Copyright Amendment Bill 1988

Date Introduced: 3 November 1988
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P., Attorney-General

Digest of Bill

Purpose

To impose a royalty on blank audio tape to be paid to copyright owners; create civil and criminal offences for unauthorised use of live performances and a licence scheme for educational copying from television and educational photocopying. The Bill also deals with the protection of three dimensional industrial products.

Background

Section 51 (xviii) of the Constitution gives the Commonwealth power to legislate with respect to intellectual property matters, including copyright. Australian copyright law is governed by the Copyright Act 1968 (the Principal Act). Copyright under the Principal Act is the exclusive right to do, and authorise others to do, specified acts in relation to works and other subject matter for a limited term. The Principal Act defines a 'work' as a literary, dramatic, musical or artistic work, and 'subject matter' as sound recordings, cinematograph films, television and radio broadcasts, and published editions of works.

A constant feature of copyright law has been the need for regular legislative changes to keep pace with technological change. This Bill will introduce a wide variety of technology-driven amendments, details of which were announced by the Attorney-General's Department at the 3rd Copyright Law and Practice Symposium (Sydney, 6 November 1987). A common theme in the proposals is the recognition that many types of unauthorised copying cannot be prevented either technically or by enforcement of copyright law.

The futility of attempting to stop home taping of audio materials, either direct or off-air, has led to industry demands for a blank tape royalty for some years. The development of digital audio tape (DAT) recorders, which are capable of producing tapes of sound quality practically the same as the source, has brought the matter to a head. The Attorney-General's Department favoured a blank tape royalty rather than the alternative of attachment of 'spoiler' devices to DAT recorders to ensure that they can only play but not record. Previous attempts to stop reproductive and communications technology have not had much success, as shown by attempts earlier this century to put 'spoilers' inside radios so that listeners could only tune into stations to which they had paid a licence fee, and more recently, attempts by the computer industry to sell copy-proof software.
Some of the features of the blank audio tape royalty outlined by the Attorney-General’s Department were a royalty rate proportional to the playing time of the tape and a royalty rate to be determined from time to time by the Copyright Tribunal, having regard to the evidence of the extent of home taping and the value of the works involved. In addition, copyright owners would only be eligible to receive royalties as member of a single authorised collecting society. The likelihood of a substantial outflow of funds to overseas copyright owners would be reduced by limiting eligibility to owners from countries with a similar royalty scheme.

A new licence scheme was foreshadowed for the educational sector’s copying of television programmes. The reasons given for the introduction of the new scheme were difficulties being experienced by educational institutions in obtaining a licence where a multitude of copyright owners may be involved. Copyright owners will be required to collect a royalty through a single authorised collection agency. The royalty rate would be decided between the parties, with disputes resolved by the Copyright Tribunal. Educational institutions would be able to elect whether to pay on a per student basis, or on the basis of records kept of actual photocopying.

The Copyright Law Review Committee (Report on Performers’ Protection May 1987) recommended that legislation should be introduced to provide civil remedies for performers and criminal penalties in relation to unauthorised recordings of performances. It was further recommended that unauthorised broadcasts or cable transmissions of performances be prohibited. However, the Committee recommended against granting performers copyright in their performances, or any rights at all in relation to the use of authorised recordings. Implementation of these recommendations would allow Australia’s accession to the Rome International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

Main Provisions

New sections 74 and 75 will be substituted into the Principal Act by clause 9. ‘Corresponding design’ is basically defined as a design for a three-dimensional article (proposed section 74). Where such a design is registered under the Designs Act 1906 there will be no action for breach of copyright (proposed section 75).

A new section 77 will be substituted into the Principal Act by clause 10. Proposed section 77 deals with corresponding designs that have not or cannot be registered under the Designs Act 1906. Copyright protection for three-dimensional reproductions will be removed where the corresponding design has been applied industrially (e.g. reproduced in quantities of 50 or more), whether in Australia or elsewhere, and has been sold, let for hire or offered or exposed for sale or hire in Australia or elsewhere.

A new Part VA, which will be inserted into the Principal Act by clause 12, will provide a licence scheme for copying from television by educational institutions and institutions assisting the intellectually handicapped.
Proposed sub-section 135E (1) provides that an educational institution may copy any television broadcast if the copy is made solely for the educational purposes of that or another such institution. Similar rules will apply for institutions assisting intellectually handicapped persons. Also a remuneration notice must be lodged and certain records kept.

Institutions that have given a remuneration notice may make preview copies of television broadcasts without payment in order to assess whether or not the programme should be retained. The copy must be erased within 14 days unless used for the purposes of proposed sub-section 135J (1) (proposed section 135F).

Proposed section 135G will provide that an institution may give notice (a remuneration notice) to a collecting society that it wishes to participate in the licensing scheme. A remuneration notice will serve as an undertaking to pay equitable remuneration for all copies made and must indicate whether the institution elects to make the payment on the basis of full records of copies made or on the basis of a sampling system.

Remuneration will be assessed on the basis of comprehensive records or a sampling scheme under which the institution makes an annual payment per enrolled student. Under either scheme, the amount of payment will be negotiated between the collecting society and the institution. If the parties cannot agree on an amount, an application may be made by either party to have the amount determined by the Copyright Tribunal. There may be different rates according to the type of educational institution, the nature of the programmes copied or if different classes of students are involved (proposed sections 135H and 135J).

The collecting society may visit institutions to assess the amount of copying of TV broadcasts carried out and inspect records. It will be an offence for an institution not to provide all reasonable assistance to a person carrying out an assessment or inspection. The maximum penalty for breach of this provision will be $500 (proposed section 135L).

All collection and distribution of remuneration will be made through a collecting society. The Attorney-General is not to declare a body to be the collecting society unless it satisfies a number of rules, including that it is a company limited by guarantee; all relevant copyright owners, or their agents, are entitled to become members; no dividends are paid; and its rules contain provisions about the distribution of amounts collected (proposed section 135P).

Copyright owners and institutions may agree on terms for copying independently of the licence scheme (proposed section 135Z).

A new Part VB will be inserted into the Principal Act by clause 13. Proposed Part VB will provide a licence scheme for the photo-copying of material by educational institutions, institutions assisting handicapped readers or intellectually handicapped persons. The mechanisms for collection, remuneration, and inspection of records will mirror those in proposed Part VA.
Proposed section 135ZG will allow free copying of small parts of literary and dramatic works (two pages or 1% of works over 200 pages) provided no whole work is copied.

Proposed sections 135ZJ – 135ZL deal with multiple copies. Under proposed section 135ZJ a journal article may be copied (or more than one if they relate to the same subject matter) and under proposed section 135ZL an institution may copy a reasonable portion of other works, works not separately published or more than a reasonable portion of a separately published work that is unavailable. Proposed section 135ZK will provide that a literary or dramatic work published in an anthology (provided the work is not more than 15 pages in length) may be copied.

A new Part VC will be inserted into the Principal Act by clause 14. Proposed Part VC will provide that home taping of published records and cassettes either directly or off – air will no longer be an infringement of copyright. Copyright owners (composers, authors, publishers and record companies) will be recompensed for this use by the payment of a royalty on blank audio tapes.

The royalty scheme will apply to 'blank tape', which is defined to be of a kind ordinarily purchased or hired for use for making copies of sound recordings. The definition includes pre – recorded tapes (proposed section 135ZZJ).

Copyright will not be infringed where a copy of a published sound recording is made on private premises for a persons private use (proposed section 135ZZK).

A royalty will be payable for each blank tape first sold, let for hire or distributed in Australia. The royalty on a blank tape will be calculated by multiplying the per – minute royalty rate determined by the Copyright Tribunal by the number of minutes of normal playing time of the tape (proposed section 135ZZN).

The royalty will be payable quarterly, to the collecting society, by the vendor who first distributes a blank tape in Australia (proposed section 135ZZP).

Where a blank tape is sold to a prescribed organisation or exempt body, the royalty will not be payable provided the vendor supplies certain information to the collecting society. To become an exempt body, an organisation must apply in writing to the collecting society. The collecting society must then declare the organisation to be an exempt body if it is satisfied that the tapes will not be used to copy copyright sound recordings. A refund of the royalty will be available to prescribed organisations and exempt bodies where the royalty has not been deducted by a vendor. In addition, other organisations and persons may obtain a refund if they give the collecting society a receipt for the purchase of the tape and a statutory declaration stating that they will not use the tape to copy copyright sound recordings (proposed sections 135ZZR – 135ZZT).
The administrative provisions of this Part reflect those of proposed Parts VA and VB.

The collecting society may inspect the records of vendors which are relevant to the assessment of the amount of royalty payable by the vendor. It will be an offence for a person to either obstruct an inspection, or disclose information obtained as a result of an inspection. The maximum penalty for breach of this provision will be $500 (proposed section 135ZZY).

Copyright owners, and persons wishing to make copies of sound recordings, may agree on terms for copying independently of the blank tape royalty scheme (proposed section 135ZZZ).

A new Part XIA will be inserted into the Principal Act by clause 26. Proposed Part XIA will provide civil remedies and impose criminal penalties for the unauthorised use of a live performance. Reading the news and performing a sporting activity are specifically excluded, as are direct (live recordings) or indirect recordings (off - air recordings of live broadcasts, re - broadcasts or cable transmissions) made for criticism or review or judicial proceedings and legal advice. A person may also make an indirect recording where the recording is made for the private use of the person who made it; scientific research; the educational purposes of the educational institution on whose behalf the copy is made; and providing assistance to handicapped readers and the intellectually handicapped by institutions assisting them.

The Bill classes certain acts as 'unauthorised uses', giving rise to a claim by a performer. It will be an 'unauthorised use' to do any of the following without the consent of a performer: record a performance, either directly or indirectly; or broadcast, re - broadcast or transmit by cable to subscribers, either directly from a live performance or from an unauthorised recording of it (proposed section 248G).

A performer may bring an action for an 'unauthorised use' of their performance. A performer who brings an action for an 'unauthorised use' may seek an injunction and damages (proposed section 248H).

Proposed sections 248N, 248P, and 248Q will provide certain criminal offences and penalties for unauthorised recording, broadcasting, and transmission by cable of performances. The maximum penalties for breach of these provisions will be fines of $50 000 or imprisonment for 5 years for people, and $250 000 for corporations.

Proposed section 248S will allow a court hearing an offence to order the destruction or delivery to the performer of any unauthorised recordings of performances, or any plates or recording equipment used, or intended to be used, for making an unauthorised recording or copies of a recording.
Proposed section 248T will allow the provisions of this Bill to be extended by regulation to performances in foreign countries and to citizens or residents of foreign countries.

For further information, if required, contact the Law and Government Group.

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Bills Digest Service
Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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