1984

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COPYRIGHT AMENDMENT BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, Senator the Hon. Gareth Evans).

CONTENTS

COPYRIGHT AMENDMENT BILL 1984

OUTLINE

The Copyright Amendment Bill 1984 will amend the Copyright Act 1968:

. To protect computer software as a literary work;

. To clarify the nature and scope of that protection; and

. To make certain miscellaneous drafting or consequential amendments that are considered necessary or desirable.

2.   The Bill will specifically include computer programs in the existing copyright category of "literary works" and will give to computer programs the protection now applied to literary works.   Other amendments will clarify the nature and scope of this protection having regard to the distinctive features of computer software.   A presumption will be created that the making of a "back-up copy" of a computer program is permitted.   New offence provisions to deter and combat piracy of programs will be introduced.

3.   The Bill will end the state of uncertainty regarding the legal protection of computer software which first arose following the decision in the Federal Court last December that certain categories of computer software were not protected under the Copyright Act.

INTRODUCTION

4.   On 7 December 1983, Mr Justice Beaumont of the Federal
Court held in the <u>Apple Computer</u> v. <u>Computer Edge</u> case that
certain categories of computer software were not protected as
literary works under the Copyright Act. That decision was
reversed 2 to 1 on appeal to the Full Bench of the Federal
Court but a further appeal has been lodged with the High Court
and there is thus continuing uncertainty as to the correct
legal position.

5.   The Attorney-General, the Minister for Industry and
Commerce, and the Minister for Science and Technology jointly
announced on 21 December 1983 that the Government intended to
undertake such legislative action as was necessary to ensure
that software was adequately protected.

6.   Interested parties were consulted and possible legislative
measures were considered in the light of existing intellectual
and industrial property law and Australia's obligations under
the relevant international conventions.

7.   The three Ministers announced on 15 May 1984 that the
Government had decided to resolve the state of uncertainty by,
as a first step, amending the Copyright Act to protect
computer programs as literary works and otherwise to clarify
the nature and scope of copyright protection of computer
software.

8.   This Bill will implement that decision. The main
amendments which it will effect are the following:

.   Definition of "computer program";

.   Definition of "literary work" to include computer program;

.   Definition of "adaptation" of a computer program;

. Redefinition of "infringing copy" to cover copies of adaptations of works;

. Redefinition of "infringing copy" to remove an anomaly whereby an article imported with permission might nevertheless technically be an infringing copy;

. Definition of "material form" to cover storage in any form from which a work or adaptation can be reproduced;

. Creation of a presumption that the making of a "back-up copy" of a computer program is permitted;

. Extension of the "anti-piracy" offence provision in section 132 to cover creation of infringing copies by telephone or radio transmission of a program;

. Creating an offence of advertising the supply of infringing copies of computer programs;

. Conferring copyright protection on existing programs;

. Actions prior to commencement of the amendments will not be infringements.

NOTES ON THE CLAUSES OF THE BILL

Clauses 1 and 2 - Short Title and Commencement

9. The first two clauses of the Bill provide for the short
title and commencement of the legislation. The Bill will come
into operation on the date it receives Royal assent (clause 2).

Clause 3 - Interpretation

(a) "Adaptation"

10. The existing definition of adaptation will be amended by
including a provision that an adaptation of a computer program
means a version of the work, whether or not in the same
language, code or notation as that in which the work was
originally expressed, other than a reproduction of the work.

11. Copyright in literary works includes exclusive rights to
reproduce or adapt such works and computer programs will be
treated as literary works and computer programs will be
treated as literary works. However, the present definition of
adaptation in relation to literary works only includes
translation, conversion between dramatic and non-dramatic
forms, and conversion to a pictorial form.

12. Of these, only translation is likely to be relevant to
adaptation of programs and there are legal doubts as to
whether this refers only to translations between human
languages.

13. The new definition is intended to cover translation either
way between the various so-called "high-level programming
languages" in which the programs may be written by humans
(often called "source code") and languages, codes or notations
which actually control computer operations (often

called "machine code" or "object code"). Thus "adaptation" is
intended, for example, to cover the compilation of a FORTRAN
program to produce machine code which will directly control
the operation of a computer. Languages, etc. of intermediate
level would also be covered.

14. It is also possible for a program to be converted from
object code into source code, or between different languages
of similar level. In some circumstances this process will
result largely in a substantial reproduction of the original
program. In other cases, however, such as compilation
followed by de-compilation, the differences may be so
substantial that one cannot speak of a reproduction although
the final product is clearly derived from the original. The
new definition of adaptation is intended to cover such
situations.

(b) "Computer program"

15. The definition of computer program is new. Comments on
particular aspects of the definition follow.

16. The phrase "expression....of a set of instructions" is
intended to make clear that it is not an abstract idea,
algorithm or mathematical principle which is protected but
rather a particular expression of that abstraction. The word
"set" indicates that the instructions are related to one
another rather than being a mere collection.

17. The phrase "in any language, code or notation" is intended
to cover not only high level (generally human intelligible)
but also low level (generally only machine intelligible) and
intermediate level means of expression. Thus it would cover a
computer language such as FORTRAN, an assembly language and
compiled or assembled machine code.

18. The phrase "whether with or without related information" is intended to make clear that the protected program may include material other than instructions for the computer (such as information for programmers or users of the program, or data to be used in connection with the execution of the program).

19. The phrase "intended....to cause" is used in preference to words such as "capable......of causing" to cover the situation where the program, as written, may not operate for technical reasons such as the presence of a programming error.

20. The words "either directly...material form" are intended to make it clear that a program need not necessarily be capable of execution in its existing form but may need first to be translated into another language (e.g., compilation of a FORTRAN program) or converted into a suitable machine readable form (e.g. keying a handwritten program onto magnetic disk).

21. The phrase "to cause a device...to perform a particular function" is intended to make clear that the device is one the performance of which is ultimately controlled by the abovementioned "expression...of a set of instructions".

22. The phrase "having digital information processing capabilities" is intended to make clear that the device is not a device which merely processes information by analogue methods (e.g. a radio) but does include devices which, though considered as a whole might not be information processors, nevertheless have some such capability. Examples would be computerised telephone switching equipment and computerized ignition systems.

(c)-(e) "Infringing copy"

23. The definition of infringing copy is amended:

.   To cover a reproduction of an adaptation of a work where
    the making of the reproduction infringed copyright in the
    work;

.   To make use of the existing short definition of work in
    section 10; and

.   To remove an anomaly in the definition whereby an article
    imported with the permission of the copyright owner might
    nevertheless technically be an infringing copy because the
    importer did not have permission to make that article in
    Australia.

(f) "Literary Work"

24. This replaces the existing definition that "literary work"
includes a written table or compilation. That definition is
understood as meaning that tables or compilations which have a
"literary form", being expressed in writing, are covered as
literary works whereas other possible compilations (for
example, of musical or artistic works) would not be covered by
the definition.

25. However, because the definition of "writing" in section 10
refers to a mode of representing or reproducing words, figures
or symbols in a visible form, the present definition would not
cover tables or compilations which, though of literary form in
the sense that they were expressed in words, figures or
symbols, were not in a visible form because, for example, they
were stored on magnetic tape or in a computer.

26. By removing the requirement that tables or compilations be
in a visible form it is made clear that a computerised data
bank, for example, may be treated as a compilation being a

literary work. It is also important because data is often stored in a computer as a table. These changes are consistent with the definition of material form (see below).

27. The second arm of the definition makes it clear that computer programs and compilations of computer programs are also to be protected as literary works.

(g) "Material form"

28. The definition of "material form" is new and makes it clear that material form includes such methods of fixation as storage or reproduction on magnetic tape, read only or random access computer memory, magnetic or laser disks, bubble memories and other forms of storage which will doubtless be developed.

Clause 4 - Back-up copy of computer program

29. This clause would insert a new section 43(A) which will create, in effect, a presumption that the owner of a legitimate copy of a computer program can make a back-up copy to be used in the event that the original copy is lost, destroyed or rendered unusable. The section will provide, however, that the owner of copyright in the program can negative this presumption by explicit direction to the owner of the copy (given not later than the time the copy is acquired) and makes it clear that a clearly legible direction printed on the copy or on a package in which it is supplied, shall be taken to be such an express direction.

Clause 5 - Offences

30. Clause 5 would insert a new sub-section 5A into the main offence provision, section 132 of the Act, to provide that a person is deemed to distribute an infringing copy of a program when he transmits that program and an infringing copy is made by reception and recording of the transmission.

31. This provision will thus extend the existing prohibition on commercial distribution of "pirate" copies of programs to cover the situation where the program is supplied to the purchaser not as a physical copy but by way of a transmission which he can record.

Clause 6 - Advertisement for supply of infringing copies of computer programs

32. Clause 6 would introduce a new section 133A which proscribes advertisements for the supply of infringing copies of computer programs. It applies to advertising by any means (magazines, radio, etc) and applies both to the person responsible for placing the advertisement and to the person publishing the advertisement.

33. It will be necessary to prove that the advertiser or publisher knew or had reasonable grounds for knowing that the copy, when supplied, would be an infringing copy.

34. The penalty would be $1500 for a first offence and $1500 or imprisonment for six months for a second or subsequent offence.

35. Consistently with the proposed amendment to section 132, it is proposed also to cover advertising supply of infringing copies by way of transmission of computer programs.

36. Prosecutions may be brought either in the Federal Court or in any other court of competent jurisdiction. (The effect of the Acts Interpretation Act is to confer the necessary jurisdiction on the Federal Court.)

Clause 7 - Application and transitional

37. Sub-clause 7 (1) provides that the amendments made by the Bill will extend to works and other subject matter made before the commencement of the Act. Copyright protection will be thus conferred on existing computer programs.

38. However, sub-clause 7(2) provides protection in respect of existing copies if the courts ultimately hold that there is no copyright in computer programs. The legislation conferring copyright on existing programs will not operate retrospectively to cause past actions to have been infringements or cause existing copies to become infringing copies.