	Ph: (02) 9225 0200 Fax: (02) 9225 1595	Baker & McKenzie 50 Bridge Street SYDNEY NSW 2000 derek.neve@bakernet.com
Membership Correspondence	Tim Hemingway (Membership Officer)	Ph: (02) 9353 4000 Fax: (02) 9251 7832	Clayton Utz 1 O'Connell Street SYDNEY NSW 2000 themingway@claytonutz.com
Website	www.nswscl.org.au		

Victorian Society for Computers and the Law Inc

	Name	Phone/Fax	Address
General Correspondence and Membership	Michael Sneddon (Secretary)	Ph: 0500 800 145	VSCL PO Box 89 Flinders Lane Post Office MELBOURNE VIC 8009 vscl.enquiries@vscl.org.au
Website	www.vscl.org.au		

Western Australia Society for Computers and Law

	Name	Phone/Fax	Address
General Correspondence	The Secretary, WASCAL	Ph: (08) 9443 5383 Fax: (08) 9443 5390	PO Box U1910 PERTH WA 6001 secretary@wascal.asn.au
Website	www.wascal.asn.au		

The New Zealand Technology Society

	Name	Phone/Fax	Address
General Correspondence	Olivia Clark (Administrator)	Ph: (04) 472 3023 Fax: (04) 471 1833	Wigley & Company L9, Tourism and Travel House 79 Boulcott Street PO Box 10764 Wellington Jade.Firth@nzcs.org.nz
Website	www.nzcs.org.nz/SITE/Default/technology_law_society/default.asp		