Striking a balance of interests

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Recent reforms to Australia's copyright laws.

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Any opinions expressed in this article are the author's alone and do not necessarily reflect views held by the Commonwealth Attorney-General's Department.

The Federal Parliament passed two Copyright Amendment Bills in July this year, which came into effect on 30 July 1998. These new Acts are the *Copyright Amendment Act (No. 1) 1998* (Cth) (No. 1 Act) and the *Copyright Amendment Act (No. 2) 1998* (Cth) (No. 2 Act). The reforms to the *Copyright Act 1968* (Cth) (Copyright Act) brought about by these two amending Acts are both broad ranging and controversial, in part.

The range of copyright issues embraced by the amendments is evidenced by the size of the No. 1 Act; it has ten schedules that each deal with a distinct copyright issue. For instance, aside from the topics discussed below, there are provisions dealing with the streamlining of reporting mechanisms for government copying of works, provisions updating terminology used in the Act regarding people with an intellectual and/or print disability and provisions concerning the resources available to the Copyright Tribunal.

Both Acts have attracted a share of public and media interest, but it is the No. 2 Act that has attracted the most widespread scrutiny. The No. 2 Act has the effect of removing copyright controls over the parallel importation of legitimately recorded music (CDs and cassettes). Arguments publicised by the media have questioned whether the removal of such controls will lead to one or more of lower prices of CDs for music consumers, the demise of the local music industry, and a flood of pirated product onto the Australian market. At the time of the passage of the legislation, newspaper headlines reflected the polarised opinions on the possible consequences. The *Age* ran the editorial, 'CDs decision hits the right note' with the subheading, 'The benefits to consumers outweigh the claimed threat to local talent'.[1] Conversely, *Australian Financial Review* writer, John Schumann, proclaimed, 'Import laws on wrong track', explaining, 'The Government's new "parallel importing" laws will not only hurt Aussie talent but will eventually limit the chances of lower CD tariffs'.[2]

The intensity of the CDs debate is mirrored in other areas of copyright reform. These debates illustrate the nature of the competing interests that copyright creators, owners and users can have and the difficulties faced by legislators in formulating adequate responses. Not surprisingly, Australia's Copyright Act is littered with copyright 'deals' that reflect one of the fundamental precepts of copyright law: the balancing of the interests of the general community with those of copyright creators and owners. One of the aims of copyright protection in Australia has been to encourage further intellectual creativity and innovation as well as enabling access by the broader community to the products of that creativity: books, music, the visual arts and computer software, for instance. How well Australia's copyright laws have dealt with these competing motivations and whether such goals can apply in today's global intellectual property environment are equally open to argument.

However, this article does not propose to delve further into these questions. It only outlines some of the more interesting and

controversial amendments recently enacted, gives an indication of the history prompting the changes and notes how the law has altered.

The genesis of the 1998 copyright reforms

The Coalition Government promised to implement long overdue copyright reform to provide fair and adequate protection of rights as part of its 1996 election policy statements. The two amending Acts are important first steps in implementing the Coalition Government's agenda. However, the development of the legislation on a number of issues had predated the election of the Coalition Government, as explained below.

Copyright Amendment Act (No. 1) 1998

The No. 1 Act addresses a number of copyright law issues which have been under consideration for some years. Even with the eventual introduction of the legislation into Parliament in June 1997, the debate over issues it raised did not abate. For this reason, the Copyright Amendment Bill 1997 (No. 1 Bill) was referred to the Senate Legal and Constitutional Legislation Committee (Senate Committee) on 26 June 1997. It received 118 submissions during the course of its inquiry and reported in October 1997. In evidence before the Senate Committee the nature of the proposed reforms was explained by Mr Chris Creswell, Assistant Secretary, Intellectual Property Branch, Attorney-General's Department:

> The bill makes a number of wide-ranging amendments that are intended to improve the operation of copyright law in Australia in line with the government's process of ongoing review of the act. The amendments are generally the result of inquiry and consultation extending over a number of years and those in schedules 4 to 11 can generally be regarded as non-controversial and supported by relevant interests. The schedules in the bill that have resulted in the greatest diversity of views during the consultation preceding the bill, and in the submissions made to the committee, are schedules 1 to 3 on moral rights, employed journalists' copyright and importation of goods with copyright packaging and labelling.[3]

Ultimately, the Senate Committee recommended that the Bill be passed, subject to a number of amendments. Many of these suggestions were implemented by the Government when it reintroduced the No. 1 Bill into the Senate in July 1998.

Reforms to the rights of employee journalists and publishers

Background

Before the recent amendments, s.35(4) of the Copyright Act provided that newspaper and magazine proprietors owned the copyright in articles written by employed journalists for the purposes of publication in a newspaper or magazine, or for broadcasting. Employed journalists owned the remainder of the copyright and could therefore control all other uses of their works, such as the publishing of their articles in book form or the digital transmission of their works. The effect of the section was, and continues to be, to split copyright rights between the employer and the employee and to create a unique position in copyright law for this industry. This is because normally an employer, irrespective of their business activity, owns all of the copyright in works created by an employee during the course of employment (s.35(6) of the Copyright Act). The position of self-employed or freelance journalists, like most other self-employed workers, has never been affected by s.35(4) or s.35(6), that is, subject to any agreement to the contrary, these journalists retain all copyright in their works.

In recent years there was a continuing debate about the division of rights between employed journalists and newspaper and magazine proprietors fuelled by increasing speculation about how journalists' work might be used in the future by newspapers and magazine publishers and who should control the use of the material when delivered and stored in new digital formats. While journalists were concerned that additional remuneration should flow to them for re-utilisation of their work, publishers were keen to be placed in a position so that they could fully exploit the new technological means of publication and delivery of news and information. Publishers viewed the division of copyright as a potential impediment to their participation in the information industry.

In 1994, a specialist advisory body established by the Commonwealth Government to report to it on copyright law issues, the Copyright Law Review Committee, inquired into the operation of s.35(4). The committee was split in its recommendations but the minority recommendation which was accepted by the Government was to retain but modify the operation of s.35(4). The minority reached this view principally because there did not appear to be any overwhelming reason to repeal the section in its entirety.[4]

The Senate Committee further examined the issue based on the Government's proposal in the No. 1 Bill, which was to retain but modify s.35(4). The Senate Committee ultimately recommended that the Government's amendments be passed except for one issue: the so called 'publishers' right of restraint'. When originally introduced, the No. 1 Bill provided newspaper proprietors with a 'right of restraint'. The right of restraint would have enabled newspaper proprietors to block the photocopying of more than 15% of a newspaper or magazine, even though employed journalists were to retain the right to control photocopying of their works. The right of restraint was described by the Senate Committee as, 'arbitrary, impractical and unworkable'.[5]

Current position

Section 35(4) has been amended so that:

> The proprietors of newspapers, magazines and similar periodicals acquire additional rights to facilitate the electronic publication and delivery of newspapers, magazines and similar periodicals. Employed journalists retain their traditional rights of photocopying and independent book publication.[6]

The amendments in Schedule 1 of the No. 1 Act ensure that newspaper proprietors are free to develop new modes of distribution, such as the Internet, for their publications, and store works in on-line databases while leaving employed journalists with the rights to reproduce their articles in book form, and to benefit financially from the photocopying of their articles, such as when media monitoring services photocopy their works. There is no 'right of restraint', as described above. As indicated by the Senate Committee in its report, these amendments reflect agreements reached independently between most newspaper publishers and the Media Entertainment and Arts Alliance (the union representing journalists).[7]

Reforms to benefit visual artists

In 1998 during and following the deliberations of the Senate Committee, visual artists and their representative

organisations reinvigorated their campaign to amend certain provisions of the Copyright Act that they asserted operated unfairly towards them. They were successful in obtaining the changes to the law that they had been seeking over a number of years, when the Government accepted recommendations of both the majority and minority of the Senate Committee and put forward amendments to the original No. 1 Bill.

Commissioned photographs

Prior to the recent amendments, the effect of s.35(5) of the Copyright Act was that when a photograph was commissioned, the commissioning party was the first owner of copyright in the photograph. This was subject to any agreement to the contrary that was reached between the commissioner and the photographer. Section 35(5) of the Copyright Act, as it applied to photographers, created an exception to the normal position of other creators (for example, visual artists such as sculptors and craftworkers, and writers and composers) who retain copyright in commissioned works, rather than the commissioning party. The origins of s.35(5), which also applies to commissioned portraits and engravings, is acknowledged to have little apparent logic, although it stems from earlier copyright statutes.[8]

In reintroducing an amended No. 1 Bill into the House of Representatives on 15 July 1998 the Attorney-General, the Hon. Daryl Williams AM QC MP, explained the Government's proposed reforms, which are now in place, as follows:

> The government amendments to schedule 2 of the bill transfer ownership of copyright in commissioned photographs from the commissioning party to the photographer, except for photographs of a private or domestic nature [for example, weddings and family portraits] where the copyright control rightly remains with the person commissioning the photograph ... This change to the law has been sought by commercial photographers for a number of years and will assist them in licensing future uses of their works, especially in the on-line environment.[9]

Copying of artistic works by educational institutions

Responding to recommendations made by the Senate Committee and following consultations with affected stakeholders, the Government decided in July 1998 to move an amendment to s.135ZM of the Copyright Act. The No. 1 Bill as originally introduced did not include provisions to amend s.135ZM.

Section 135ZM, as it operated before its amendment, enabled educational institutions, including schools and universities, to copy artistic works that explained or illustrated text or other material without having to pay for the copying of the artistic works, even though payment was being made for the copying of the textual material. Representations to the Senate Committee urged the repeal of the entire section which was described to the committee as 'inequitable and unworkable'.

Instead of repeal of the section, the Government proposed 'positive reform' to benefit visual artists. Section 135ZM of the Copyright Act now provides that where an artistic work is copied along with text that accompanies the artistic work, then remuneration payable to the author of the text is to be shared with the visual artist/s. It means that visual artists will receive copyright payments to the same extent as other creators. However, copyright payments by educational institutions do not increase because of the new arrangements.

Reforms concerning 'parallel importation'

Both the No. 1 Act and the No. 2 Act contain reforms to the Copyright Act relating to the issue of parallel importation. The reforms in the No. 1 Act change copyright law in relation to the packaging and labelling of imported goods and the No. 2 Act, as has already been indicated, changes the law on importation of recorded music. Parallel imports are goods manufactured lawfully in a territory outside Australia, which although intended to be sold in that other territory are imported into Australia for sale without the consent of the copyright owner in Australia. Before the recent amendments copyright owners could prevent parallel imports of goods with certain packages or labels and music CDs coming into Australia. This position has now changed, although as the Senate Committee explained in its report on the Copyright Amendment Bill (No. 2) 1997 (No. 2 Bill) the controversy surrounding parallel imports had been considered by successive governments and review bodies for more than ten years.[10]

Parallel importation of goods with copyright packaging and labelling

The amendments in Schedule 3 of the No. 1 Act remove copyright control over parallel importation of packaging and labelling. The amendments stop the practice of using copyright in artistic works on packages and labels to prevent other businesses and individuals from importing and reselling legitimate products. There was concern that in some industries, such as the liquor and toy industries, the practice had become quite widespread. The desired practical outcome of these amendments is increased competition in respect of branded goods, leading to benefits for consumers in the form of one or more of improved service, reduced prices and increased choice.

The Copyright Law Review Committee recommended the removal of the copyright controls over packaging and labelling in 1988, stating:

> If the simple expedient of affixing or attaching a label in which copyright subsists to any goods at all entitles the owner of the goods to exclude others from marketing similar goods, the sooner the practice is stopped the better it will be. However imaginatively labelled or packaged a bottle of liquor may be, the product is liquor. The same may be said of cigarettes, perfume and cosmetics.[11]

The Senate Committee reheard arguments in favour and against the retention of the parallel import provisions but the majority recommended that the controls be removed remarking that, 'copyright law should be used strictly for the purposes of the protection of intellectual property and not to create other and additional non-tariff barriers to imports'.[12]

The change does not affect trade mark law which will continue to operate, as now, to protect brands and, under some circumstances, to permit action against parallel importation.

These changes to the Copyright Act do not commence until February 2000 to ensure that businesses legally using this means of controlling their exclusive distribution arrangements can have sufficient time to adapt their business operations.

Reforms regarding sound recordings

In relation to the No. 2 Act, the Coalition Government specifically promised in its arts election policy, *For Art's Sake – A Fair Go!*, that it would consider how to ensure that cheaper CDs were available for consumers. The policy stated:

> The coalition is concerned about the high price of CDs by world standards and Labor's failure to introduce greater competitive pressures in the wake of recent reports of the Prices Surveillance Authority ... In government, we will invite formal submissions through industry and the wider community to determine the most effective means of achieving lower prices for consumers.

Indeed, on 8 October 1997 the Coalition Government announced its decision to amend the Copyright Act to permit the parallel importation of CDs, which the No. 2 Act implements.

The effect of the removal of the controls on parallel importation is that CDs made legitimately in other countries, that is, non-pirate CDs, can be imported into Australia without the consent of the Australian copyright owner.

While the Act maintains the rights of copyright owners to stop commercial importation of pirate CDs, it also contains provisions designed to allay fears that pirate CDs will flood the Australian market. The No. 2 Act includes a range of measures that improve protection for owners of copyright in sound recordings. In civil proceedings for importation of infringing copies of CDs, the onus of establishing the defence that the imported CD was not an infringing copy is placed on the importer or distributor. The No. 2 Act also increases the maximum monetary penalties for copyright offences. Persons convicted face fines of over $60 000 per offence and/or five years imprisonment. Corporations can be fined over $300 000 per offence. As this article indicated earlier, the community response to the Government's reforms is mixed and only time will tell how the reforms actually impact on the Australian music industry or benefit consumers.

The remaining case of moral rights

The Copyright Amendment Bill (No. 1) 1997 as introduced originally into Parliament in June 1997 included amendments providing for comprehensive protection for the moral rights of attribution and integrity of authors of works and the makers of film. The right of attribution is the right to be identified as the creator of a work; for instance, the right of an author to insist on his or her name being put on copies of his or her books. The right of integrity is the right to object to derogatory treatment of a work which prejudices a creator's reputation; an example may be the right of an artist to object to the cutting up of his or her painting and the sale of the painting as separate pieces of art.

The enactment of specific moral rights laws in the Copyright Act has been under consideration by successive governments for at least a decade, since the Copyright Law Review Committee released a report on the matter in 1988.[13] If moral rights laws were introduced in Australia, based on the scheme in the No. 1 Bill, they would apply across a number of industries and to any creator who writes, draws, takes photographs or directs films. Office workers, journalists, playwrights, choreographers, composers, directors and architects, among others, would be afforded the new rights.

Recently, the Attorney-General stated that both the Government and copyright creators, owners and users had come a long way in developing an appropriate moral rights regime for Australia, but that the moral rights legislation would not proceed until further consultations were held on the specific issue of waiver. In opening a recent moral rights consultation forum the Attorney-General explained that:

> The issue for the Government to resolve is at what point in time, and to what extent, should the legislation provide that a creator of a copyright work or film can waive or relinquish his or her moral rights of attribution and integrity.[14]

The timing for the granting of a waiver had been a major concern to the film and television industry. Now, the issue of moral rights will be a matter for the incoming Government.

Further reform — the 'Digital Agenda'

On 30 April 1998 the then Attorney-General, Daryl Williams, and the then Minister for Communications, the Information Economy and the Arts, Richard Alston, announced that the Government would introduce further reforms to the Copyright Act to address deficiencies in the existing law as it applies to the Internet and other new technologies. It is likely that the Government will release an exposure draft Copyright Amendment Bill implementing the proposed Digital Agenda reforms in the coming months.

More information

The Intellectual Property Branch of the Attorney-General's Department circulates an email newsletter, the *AGD e-News on Copyright,* on an occasional basis to inform the public about government copyright developments. The newsletter was launched in May this year. In July 1998, Number 2 of the *AGD e-News on Copyright* described in some detail the various reforms contained in the No. 1 and No. 2 Acts. The newsletter is now available online at the Attorney-General's Department's website, Window on the Law: URL http://law.gov.au/publications/copyright_enews/No2_July_1998/frameset.html. To be placed on the mailing list to receive the *AGD e-News on Copyright* by email, phone 02 6250 6875; or email: IP_Branch@ag.gov.au). The Attorney-General's Department has also produced a short guide, *Copyright Law in Australia* which gives general information about copyright law and answers common questions. This is available at the Window on the Law site or from the Department (contact details as above).

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