COVER SHEET

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Copyright Down Under

Developments in Copyright Law in Australia in the Last Two Years

Sarah Waladan
Executive Officer
Australian Digital Alliance;
Copyright Adviser
Australian Libraries Copyright Committee

Tom Cochrane
Deputy Vice-Chancellor
Queensland University of Technology, Australia

In the world of copyright and intellectual property Australia is a relatively small player. Nevertheless, it has its own tradition of law making, a thriving creative and cultural sector, and is a net importer of intellectual property ("IP") in terms of both scholarly literature covering science, technology and social sciences, and also entertainment.

Australia's size means that it has some interesting points of comparison with Nordic countries. These include not only the relative impact of its own export of IP, and dependency on the import of IP, but also the fact that its society is technologically advanced with a high degree of internet penetration and use of digital technology and digitally stored information and knowledge.

The last two years has seen various changes to Australian Copyright law, which have been brought about by a combination of international and domestic developments. Following the internet treaties in 1996 (The WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty), Australia moved to amend its domestic legislation in 2000, with significant debate about the idea of preserving basic rights and the balance of copyright through a technologically neutral process.

After a process of public consultation, the *Copyright Act 1968* was amended by the *Copyright Amendment (Digital Agenda) Act 2000*, with the specific intention of ensuring that "copyright law continues to promote creative endeavour, and at the same time, allows reasonable access to copyright material in the digital environment"[1].

Copyright Law Revision connected to trade agreement negotiations

During the consultation process submissions were made by various parties in a way that is familiar in many jurisdictions struggling with changes to copyright law in rapidly changing environments. When the new law was passed, the Australian government undertook at that time to conduct a review three years later of the way that the amended Act was working with the intention of making any changes or modifications that seemed warranted by either unintended consequences of the amendments, or by a significant revised view on any of the issues.

This review was scheduled to commence in 2003. However, before its completion, it had become evident that whatever changes were being considered in Australia in this area, they were most likely to be strongly affected by the pending negotiation of a Free Trade Agreement (FTA) with the United States. In the event, this was indeed the most telling set of changes to influence Australian Copyright Law, and the Australian Act was significantly amended in the summer of 2004/05.

Indeed, it is worth noting that when the FTA negotiations were announced, the primary public concern in Australia was with the traditional export industries to the United States, particularly primary production (sugar, beef, etc). It was quite striking therefore that the bill to implement the Free Trade Agreement in the Australian Parliament, when introduced many months later, dealt with copyright matters for almost half of its entire printed volume!

For many concerned to support the middle road which Australian copyright law-making had previously appeared to be following, it now seemed that this path had been significantly affected. The relationship between the US Digital Millennium Copyright Act (DMCA) and any future Australian law was more obvious and connected than previously imagined.

Changes brought about interest in alternative licensing schemes

In brief the main changes that were now to be made to Australian copyright law included the extension of term of copyright from 50 to 70 years; the introduction of performers rights; a change in definition of material form (being broadened so as to include any form of storage of a work or adaptation whether or not it can be reproduced); the adoption of safe harbour provisions for carriage service providers (in Australia somewhat complicated by definitions of carriage service providers for other purposes); and the introduction of a compensation scheme.

Importantly, provisions relating to changes to technological protection measures, and the circumvention of these were deferred for review with the intention of later amendments and regulation giving effect to the necessary clauses within the Free Trade Agreement.

Naturally, the introduction of these changes was regarded with some concern, particularly by copyright user groups, and institutions such as universities, schools and others with potentially greater liability and financial exposure in the event of copyright infringement, compared to the previous regime.

[It is fair to say that one by-product of this was a stronger interest in alternative copyright licensing schemes, such as an Australian developed "free for education" approach, and the Australian adoption of Creative Commons].

The process of considering the legislative changes envisaged by the draft text of the US Free Trade Agreement, involved the Government establishing two committees of the Parliament for the purpose of more detailed review, committees in which politicians of all major parties were included. These reviews generated considerable interest not only amongst copyright user groups, but also more broadly amongst consumer groups, individuals, and politicians.

Through this process, Australians became aware, not only of the significant changes and increased levels of protection of copyright material that the proposed FTA would bring, but also of the outdated nature of current Australian copyright law exceptions. Many realised for the first time that it is technically illegal for individual citizens to undertake activities which involve private copying, for example, for their own use of a track from a purchased CD, or a video tape of a broadcast television program.

Interestingly, for some politicians, their interest in the detail of the law was greater than ever before, and various commentators have suggested that this in turn spurred political interest in a review of the law as it relates to private non-commercial copying in Australia.

Major review of fair dealing provisions

Subsequently, and separately from the FTA implementation process, the Government in May of 2005 announced a major review of the fair dealing provisions and exceptions to copyright infringement generally, and sought consultation on whether Australia should adopt a broad

non-prescriptive fair use style exception, which would allow courts to incorporate additional exceptions into law over time.

This was partly in response to the criticism that whilst Australia had adopted the protective aspects of US copyright law through the FTA, it had not adopted the broader exceptions, therefore changing the balance of interests within Australian law. It was also a general acknowledgement of the out-datedness of Australian law in the light of new technologies. At the time of writing, this review had not led to specific legislative proposals, but it is known that the Government has been giving serious consideration to a broader fair use set of exceptions, similar to some degree to those in place in the US.

Across the same period as the introduction of the Free Trade Agreement provisions, a copyright case, Stevens v Kabushiki Kaisha Sony Computer Entertainment (HCA 58, 6 October 2005), on appeal to the High Court of Australia (the nation's highest court) tested an important aspect of Australian law relating to the scope of Australia's technological protection measure provisions.

Amongst the issues before the Court was whether such provisions should be able to be used by copyright holders to deny access to copies of works, whether or not that access was related to the protection of copyright in those works. This had important implications for user groups because if the Court had found that copyright law could be used to deny access to works, this would effectively have extended copyright protection in digital works and rendered copyright exceptions in respect of such works practically useless.

Landmark decision on technological protection measures

The Court in October 2005 handed down a unanimous decision finding that Australian copyright law envisaged a direct link between denial of access and protection of copyright. The court held that the *Copyright Amendment (Digital Agenda) Act 2000* did not intend to expand copyright protection; rather, it intended to bring copyright law into the digital environment, both the protective aspects, as well as the exceptions to infringement.

Whilst it remains unclear how the Government proposes to reconcile the High Court's decision with its obligations to implement the technological protection measures provisions contained in the US Free Trade Agreement, it has become apparent that the decision has significantly influenced the Government's implementation process thus far.

During a bi-partisan review inquiring into how to implement these provisions, for example, a Parliamentary Committee (Standing Committee on Legal and Constitutional Affairs) delayed the initial deadline for submissions until after the Court's decision was handed down, and subsequently discussed substantial aspects of the decision in its final report to Government.

Furthermore, the Committee's report strongly reflects a concern to maintain balance between copyright owners and users. Indeed the overall recommendation, (the first of the report), is that:

"the Committee recommends that the balance between copyright owners and copyright users achieved by the Copyright Act 1968 should be maintained upon implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement"[2].

No doubt, this report will in turn affect the Government's consideration of how it will finalise implementation of the US Free Trade Agreement in the coming months.

Australia has been on an interesting journey in terms of copyright law making over the past two years. Primarily, this has been caused by the advent of the Australia - United States Free Trade Agreement. Technological developments however have also impacted on the development of this area of the law.

There can be no doubt that the United States' strategic interests can be seen to be served by seeking to harmonise intellectual property and copyright laws of other states with its own DMCA as closely as possible, in bilateral agreements.

Ironically, however, the process of exposing politicians to greater detail about the specific operations of the law has had some interesting side effects.

As Australia moves to consider its further obligations in relation to both the Free Trade Agreement, and its own undertakings to review aspects of copyright law, it would seem that a new direction that seemed to take Australia away from a previously stated commitment to balance between creators, owners and users has fostered an equal and opposite reaction.

The extent to which this might occur without attracting any policy pressure from the U.S. in terms of the Free Trade Agreement's provisions, has yet to be tested. ■

1 Hon Daryl Williams, 'Second Reading Speech, Copyright Amendment (Digital Agenda) Bill 1999, House of Representatives, Parliamentary Debates, 2 September 1999, p. 9749

2 Inquiry into technological protection measures (TPMs) Exceptions, Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, see Recommendation 1 at xvii.