

# CHAPTER 2

## OVERVIEW OF THE BILL

2.1 This chapter provides a brief general overview of the Bill.<sup>1</sup>

### *Schedules 1 to 5 – amendments addressing copyright piracy*

2.2 The EM states that Schedules 1 to 5 of the Bill introduce significant reforms to Australia's copyright regime which are aimed at addressing copyright piracy. In addition to these amendments, a number of the provisions harmonise the criminal law offence provisions of the Copyright Act with Commonwealth criminal law policy and the *Criminal Code Act 1995* (Criminal Code).<sup>2</sup>

### *Schedule 1 – Criminal laws*

2.3 Schedule 1 creates indictable, summary and strict liability offences for copyright infringement, with a range of penalty options. The strict liability offences will be underpinned by an infringement notice scheme in the Copyright Regulations 1969 (Copyright Regulations). According to the EM, this will give police and prosecutors a wider range of enforcement options, depending on the seriousness of the relevant conduct, ranging from infringement notices for more minor offences, to initiating criminal proceedings in more serious cases. The criminal provisions 'are not aimed at ordinary people, but at copyright pirates who profit at the expense of ... creators'.<sup>3</sup>

### *Schedule 2 – Evidential presumptions*

2.4 Schedule 2 contains amendments to evidential presumption provisions in civil and criminal proceedings which aim to assist copyright owners and reduce costs in the litigation process. These provisions allow for presumptions in relation to establishing the subsistence and ownership of copyright. The Bill strengthens these provisions by providing that statements contained on labels, marks, certificates and so on are presumed to be correct unless the contrary is established, rather than on the basis that they are 'admissible as prima facie evidence' (as set out in the existing presumptions). There are also new presumptions recognising the labelling practices of commercially released films and computer software that will apply in both criminal and civil

---

1 Most of the text in this chapter is taken directly from the EM to the Bill, and the Second Reading Speech. However, due to the length of the EM, this chapter will contain only a general overview. Further detailed explanations of each of the Bill's provisions are provided in the EM.

2 EM, pp 1-2.

3 Senator the Hon. Santo Santoro, Minister for Ageing, *Senate Hansard*, 6 November 2006, p. 89.

proceedings. The amendments also introduce a presumption of originality for computer programs.

*Schedule 3 – Technologically neutral definitions*

2.5 Schedule 3 contains amendments to ensure that the definition of 'article' in subsection 10(1) of the Copyright Act can include an electronic reproduction or an electronic copy of a work or other subject-matter for the purposes of civil proceedings. The EM states that this is to overcome doubts about the protection of digital files or their download over the Internet.

*Schedule 4 – Civil remedies and commercial-scale infringement online*

2.6 Schedule 4 contains amendments to give enhanced powers to courts to grant relief to copyright owners in civil actions which involve commercial-scale electronic infringements, such as in the peer-to-peer context. The new provisions will operate so that, in such cases, a court may take into account likely infringements as well as a proved infringement in determining appropriate relief.

*Schedule 5 – Customs seizure of imported infringing copies*

2.7 Schedule 5 contains amendments to the Customs 'Notice of Objection' provisions in the Copyright Act. According to the EM, this will reduce the administrative and cost burden on rights holders in lodging notices and providing security for notices. It will also ensure that the Notice of Objection provisions remain consistent with changes made to the *Trade Marks Act 1995*.

*Schedule 6 – Exceptions to infringement of copyright*

2.8 Schedule 6 contains amendments concerning new copyright exceptions, in response to the Federal Government's recent 'Fair Use and Other Copyright Exceptions' review. The Bill includes exceptions for two kinds of copying for private and domestic use – 'time-shifting' and 'format-shifting', and four new specific exceptions. The four specific exceptions are to be based on the principle of 'fairness', that is, a court would be required to assess whether a use is 'fair' by testing it against new conditions set out in the legislation.

2.9 The EM states that the exceptions will provide flexibility to allow copyright material to be used for socially useful purposes; and will better recognise the rights of consumers to enjoy certain copyright material that they have legitimately acquired, where this does not significantly harm the interests of copyright owners. According to the EM, some of these amendments arose from the Federal Government's Digital Agenda review in 2003-06, others from the Fair Use review in 2005-06, or to achieve compliance with the World Intellectual Property Organization (WIPO) Copyright Treaty.<sup>4</sup>

---

4 EM, p. 3.

---

2.10 One of the exceptions contained in Schedule 6 applies to libraries and archives to give the public access to items of historical and cultural significance in the online environment. There is also a new exception for key national cultural institutions related to preservation of collections. This exception aims to allow these institutions to more effectively deal with items of historical and cultural significance to Australia that are in their collections.

2.11 Specifically, the following 'fair use' exceptions are contained in the Bill:

- recording broadcasts for replaying at a more convenient time (time-shifting) – Schedule 6, Part 1;
- reproducing copyright material in a different format for private use (format-shifting) – Schedule 6, Part 2;
- uses of copyright material for certain purposes which, in general terms, are:
  - non-commercial uses by a library or archives (including a museum);
  - non-commercial uses for educational instruction by an educational institution;
  - uses for or by a person with a disability; and
  - uses for parody and satire (Schedule 6, Part 3);<sup>5</sup>
- Schedule 6 also includes amendments which clarify the existing exception related to 'fair dealing' for the purposes of research or study (Schedule 6, Part 4) – the effect of this change is to limit the extent of fair dealing for research or study to the definition of a 'reasonable portion', regardless of whether the work is out of print, or out of print and only available in one library or archive in Australia<sup>6</sup>; and
- changes to exceptions related to official copying of library and archive material (Schedule 6, Part 5).

2.12 The Regulation Impact Statement (RIS) in respect of amendments made in Parts 1-3 of Schedule 6 of the Bill is included in the EM.<sup>7</sup> The RIS notes that the

---

5 The Bill brings together four different categories of exceptions and treats them in the same way. The new extended fair dealing exceptions will not apply to uses where an existing exception or statutory licence already operates; it only covers new uses which must comply with the standards of Australia's international treaty obligations under the Berne Convention, the TRIPS Agreement (Agreement on Trade Related Aspects of Intellectual Property Rights), the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, and the AUSFTA.

6 A 'reasonable portion' is taken to be one article from a periodical publication; more than one article from the same periodical publication only when those articles are required for the same piece of research or the same course of study; or 10 per cent of the number of pages in a work that consists of more than 10 pages, or one single chapter of the work; or, for a published literary or dramatic work in electronic form (other than a computer program), 10 per cent of the number of words in a work, or the whole or part of a single chapter of the work.

7 EM, pp 5-13.

Federal Government made a commitment to examine the issue of 'fair use' in its 2004 election policy *Strengthening Australian Arts*. The RIS also notes that, on 5 May 2005, the Federal Government published an issues paper seeking public comment on whether the Copyright Act should include a general exception associated with principles of 'fair use' or specific exceptions to facilitate public access.<sup>8</sup>

### ***Schedule 7 – Maker of communication***

2.13 Schedule 7 contains an amendment to make it clear that a person who merely accesses or browses the Internet is not considered to be responsible for determining the content of the copyright material accessed online, nor considered to be electronically transmitting the material to him or herself. This matter was raised by the Digital Agenda review. The clarification is intended to remove any doubt that a person does not determine the content of material by merely doing the technical process necessary to receive a communication (for example, by clicking on a hyperlink).

### ***Schedule 8 – Responses to Digital Agenda review***

2.14 Schedule 8 contains amendments arising from the Federal Government's response to the review of the 2001 Digital Agenda reforms in relation to the use of copyright material for educational purposes and the educational statutory licences. Amendments to the educational statutory licences are intended to benefit educational institutions dealing with online material.

2.15 Schedule 8 covers the following specific areas:

- communication of works or other subject matters in the course of educational instruction (Schedule 8, Part 1);
- educational copying of communications of free-to-air broadcasts (Schedule 8, Part 2);
- copying 'insubstantial' parts (or 1 per cent) of works in electronic form (Schedule 8, Part 3);
- reproduction and communication of works from electronic anthologies by educational institutions (Schedule 8, Part 4); and
- active caching of websites on a server by educational institutions for educational purposes (Schedule 8, Part 5) – 'active caching' refers to the process of loading selected websites onto a server to store for a particular course of study.

### ***Schedule 9 – Unauthorised access to encoded broadcasts***

2.16 Schedule 9 repeals and replaces provisions dealing with encoded broadcasts and includes amendments implementing the Federal Government's review of

---

8 EM, pp 5-6.

---

unauthorised access to, and use of, subscription broadcasts; as well as harmonising the provisions with Criminal Code style and Commonwealth criminal law policy.

### ***Schedules 10 and 11 – Copyright Tribunal amendments***

2.17 Schedules 10 and 11 contain amendments to enhance the jurisdiction of the Copyright Tribunal. Many of the amendments implement the Federal Government's response to the Copyright Law Review Committee report on the *Jurisdiction and Procedures of the Copyright Tribunal*. The remaining amendments deal with internal administration and operation of the Copyright Tribunal.

### ***Schedule 12 – Technological protection measures***

2.18 Schedule 12 contains amendments to implement obligations under the AUSFTA in relation to Technological Protection Measures (TPMs). Under the AUSFTA, the Federal Government provided undertakings to implement a new liability regime for circumventing TPMs within two years from the date of entry into force of the AUSFTA; that is, by 1 January 2007.

2.19 In September 2006, the Federal Government released an exposure draft of the Copyright Amendment (Technological Protection Measures) Bill 2006, expressing the hope that such legislation would be 'Good News for Consumers, Bad News for Pirates'. The provisions in that exposure draft have been amended and incorporated in the Bill at Schedule 12.<sup>9</sup>

2.20 TPMs or anti-circumvention devices are certain types of technology that are associated with copyright material and are used for the purpose of preventing copyright material from being copied or accessed. They commonly include password, encryption and DVD region encoding mechanisms. TPMs can be circumvented in several ways, for example, as a result of the unauthorised distribution of passwords and serial numbers, or by employing more sophisticated hacking utilities like password cracking tools and software decompilation programs.

2.21 Apart from protecting copyright material, TPMs can also be used for other purposes. For example, they may be used to restrict competition in markets for non-copyright goods and services, or to prevent the improper use of goods lawfully acquired.

2.22 The Copyright Act currently prohibits, amongst other things, the importation, dealing and manufacturing of TPM circumvention devices (section 116A, for civil liability and subsections 132(5A) and (5B) for criminal liability). However, the Copyright Act does not prohibit the actual *use of* a TPM circumvention device. The Copyright Act also provides that the prohibitions relating to the manufacturing and the

---

9 The following background to the provisions related to TPMs is taken directly from Parliamentary Library, In progress Bills Digest no. 51, 2006-07, Copyright Amendment Bill 2006 at [http://libiis1/library\\_services/pubs/bd051-2006-07.pdf](http://libiis1/library_services/pubs/bd051-2006-07.pdf) (accessed 3 November 2006).

trafficking of circumvention devices do not apply for certain 'permitted purposes' (subsections 116A(3) and (7)). These permitted purposes or exceptions include:

- reproducing computer programs to make interoperable products;
- reproducing computer programs to correct errors;
- reproducing computer programs for security testing;
- copying by Parliamentary libraries for members of Parliament;
- reproducing and communicating works by libraries and archives for users;
- reproducing and communicating works by libraries and archives for other libraries and archives;
- reproducing and communicating works for preservation and other purposes;
- use of copyright material for the services of the Crown; and
- reproducing and communicating works etc by educational and other institutions.

2.23 The current scheme will be repealed and the new law, which will be in the form of amendments to the Copyright Act, will impose civil and criminal penalties, on any person who:

- knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or
- manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
  - are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
  - have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
  - are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.

2.24 In short, Australia is required to tighten its law regarding circumvention of TPM devices to prohibit not only manufacturing and dealing but, also, the actual *use of* a circumvention device. In addition the number of exceptions or 'permitted purposes' which can be included in the regime are strictly limited.

2.25 The new law required by the AUSFTA will replace the 'permitted purposes' for which circumvention devices may be dealt with under the current law, with several narrow exceptions. Those exceptions are set out in the AUSFTA (Article 17.4.7(e)(i) to (viii)) and generally relate to the following categories:

- reverse engineering for the purposes of achieving interoperability;

- 
- security testing of encryption technologies;
  - parental control locks;
  - security testing of computers/networks;
  - privacy issues;
  - law enforcement and national security;
  - libraries for making acquisition decisions; and
  - other exceptions identified under a legislative or administrative review as addressing a credibly demonstrated actual or likely adverse effect on non-infringing use.

2.26 The House of Representatives Legal and Constitutional Affairs Committee inquiry into TPMs held in 2005 was an administrative review for the purpose of this last category.<sup>10</sup>

2.27 According to the Attorney-General's Second Reading Speech, the Bill provides for more effective protection for TPMs to encourage distribution of copyright material online and increase the availability of music, film and games in digital form. It is envisaged that this will, in turn, foster development of new business models and provide enhanced choice for consumers.<sup>11</sup>

2.28 The EM explains that the liability scheme set out in the Bill will target people who circumvent TPMs, in addition to those who manufacture or supply devices or services used for circumvention. However, the liability scheme will provide for specific exceptions in the Bill and additional limited exceptions in the Copyright Regulations on a case-by-case basis.

2.29 The Second Reading Speech states that these exceptions are in accordance with recommendations contained in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs relation to review of TPMs exceptions.<sup>12</sup> For example, exceptions to liability for circumventing TPMs will be provided where it is in the public interest or where a special case has been made out. Any additional exceptions cannot be granted where they would undermine the adequacy and effectiveness of the legal remedies provided under the scheme.<sup>13</sup>

---

10 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of technological protection measures exceptions*, February 2006.

11 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.

12 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 2. See House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of technological protection measures exceptions*, February 2006.

13 Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions", p. 1.

2.30 Schedule 12 also specifically creates an exception for 'region coding' devices and allows Australian consumers to use multi-zone DVD players.<sup>14</sup>

---

14 The Hon. Philip Ruddock MP, Attorney-General, Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.