

# Copyright changes to free trade

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The *US Free Trade Agreement Implementation Act 2004* (the AUSFTA Act), and the *Copyright Legislation Amendment Act 2004* came into effect on 1 January 2005. Thus most of the changes to copyright law which the AUSFTA requires are now in place, by way of these pieces of legislation. Some major changes that educational and cultural institutions should be aware of are outlined here in brief.

## Term extension

The term of copyright is extended from 50 to 70 years (note: this is not retrospective but relates only to materials that are in (or come into) copyright on or after 1 January 2005), with the effect that no new material will fall into the public domain in the next 20 years. It should be noted, however, that there are at least two important exceptions to this — the copyright term for material in which the Government owns copyright remains 50 years, and the copying of unpublished material under section 51(1) also remains 50 years after the author's death.

## Introduction of performers' rights

In accordance with the AUSFTA and the WIPO Performances and Phonograms Treaty (WPPT), performers have been granted both economic and moral rights under the AUS-

FTA Act, although the moral rights provisions will not be effective until Australia's accession to the WPPT, which is imminent. The introduction of such rights means that performers now have the right to control recordings of their performance, and communications to the public of their performance. In addition, performers have also been granted moral rights, the right to attribution of performership, the right against false attribution, and the right to integrity of performership.

Libraries should note that, in relation to sound recordings, performers whose performances have been recorded on a sound recording are now considered to be 'makers' for the purposes of section 97 of the *Copyright Act 1968*. Therefore, whereas before the AUSFTA Act, the person who owned the record in which the sound recording was embodied was the sole copyright owner, this is no longer the case. Performers now own equal shares in the copyright of that sound recording, together with the owner of the record in which the sound recording is embodied. It should also be noted that 'Performance' is broadly defined under section 248A(1) of the AUSFTA Act, and includes the reading or recitation of a literary work, or a taped interview.

## Change of definition of material form

The definition of material form has been broadened so as to include any form of storage of a work or adaptation, whether or not it can be reproduced. This effectively means that copyright owners' exclusive rights have been broadened to include the right to make such ephemeral copies of works.

However, sections 43A and 43B provide some important exceptions to breach by way of making such temporary copies. Section 43A provides that temporary copies made as part of the technical process of making or receiving a communication are not a breach, as long as the communication itself is not a copyright infringement. Section 43B has been introduced with the AUSFTA amendments and provides that temporary reproductions made as a *necessary* part of a technical process of using a copy of work will not be infringing, unless the copy is itself infringing or if use of the copy constitutes an infringement.

## Safe harbour provisions for carriage service providers

These provisions were primarily aimed at major providers of carriage services (CSPs), such as the telecommunications companies, which are not in a position to control the vast amount of content that is placed on their networks. However, whether educational or cultural institutions fall under the definition of CSP pursuant to the *Telecommunications Act 1997* will depend on the types of serv-

ices that such institutions provide, and the level of control they have over the content contained on their networks. Institutions will need to assess whether or not the particular services they provide would bring them under the definition.

Details of the safe harbour scheme can be found in both the AUSFTA Act and the *Copyright Regulations 1969* (as amended). Both can be viewed at <http://www.austlii.edu.au>.

Institutions that fall under the definition of CSP and choose to 'opt in' to the scheme by following the procedures set out in the *Copyright Regulations 1969* will be able to benefit from the safe-harbour provisions, which provide for immunity from civil liability.

## Compensation scheme

Sections 118 and 132 of the AUSFTA Act provide for compensation in certain circumstances. Basically, if a person made an agreement with a copyright owner before the date of Royal Assent of the AUSFTA Act (before 16 August 2004), on reliance of the fact that copyright in a particular work would expire, but as a consequence of the changes brought about by the AUSFTA Act (ie term extension), the copyright will now continue to exist past the time anticipated in the agreement, then the owner may object to the agreement proceeding, in writing. However, if the owner does so object, then the other person is entitled to be reasonably compensated for breach of the agreement.

If the owner does not object, and does not pay any compensation, then the person who wishes to copy the work pursuant to the agreement is entitled to copy the work and this will not be an infringement of copyright.

In conclusion, whilst the above summarises some important copyright law amendments to be aware of, libraries should expect further changes throughout the next two years, including implementation of the provisions of the AUSFTA relating to technological protection measures, and a review of the fair dealing provisions, scheduled to commence in April this year. Stay tuned.

*Sarah Waladan is executive officer of the Australian Digital Alliance (ADA) and Copyright Adviser (law and policy) for the Australian Libraries Copyright Committee (ALCC). The ADA and ALCC advocate for balanced copyright laws and the interests of libraries, and educational and cultural institutions, and have promoted these interests before Government throughout AUSFTA implementation. More information about these organisations, including submissions in relation to the expansion of the Australian fair dealing provisions, can be found on their respective websites: <http://www.digital.org.au> and <http://www.digital.org.au/alcc/>.*

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