

to explain to a client that after spending handsomely on a bevy of advisers and investing tens, hundreds or even billions of dollars in a media transaction, divestment was required.

The new regime has been fortified with some very prescriptive requirements in respect of regional radio (which, as indicated above, includes commercial radio licensees serving markets such as Wollongong, Newcastle, Geelong and Canberra), which will commence between 1 February 2007 and 1 January 2008. Upon a trigger event taking place, a regional commercial radio licensee must submit a local content plan and comply with various prescriptive local content requirements. While these requirements are subject to review by the ACMA, they are nevertheless

a throwback to media regulation of the kind not seen since the Australian Broadcasting Tribunal. Furthermore, a trigger event could occur in a wide range of situations. As a simple example, a trigger event includes a change of control. However, there are many situations in which a change of control can occur quite innocently, such as the death of a shareholder or a company restructure undertaken for entirely unrelated tax or accounting reasons, where there is no change in ultimate control. These are trigger events which would require the hapless regional radio licensee involved to comply with the new regime.

Conclusion

From the political sidelines it is easy to be critical of the new Act. As has

been well publicised, it is a compromise and therefore highly compromised. Leaving to one side the policy debate of whether cross-media reform is a necessary or good thing, and the compromises themselves, it is very clear that the new Act is in many areas, complex. It will have reverberating effects and consequences – no doubt, some of which will be unforeseen or unintended. That is usually good news for lawyers and various other advisers. However, it is also contrary to the policy objective of simple streamlined regulation, in which the role of regulators and therefore the advisory industry which grows up around them, is as unobtrusive as possible.

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Focus On Copyright

Fair Use and Copyright in Australia

In August 2006, the Attorney General, The Hon Philip Ruddock MP addressed the Communications and Media Law Association to set the scene for the amendments to Australia's copyright laws that ultimately came into effect in December 2006. The address provides an insight into the Federal Government's main concerns about the challenges digital media present for copyright regimes the world over. We have reproduced it here in full with the Attorney General's permission.

Fair Use and Copyright in Australia

Firstly, may I acknowledge the traditional owners of the land we meet on and pay my respects to their elders, both past and present.

I am delighted to be with you to talk about the changes we are making to copyright law.

Many of the issues we are facing are not new – copyright recognition in one form or another has been traced back to ancient times. Even the dark

ages of Europe had the occasional dispute over the right to copy. For example, some of you may be familiar with the story of the dispute in the sixth century between two Irish monks – Abbot Finnian and Columba.

While accounts of the disagreement differ – not surprising after 1400 years – they agree on the key facts. Columba copied without permission a rare psalter of St Jerome belonging to Abbot Finnian thereby reducing its value. Abbot Finnian complained to the King. The King ruled Columba

should hand over his copy to Abbot Finnian with the words: *"To every cow her calf and to every book its copy"*.

According to some reports this was not the end of the matter – Columba's clan successfully contested the King's decision in a bloody battle in which thousands were killed. The controversy and resulting warfare doesn't seem to have irreparably damaged the reputation of either man. Columba apparently went on to live an exemplary life and both were canonized after death and were made Saints!

Happily copyright disputes today, even if vigorously contested, rarely result in bloody battles. But there's not a lot of saints around either!

Achieving a Balance

When Johannes Gutenberg developed the first commercial printing press around 1436 – he not only set the scene for an explosion in knowledge – he also unwittingly set in train the processes which have ultimately led to the issues facing us today.

With mass publication, and the commercialisation of the creative process, came the need to adjudicate between competing rights – while at the same time protecting the community's interest in encouraging the dissemination of ideas and the development of new technology. It goes without saying that the number of competing rights has increased exponentially over the centuries. So "adjudication" of what should be the right "balance" has become more challenging for governments.

Technology is developing at an overwhelming rate. In Gutenberg's day law makers only had to deal with the printing press. Today technology is everywhere. We have DVDs, TVs, MP3s, iPods, and Blackberrys. A Blackberry used to be something you ate – not something you talked into and read messages on! And I have four different remote controls on my coffee table!

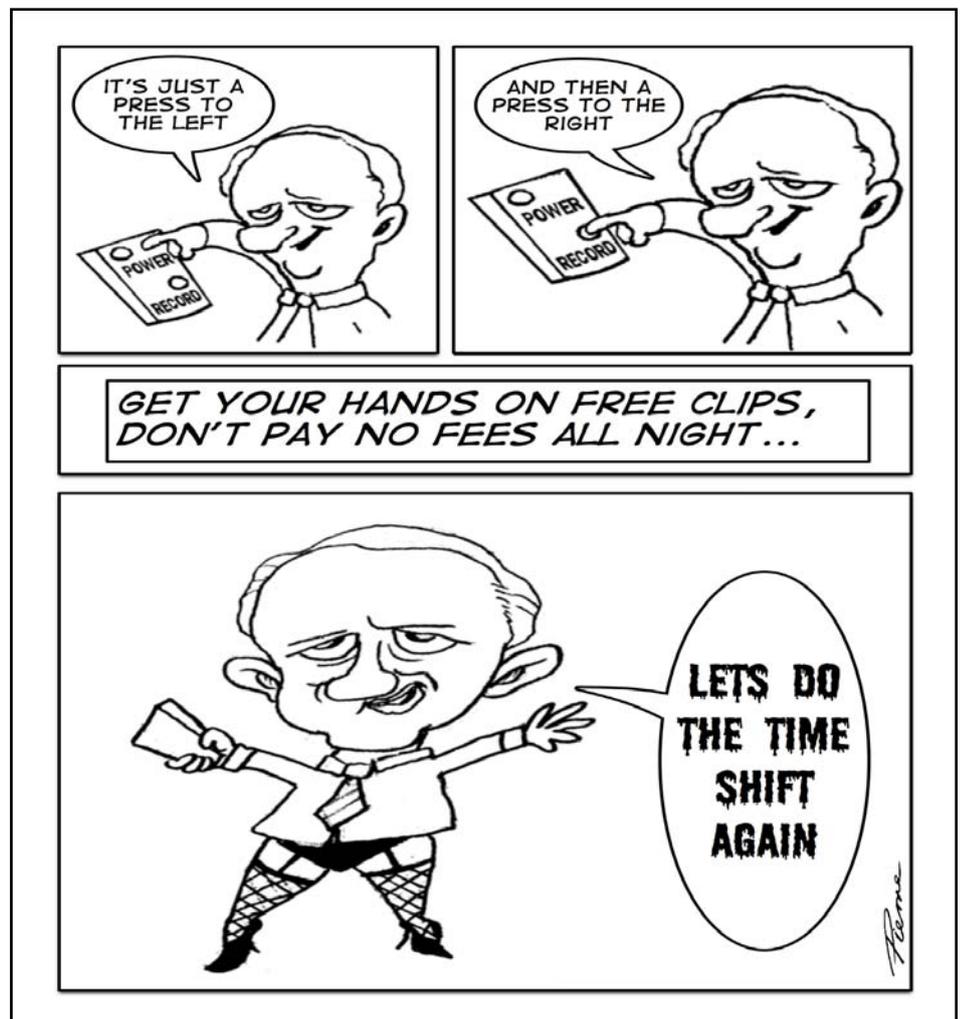
I believe our current system of copyright has served us very well. However, it is imperative it keeps up with the pace of change to ensure a balance is maintained. Crucial to this is effective enforcement and anti-piracy measures. As you know, I have recently announced major reforms to our laws which I will introduce into Parliament in 2006.

Over the coming days and weeks I will be issuing various parts of the exposure draft of the Bill for public comment. You will first have an opportunity to comment on Australia's approach to implementing its new technological protection measures scheme consistent with the Australia-US Free Trade Agreement. These reforms will clearly strengthen the protection regime for copyright owners and make a real difference to effective enforcement in the online environment.

This will be followed by draft provisions on other new enforcement measures and new exceptions for users as well as other significant reforms.

We will endeavour to stagger the submission dates so you will not be overwhelmed.

We aim to introduce the legislation in mid October and anticipate it will



be referred to a Senate committee. We are aiming to have the legislation passed by the end of the year 2006.

I do not propose to say anything today about the technological protection measures. Our changes will be announced shortly. However, I can say that, with the Bill, we have tried to give copyright owners assistance to tackle the problem of copyright piracy while attempting to maintain users' access to information.

As you will appreciate this requires the balancing exercise I referred to earlier.

The Reforms

The new measures will make our laws fairer for consumers and our educational and cultural institutions. They are intended to encourage the creative industries. And they will make it tougher on copyright pirates thereby maintaining the integrity of the system, and retaining the confidence of the public on which it depends.

The reforms are commonsense amendments which will maintain Australia's copyright laws as the best in the world for the benefit of our creators and copyright owners and for the many Australians who enjoy creative works. It is important that reforms such as these present initiatives succeed in re-vitalising copyright as an effective tool of public policy.

The Reforms – A "Fair Use" Exception?

Most of you are already familiar with the reforms so I will concentrate on the major issues and the reasons behind our decisions.

As you know, laws in most countries allow for particular uses of copyright material that do not infringe copyright. These exceptions recognise the public benefit in permitting copyright material to be used for purposes such as news reporting, education, research and criticism and review. To date, Australia has provided for this

by means of a number of specific exceptions and statutory licences. This is designed to provide certainty to copyright owners and users as to what can and cannot be done. However, a key issue is whether this system is flexible enough to respond to rapidly changing technology which can render a specific copyright exception out-dated or its scope uncertain.

When we were drawing up our reforms we looked at whether we should move to a general exception, which would allow the courts to determine on a case-by-case basis whether particular uses should qualify as an exception to copyright. US copyright law has a general "fair use" exception of this kind.

We found little support for doing away with our present system of specific exceptions – although some user groups did want to add a new general exception in addition to the present exceptions. They argued that this would restore balance to the Act by recognising the rights of consumers, allowing some flexibility, and assisting cultural and educational institutions to make better use of new technology for public functions.

Most copyright owners strongly opposed a general exception.

They were concerned that such a provision, superimposed on the existing system, could result in confusion and increased litigation unless there were other major legislative changes.

After looking at the various options, I decided that the US fair use approach – as the main exception to copyright – is not the most suitable model for Australia.

It could cause confusion and uncertainty if introduced here. Even in the US context the extent of user rights is often unclear because appeal courts have not made a final ruling on whether particular uses of copyright material is lawful.

I also recognise there is uncertainty concerning whether a US-style fair use exception would comply with Australia's obligations under international copyright treaties.

Reforms – Specific Exceptions

However, I do recognise that reforms are necessary in two areas.

First, the Government will be legislating a new extended dealing exception to ensure copyright law has some flexibility where material is used for non-commercial purposes by Australian educational bodies, libraries and other cultural institutions. It will also assist people with a disability. This exception will be an important part of the copyright balance between private rights and the broader public interest. I remind you that the first copyright act, the Statute of Anne [of 1709] was not simply concerned with protecting the interest of the author or bookseller. Fundamentally it was intended to encourage the spread of education and the production of useful books. I hope the new exception will provide some of the flexibility and public benefits of the US fair use exception, albeit within clearer limits.

Secondly, new exceptions will allow certain copyright material to be used for private and domestic use. We will be amending the law to allow consumers to "time shift" – to record television and radio programs in their own homes so they can view or listen to them at a later time. However, this exception will not allow a recording to be used over and over again or distributed to others. We will also be amending the law to permit a person who has purchased a legitimate copy of some categories of copyright material to make a copy in a different format. Its greatest impact will be to allow individuals to store their personal music collections recorded on CDs, audio tapes or vinyl records in the memory of an MP3 player or home entertainment personal computer. We are also aware that consumers may want to use technology to copy audiovisual material to other devices as well. We have made no decision about that for the moment. However, we will be reviewing the issue in two years time following developments in the market to see whether the law should be expanded to audio-visual material in a way which complies with our international obligations.

The reforms we are proposing will legalise practices which commonly occur in many Australia homes. To continue to treat them as copyright infringements diminishes both the credibility of the Act and respect for copyright law, and increases public tolerance of more damaging commercial piracy. Everyday consumers should not be treated like copyright pirates. Copyright pirates should not be treated like ordinary consumers.

Tougher Copyright Piracy Laws

Copyright piracy is theft. It harms not only our creative industries – like composers and film makers – but also those businesses relying on the creative industries including small businesses like cinema operators and video shops. The Government has already introduced significant amendments in 2000 and 2004 targeting copyright criminals. I'm sure you're familiar with these. However, technological advances continue to make it easier to commit copyright piracy on an even larger and more damaging scale. This applies to both the online environment and the physical market place. Copyright owners and law enforcement agencies need stronger, up-to-date and more straightforward measures to combat the problem.

The new measures we will be introducing include:

- On-the-spot fines
- Proceeds of crime remedies
- Giving a court additional power to award larger damages payouts, and
- A change in presumptions in litigation to make it easier to establish copyright piracy.

We have also commissioned the Australian Institute of Criminology to undertake research about the extent and impact of piracy within Australia. The research is underway and once completed will provide the Government with further information to help identify options to address this global issue. We are also working with enforcement agencies to try to develop practical measures to tackle

piracy. Finally, we are also trying to tackle the issues at source, by getting greater cooperation from some of the countries in our region where piracy is a great problem. During my recent visit to China and Indonesia ways of improving cooperation on intellectual property enforcement were discussed. We will continue this dialogue with them.

Conclusion

It took more than two hundred and

fifty years after the invention of the printing presses for England to progress – from copyright administration by a system of royal privileges – to statute. Nowadays, the pace of technology change is so swift that it is impossible to say with any certainty, what new technologies we'll be using in ten years time – or even in twenty – let alone in two hundred and fifty years.

We must constantly monitor the effectiveness of our laws. We must

ensure they achieve the balance we need to foster the creative industries, benefit consumers, defeat the copyright pirates and serve the community in the widest sense.

I look forward to taking your questions. If hundreds of years ago, two Irish Saints could disagree on copyright laws, I'm sure a roomful of lawyers in the twenty-first century will have plenty to say. To paraphrase the Irish King, *"To every cow her calf, to every lawyer, his – or her – own opinion!"*

Copyright Law Reform

Catherine Mullins summarises the Copyright Amendment Act 2006

The *Copyright Amendment Act 2006 (Act)* seeks to ensure that it is the copyright pirates who are penalised for flouting the law, not ordinary consumers who have legitimately purchased copyrighted products.

Introduction

On 19 October 2006, the Senate referred the provisions of the *Copyright Amendment Bill 2006 (Bill)* to the Standing Committee on Legal and Constitutional Affairs for inquiry and report by 10 November 2006 (and then 13 November 2006).

The Bill described a range of major amendments to the *Copyright Act 1968 (Copyright Act)*, many of which implement outcomes of the Federal Governments Copyright Law Reviews in 2005 and 2006 as well as other policy initiatives.

The Bill was passed (without amendments) and commenced on 11 December 2006.

The Changes

New Exceptions for Private Use

"Time Shifting" and "Format Shifting" are the two new exceptions to copyright infringement relating to private use:

- Time Shifting (Schedule 6, Part 1) – these provisions allow an individual to copy from television and radio without permission in order

to replay it "at a time more convenient than the time when the broadcast is made". Once made the copy can then be watched by household members, but can not be more widely distributed. These provisions do not impose any obligation on the individual to check the commercial availability of the material.

- Format Shifting (Schedule 6, Part 2) – these provisions allow an individual who owns copies of certain types of material to copy that material into different formats, for instance:
 - hard copy photos can be copied into digital form and digital photos can be copied into non-digital form;
 - VHS cassettes can be copied onto DVDs;
 - magazines can be scanned so as to be used in a digital device;
 - personal CD collections can be copied into MP3 or other digital formats for use in an iPod or computer.

Importantly the Act does not provide for:

- digital audio visual material to be copied onto another device such as a portable player;

- a backup copy to be made of a CD;
- computer games to be copied;
- somebody else to make a copy;
- a copy to be made for yourself from an item owned by somebody else;
- a recording downloaded from the internet to be copied; or
- getting someone else to make a copy for you.

New Flexible Dealings Exceptions

The Act's new flexible dealings exceptions allow for the use of copyright material for certain purposes which, in general terms are (Schedule 6, Part 3):

- non commercial uses by libraries, museums and archives, for instance copies of parts of historical documents can be included in materials for visitors;
- non commercial uses by educational institutions for the purpose of teaching, for instance old VHS educational tapes can be copied onto DVDs;
- uses for or by a person with disabilities, for instance a person with print disabilities can copy a book into a format that they are able to read; and
- uses for parody and satire.

Schedule 6 also includes amendments clarifying the existing exception related to "fair dealing" for the purposes of research or study (Schedule 6, Part 4) the effects of which being to limit the