



Country Report Australia

Annual report to the IFLA CLM committee
San Juan Puerto Rico 2011

Copyright

Earlier this year the Attorney-General announced his intention to consult on two reviews:

- A proposal to extend the scope of the Safe Harbour scheme to include a greater range of internet intermediaries, and
- Proposals for additional exceptions to allow circumvention of technological protection measures. Currently there are no additional exceptions in place. The Copyright Advisory Group has approached the Attorney-General for an additional exception to allow circumvention of technological protection measures for certain education purposes.

The Attorney-General also indicated he would provide the Australian Law Reform Commission with a reference on copyright. He suggested that the balance of exceptions under Australian law in the context of the online environment may warrant this kind of examination. The draft terms of reference are still under consideration.

Improving enforcement regime for counterfeit goods

The Intellectual Property Laws Amendment (Raising the Bar) Bill 2011 is currently before the Senate (introduced 22 June 2011). The Bill seeks to amend the Patents Act 1990, the Trade Marks Act 1995, the Copyright Act 1968, the Designs Act 2003 and the Plant Breeder's Rights Act 1994. In relation to copyright, the Bill seeks to:

- Revise the 'notice of objection' scheme under Part V of Division 7 of the Copyright Act to make it more effective. This relates to the procedures when Customs seizes allegedly counterfeit copyright materials being imported to improve enforcement.
- Provide exemption from copyright infringement for 'open for public inspection' (OPI) documents during patent granting process.

Legal matters

Litigation

Roadshow Films Pty Ltd v iiNet Limited

On 20 November 2008, seven leading film companies and their affiliates and licensees filed a legal action in the Federal Court alleging that the Internet Service Provider (ISP) iiNet authorised copyright infringement by failing to take reasonable steps, including enforcing its own terms and conditions, to prevent the known copyright infringing activity of its subscribers. This is the first Australian case in which the authorisation liability provisions in the Copyright Act have been tested against an ISP in relation to infringing peer-to-peer file sharing over its networks.

On 4 February 2010, the Court found that while iiNet did have knowledge of infringements, and did not act to stop them, this did not result in a finding of authorisation of infringement. The Australian Federation Against Copyright Theft (AFACT) appealed the decision. On 24 February 2011, the Full Federal Court dismissed the appeal. However, aspects of the judgement are encouraging for copyright owners. The decision notes that under different factual circumstances, ISP liability for authorisation of copyright infringement could successfully be made out.

On 24 March 2011 AFACT filed an application in the High Court seeking special leave to appeal the Full Federal Court decision on six grounds. This application is scheduled to be heard on 12 August 2011.

There are ongoing discussions between the affected industries about addressing the issue of illegal file sharing. The Government continues to consider that an industry-negotiated solution to this problem is the most desirable outcome and is prepared to take steps to facilitate agreement. *Phonographic Performance Company of Australia Limited & Ors v. Commonwealth of Australia & Ors*

In February 2010, the Phonographic Performance Company of Australia (PPCA), and various music companies which it represents (including EMI, Universal, Warner and others), challenged the constitutional validity of sections 109, 152(8) and 152(11) of the *Copyright Act 1968* (Cth) in the High Court. These provisions introduced in 1968, provided that radio stations were free to broadcast sound recordings without infringing the copyright of the record manufacturers. However, the introduction of section 152 in the 1968 Act meant radio stations were to give "equitable remuneration" to record companies in return for this freedom, which was capped at 1% of the radio stations revenue.

After an initial hearing in January 2011, the Full Court held three hearings in May 2011. The Court reserved its decision, which is expected to be handed down in the next few months.

Telstra Corporation Limited v Phone Directories Company Pty Ltd

In February 2010, the Federal Court held that Telstra's White and Yellow Page phone directories are not protected by copyright. Telstra lost its appeal in the Full Federal Court in December last year and applied for special leave to appeal to the High Court prior to 12 January 2011. The High Court has agreed to hear the application later this year, possibly in early September.

Key issues in the case include the applicability of copyright to databases, as well as the importance of originality and authorship when it comes to determining whether copyright subsists.

Revision/changes in existing law or regulations

New legislation

Trade Agreements

Australia has participated in negotiations for the Anti-Counterfeiting Trade Agreement (ACTA) that concluded with the final draft text being agreed by all parties on 3 December 2010. ACTA is the first plurilateral agreement that establishes a new standard of intellectual property enforcement to combat the high levels of commercial scale trade in counterfeit and pirated goods worldwide. It provides protection for IP right related industries as well as for creators and consumers from pirated and counterfeit goods. The Government will consider whether or not Australia will sign the Anti-Counterfeiting Trade Agreement after the text has been considered by the Parliament through the normal treaty-making processes.

Australia is also currently negotiating free trade agreements with China, Malaysia, India, Japan and Korea which include chapters on intellectual property. Australia is also participating in the Trans-Pacific Partnership negotiations with Australia, Brunei, Chile, Malaysia, New Zealand, Peru, Singapore, the United States and Vietnam.

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