

New Copyright Laws

Karen Gettens reports on the latest amendments to the Copyright Laws and also discusses the current position of recognition of moral rights in Australia.

The *Copyright Amendment Act 1998* and the *Copyright Amendment Act (No.2) 1998* commenced on 30 July 1998. All of the provisions of these acts are now in force, except for the amendments concerning the parallel importation of packaging and labelling, that have been delayed for 18 months.

THE ROAD TO COPYRIGHT REFORM

Governments over the past decade have been struggling with the issue of copyright reform. In 1996 the Coalition Government was elected on the promise of long overdue copyright reform to provide fair and adequate protection of rights, including moral rights, in Australian copyright law. The road to reform followed:-

18 June 1997 - the *Copyright Amendment Bill 1997* ("Bill") was introduced to the House of Representatives.

27 June 1997 - the Bill was introduced to the Senate. The Senate promptly referred the Bill to the Senate Legal and Constitutional Legislation Committee. The Committee held three public hearings concerning the Bill, and received 118 submissions.

27 October 1997 - The Committee's report was tabled supporting the Bill, including the issue of moral rights, but called for various amendments.

20 November 1997 - the *Copyright Amendment Bill (No.2)* ("Bill No. 2") 1997 was introduced to the House of Representatives. The Bill provides that non-pirate CDs can be imported into Australia without the consent of the Australian copyright owner.

26 November 1997 - Bill (No.2) is passed by the House, and is subsequently referred to the Senate Legal and Constitutional Legislation Committee for report. During February and March 1998 the Senate Committee held seven public hearings on the Bill.

1 April 1998 - the Senate Committee tabled its report on the Bill. The Report supported the Bill, but also made some suggestions for consideration.

11-12 July 1998 - both Bills were passed by the Senate (at around 12:45am). The

Bill had been passed with 28 amendments that were recommended by the Senate Committee. Bill (No.2) was passed with the support of Senator Harradine. Senator Colston had announced his opposition to the Bill, but was not in the Senate at the time the vote was taken. The vote was 33-32.

15 July 1998 - at a special sitting of the House, the House of Representatives passed the amended bills.

30 July 1998 - The Bills were given Royal Assent.

THE MAJOR AMENDMENTS AT A GLANCE

The *Copyright Amendment Act 1998* (Cth) ("Act") contains 10 schedules providing for wide-ranging copyright reforms in a number of areas:

- employed journalists copyright (Schedule 1);
- commissioned photographs (Schedule 1);
- parallel importation of packaging and labelling (Schedule 2);
- conversion damages and detention (Schedule 3);
- copying for the services of the Government (Schedule 4);
- copying for people with an intellectual disability (Schedule 5);
- copying of works by educational institutions (Schedule 9); and
- border enforcement (Schedule 8).

The proposed amendments dealing with protection of moral rights have been withdrawn, due to the debate over upfront waiver. The forecast is that a new stand-alone bill introducing comprehensive moral rights protection will be introduced in approximately three months time.

The *Copyright Amendment Act (No.2) 1998* removes the owner's control over parallel importation of CDs.

THE AMENDMENTS - EMPLOYED JOURNALISTS

Under the old s.35(4) *Copyright Act 1968* (Cth), a newspaper proprietor only owned the copyright in articles written by their employed journalists for the purposes of publication in a newspaper or magazine,

or for broadcasting. Employed journalists owned the copyright in all other uses of their works. This meant that when electronic means of publication was developed, the proprietors were not the owners of the copyright for this type of publication.

The new amendments to the *Copyright Act* rewrites s.35(4) to give proprietors 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, but proprietors are now classified as the owner of the copyright for all other uses, including publication on the Internet and on-line databases. Self-employed or freelance journalists will continue to retain all rights to their copyright work.

These amendments were recommended in the 1994 *Copyright Law Review Committee Report*, and also reflect agreements between major publishers and the Media Entertainment and Arts Alliance.

The original Bill also introduced a proprietor's "right of restraint" to block the photocopying of more than 15% of a newspaper or magazine (despite the fact that employed journalists owned the copyright in photocopying of their works). This right was criticised by the Senate Committee's Report, and has not been included in the Act.

These amendments will apply to all works created after 30 July 1998.

COMMISSIONED PHOTOGRAPHS

Under the old s.35(5), when a photograph is commissioned, the commissioner is the first owner of copyright, subject to any agreement to the contrary. This was an exception to the usual situation where the author of a work was the owner of the copyright. This anomaly has now been changed, in the new s.35(5) so that the photographer is the first owner of the copyright, except where the photographs are taken for private or domestic purposes such as weddings and family portraits. In these instances, the commissioner will retain ownership of the copyright.

These amendments to s.35(5) will now enable commercial photographers to

licence future uses of their photographs, which they have sought for a number of years.

PACKAGING & LABELLING OF IMPORTED GOODS

The amendments in Schedule 2 of the Act remove copyright control over parallel importation of packaging and labelling. These amendments were considered necessary to increase competition in respect of branded goods, and to improve service, reduce prices, and increase choice. These amendments were originally recommended by the Copyright Law Review Committee ("CLRC") in 1988. However the Government introduced amendments to delay the commencement of these provisions for 18 months after the Act commences. This will ensure that businesses legally using this means of controlling their exclusive distribution arrangements can have sufficient time to adapt their business operations. Thus, these amendments will not commence until February 2000.

SPECIAL POSITION RE THE OLYMPIC SYMBOL

The Olympic rings symbol has been excluded from the effect of the packaging and labelling amendments. This symbol is specially protected under the *Olympic Insignia Protection Act 1987*, which accords it perpetual copyright. With the express exclusion in definition of "accessory" in s.10(1), it stands in a unique position vis-a-vis other copyright material.

CONVERSION & DETENTION

Due to past abuse of the remedies for copyright infringement, the amendments under Schedule 3 of the Act make the availability and extent of the remedies of conversion damages and delivery up of goods, subject to the discretion of the court, rather than being an automatic right. These amendments were in response to the recommendations of the CLRC's 1990 *Report on Conversion Damages*. This Report found that where an infringing copy was an insubstantial part of an article (such as a badge on a soccer ball), and was not severable from it, the whole article had to be delivered up, or damages given for the whole value, thus allowing abuse by copyright owners and unfairness to defendants.

GOVERNMENT COPYING PROVISIONS

Schedule 4 of the Act amends the *Copyright Act* to streamline the system

for owners of copyright to be paid when their materials are copied by the Commonwealth, State and Territory governments. Payments will now be made on the basis of sampling, rather than the present method of full record-keeping, where there is a declared copyright collecting society.

COPYING FOR PEOPLE WITH AN INTELLECTUAL DISABILITY AND PEOPLE WITH A PRINT DISABILITY

Schedule 5 introduces more appropriate terminology in the provisions of the *Copyright Act* that affect people with a print or intellectual disability. The amendments include replacing the term "handicapped readers" with "persons with a disability" and replacing "intellectually handicapped persons" with "persons with an intellectual disability".

The Act also amends the license for institutions who assist people with a print disability under s.135ZP, to have the same rights as institutions who assist persons with an intellectual disability. Both of these institutions will now no longer be restricted to copying for the purposes of research or study only.

COPYING OF WORKS BY INSTITUTIONS

Schedule 6 of the Act makes a number of minor amendments to the statutory educational copying licences under Parts VA and VB of the *Copyright Act* to facilitate the effective operation of these licences for the benefit of both the relevant collecting bodies, and the institutions. One of these changes amends s.135ZM, so that when an artistic work is copied along with text that accompanies the artistic work, then the remuneration now payable to the author, will be shared with the visual artists. Visual artists have sought equitable remuneration for the copying of their works for some years now, and these amendments mean that they will now receive payments to the same extent as other creators.

COPYRIGHT TRIBUNAL

Schedule 7 of the Act allows for the appointment of one or more additional Deputy Presidents and for the appointment of former judges to the Copyright Tribunal. These amendments are designed to enhance access to, and the effective operation of, the Copyright Tribunal.

IMPORTED COPIES OF COPYRIGHT MATERIAL

Schedule 9 of the Act corrects minor errors made in the 1994 TRIPS amendments, and makes other minor changes to border enforcement provisions. These amendments include a fee for the lodging of a notice of objection, and authorisation for the CEO of Customs to provide certain information to objectors.

EDUCATIONAL INSTITUTIONS

The definition of "educational institution" has been broadened to include pre-schools and kindergartens, and the requirement that an educational institution must be not for profit has been removed.

THE AMENDMENTS UNDER ACT NO.2

The *Copyright Amendment Act (No.2) 1998 (Cth)* ("Act No. 2") removes the copyright owner's control over "parallel importation" of music CDs. This measure was announced by the Coalition Government in October 1997.

Sound recording prices in Australia are high by world standards. Restrictions on the parallel importation of legitimate sound recordings prevented Australian retailers from being able to source lower priced recordings from overseas sources without first gaining permission from local rights holders (usually major international record companies). This problem was identified in the 1990 Prices Surveillance Authority's report, *Inquiry into the Prices of Sound Recordings*, but has never been addressed.¹

POLICY BEHIND THESE AMENDMENTS

Parallel importation will increase competition between local and overseas suppliers of sound recordings in the Australian market. It is expected that local retailers will be able to source cheaper overseas product. This will encourage local suppliers to make sound recordings available to retailers at similar wholesale prices to those which could be obtained from overseas suppliers. Further local subsidiaries of global music companies, which control 70 per cent of the world industry typically only release 20 per cent of their titles in the Australian market. Parallel importation will mean that Australian consumers will have a greater range of choice.²

To allay fears that pirate CDs will flood the Australian market, the Act No. 2 includes a range of measures that improve the protection for owners of copyright in sound recordings:-

- In civil proceedings for importation of infringing CDs, the onus is on the importer to establish the CDs are not pirated;
- Maximum monetary penalties have increased: \$60,000 fines/5 years imprisonment for persons, \$300,000 fines for corporations, per offence;
- The Government, through the Department of Communications and the Arts, has allocated \$10m over three years to an Australian music industry promotion package.

MORAL RIGHTS

The major reform under the Act was to be the introduction of a comprehensive scheme of moral rights for creators of works and films. However once the Bill was introduced, the justification for comprehensive moral rights protection became obscured by a debate over a provision to allow upfront waiver for contracted works and films. In October 1997, the Senate Legal and Constitutional Legislation Committee recommended an extension of waiver at the time of commissioning a work or film. Since this time, the Government has held lengthy discussions with the film and television industry to find an acceptable compromise on the issue, that would satisfy all interests and would still maintain certainty and confidence in the industry. A compromise was not possible by the time the Bill was debated, so the Government withdrew the moral rights provisions from Schedule 1.

The Government is continuing to consult to develop a consensus on a workable waiver provision, and will resubmit a moral rights regime as a stand-alone bill in approximately three months time. The Government held a forum on the issue of waiver of moral rights in Sydney on 18 August 1998.

WHAT ARE MORAL RIGHTS AND WHY DO WE NEED THEM?

Moral rights are personal rights of the author of a work, that are completely independent of the author's economic rights, and continue to exist even after the transfer of economic rights. Moral rights include the right of the author to

be made known to the public as the creator of the work (paternity); the right to protect a work from distortion (integrity); the right to choose whether to publish the work; the right to restrain excessive criticism of the work; and the right to prevent violations of the author's personality. Currently, Australia has limited moral rights protections in ss189-195AA of the *Copyright Act*.

The call for a more comprehensive moral rights regime has been heard for over a decade now. Australia has an obligation under the Berne Convention for the Protection of Literary and Artistic Works to recognise moral rights under article 6bis. This was recognised in the CLRC's *Report on Moral Rights* in 1988, and then again in the 1994 *Discussion Paper, Proposed Moral Rights Legislation for Copyright Creators*.

The moral rights regime proposed in the original Bill satisfies Australia's obligations under the Berne Convention. Schedule 1 of the Bill, included:

- a creator's right to be identified as the creator of a work (the right of attribution of authorship);

- the right of a creator to take action against false attribution (the right not to have authorship of a work falsely attributed); and
- a creator's right to object to derogatory treatment of his or her work which prejudicially affects his or her honour and reputation (the right of integrity of authorship of a work).

The rights will apply to authors of all literary, artistic, dramatic and musical works and authors of cinematograph films. Authors of cinematograph films are the principal director and the principal producer of the film. The current Part IX of the *Copyright Act* contained provisions relating to the false attribution of works, but did not require recognition or attribution of authorship. Cinematograph films were also not included.

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1 As outlined in the Regulatory Impact Statement – Options to Lower the Sound Recording Prices for Consumers, 1997.

2 From Explanatory Memorandum to the Copyright Amendment Bill (No.2) 1997.

