

2004

The Parliament of the  
Commonwealth of Australia

THE SENATE

*Presented and read a first time*

**DRAFT-IN-CONFIDENCE**

**This draft is supplied in confidence and should be given appropriate protection.**

## **Copyright Legislation Amendment Bill 2004**

**No.     , 2004**

*(Attorney-General)*

**A Bill for an Act to amend the law relating to  
copyright, and for related purposes**

*B04QR270.v26.doc 11/11/2004 5:35 PM*

---

## Contents

1	Short title .....	1
2	Commencement .....	1
3	Schedule(s).....	2
<b>Schedule 1—Amendments</b>		<b>3</b>
	<i>Copyright Act 1968</i>	3
	<i>US Free Trade Agreement Implementation Act 2004</i>	9

1  
2  
3  
4  
5

**DRAFT-IN-CONFIDENCE**  
This draft is supplied in confidence and should be given appropriate protection

6  
7

<b>OPC drafter to complete</b>	
1. Does this Bill need a message? (See H of R Practice, fourth ed, pp403-408, and OGC advice.) If yes: • List relevant clauses/items— • Prepare message advice (see DD 5/2000, Attachment D) • Give a copy of the message advice to the Legislation area.	No
2. Does this Bill need a notice? (See H of R Standing Order 178.) If no list relevant clauses/items—	Yes
3. Is there any reason why this Bill should not be introduced in the Senate? (See Constitution sections 53 and 55 and Drafting Direction 9/1994.)	No

8

9

**A Bill for an Act to amend the law relating to copyright, and for related purposes**

10

11

The Parliament of Australia enacts:

12

**1 Short title**

13

This Act may be cited as the *Copyright Legislation Amendment Act 2004*.

14

15

**2 Commencement**

16

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with

17

1  
2  
3

column 2 of the table. Any other statement in column 2 has effect according to its terms.

---

**Commencement information**

---

<b>Column 1</b>	<b>Column 2</b>	<b>Column 3</b>
<b>Provision(s)</b>	<b>Commencement</b>	<b>Date/Details</b>

1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1	The later of: (a) the start of the day on which this Act receives the Royal Assent; and (b) immediately after the commencement of the provisions covered by table item 2 in the table in section 2 of the <i>US Free Trade Agreement Implementation Act 2004</i> .  However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	

4  
5  
6  
7  
8  
9

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

10

**3 Schedule(s)**

11  
12  
13  
14

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

---

2

10 **2 Subsection 43B(1)**

11 Omit “made as part”, substitute “made as a necessary part”.

12 **3 Subsection 43B(2)**

13 Repeal the subsection, substitute:

14 (2) Subsection (1) does not apply to:

15 (a) the making of a temporary reproduction of a work if the  
16 reproduction is made from:

17 (i) an infringing copy of the work; or

18 (ii) a copy of the work where the copy is made in another  
19 country and would be an infringing copy of the work if  
20 the person who made the copy had done so in Australia;  
21 or

22 (b) the making of a temporary reproduction of a work as a  
23 necessary part of a technical process of using a copy of the  
24 work if that use constitutes an infringement of the copyright  
25 in the work.

26 (3) Subsection (1) does not apply to any subsequent use of a temporary  
27 reproduction of a work other than as a part of the technical process  
28 in which the temporary reproduction was made.

29 **4 Subsection 111B(1)**

30 Omit “making of a reproduction”, substitute “making of a temporary  
31 copy”.

32 Note: The heading to section 111B is altered by omitting “**Reproduction**” and substituting  
33 “**Temporary copy**”.

---

1 **5 Subsection 111B(1)**

2 Omit “the reproduction”, substitute “the temporary copy”.

3 **6 Subsection 111B(1)**

4 Omit “made as part”, substitute “made as a necessary part”.

5 **7 Subsection 111B(2)**

6 Repeal the subsection, substitute:

7 (2) Subsection (1) does not apply to:

8 (a) the making of a temporary copy of a subject-matter if the  
9 temporary copy is made from:

10 (i) an infringing copy of the subject-matter; or

11 (ii) a copy of the subject-matter where the copy is made in  
12 another country and would be an infringing copy of the  
13 subject-matter if the person who made the copy had  
14 done so in Australia; or

15 (b) the making of a temporary copy of a subject-matter as a  
16 necessary part of a technical process of using a copy of the  
17 subject-matter if that use constitutes an infringement of the  
18 copyright in the subject-matter.

19 (3) Subsection (1) does not apply to any subsequent use of a temporary  
20 copy of a subject-matter other than as a part of the technical  
21 process in which the temporary copy was made.

22 **8 Application of items 1 to 7**

23 The amendments made by items 1 to 7 apply in respect of acts done  
24 after the day on which this item commences.

25 **9 Section 116AB (definition of *financial benefit*)**

26 Repeal the definition.

27 **10 Subsection 116AH(1) (table item 4, condition 1)**

28 Omit “A financial benefit is to be regarded as directly attributable to the  
29 infringing activity only if the carriage service provider knew or ought  
30 reasonably to have known that an infringement of copyright was  
31 involved.”.

32 **11 Subsection 116AH(1) (table item 4, after condition 2)**

---

1

Insert:

2A. The carriage service provider must act expeditiously to remove or disable access to copyright material residing on its system or network if the carriage service provider:

- (i) becomes aware that the material is infringing; or
- (ii) becomes aware of facts or circumstances that make it apparent that the material is likely to be infringing.

The carriage service provider does not, in an action relating to this Division, bear any onus of proving a matter referred to in subparagraph (i) or (ii).

2

**12 Subsection 116AH(1) (table item 5, condition 1)**

3

Omit "A financial benefit is to be regarded as directly attributable to the infringing activity only if the carriage service provider knew or ought reasonably to have known that an infringement of copyright was involved."

4

5

6

7

**13 Subsection 116AH(1) (table item 5, after condition 2)**

8

Insert:

2A. The carriage service provider must act expeditiously to remove or disable access to a reference residing on its system or network if the carriage service provider:

- (i) becomes aware that the copyright material to which it refers is infringing; or
- (ii) becomes aware of facts or circumstances that make it apparent that the copyright material to which it refers is likely to be infringing.

The carriage service provider does not, in an action relating to this Division, bear any onus of proving a matter referred to in subparagraph (i) or (ii).

9

**14 At the end of section 116AH**

10

Add:

11

- (3) In deciding, for the purposes of condition 1 in table items 4 and 5 in the table in subsection (1), whether a financial benefit is otherwise directly attributable to the infringing activity referred to in that condition, a court must have regard to:

12

13

14

- 1 (a) industry practice in relation to the charging of services by  
2 carriage service providers, including charging based on level  
3 of activity; and  
4 (b) whether the financial benefit was greater than the benefit that  
5 would usually result from charging in accordance with  
6 accepted industry practice.  
7 The court may have regard to other matters it considers relevant.
- 8 (4) An act done by a carriage service provider in complying with the  
9 prescribed procedure referred to in condition 3 in table item 4 in  
10 the table in subsection (1) does not constitute a failure to satisfy  
11 condition 2A in that item.

12 **15 At the end of section 130**

13 Add:

- 14 (3) To avoid doubt, the acceptance of evidence admitted under this  
15 section in respect of a sound recording does not imply that another  
16 person was not also:  
17 (a) a maker of the recording; or  
18 (b) an owner of copyright in the recording in the place and at the  
19 time mentioned in subsection (2).

20 **16 Application of item 15**

21 The amendment made by item 15 applies in respect of sound recordings  
22 embodied wholly or partly in records that are supplied either before or  
23 after this item commences.

24 **17 Paragraph 132(1)(a)**

25 After "or hire", insert "or with the intention of obtaining a commercial  
26 advantage or profit".

27 **18 Paragraphs 132(1)(b) and (c)**

28 Omit "and", substitute "or".

29 **19 Subparagraph 132(1)(d)(i)**

30 Omit "and", substitute "or".

31 **20 Subparagraph 132(1)(d)(ii)**

32 Omit "and", substitute "or".



- 
- 1     **21 Subparagraph 132(1)(d)(iii)**  
2             Omit “and”, substitute “or”.
- 3     **22 Paragraph 132(2)(a)**  
4             Omit “and”, substitute “or”.
- 5     **23 Paragraph 132(2A)(a)**  
6             Omit “and”, substitute “or”.
- 7     **24 Paragraph 132(2A)(b)**  
8             Omit “and”, substitute “or”.
- 9     **25 Paragraph 132(2A)(c)**  
10            Omit “and”, substitute “or”.
- 11    **26 Subparagraphs 132(5D)(b)(i) and (ii)**  
12            Omit “and”, substitute “or”.
- 13    **27 Subparagraph 132(5DA)(b)(i)**  
14            Omit “and”, substitute “or”.
- 15    **28 Subparagraph 132(5DA)(b)(ii)**  
16            Omit “trading and”, substitute “trading or”.
- 17    **29 Application of items 17 to 28**  
18            The amendments made by items 17 to 28 apply in respect of acts done  
19            after the day on which this item commences.
- 20    **30 At the end of section 132B**  
21            Add:  
22            (3) To avoid doubt, the acceptance of evidence admitted under this  
23            section in respect of a sound recording does not imply that another  
24            person was not also:  
25            (a) a maker of the recording; or  
26            (b) an owner of copyright in the recording in the place and at the  
27            time mentioned in subsection (2).
- 28    **31 Application of item 30**
-



- 1 (e) the person knows the broadcaster had not authorised the  
2 access to the broadcast; and  
3 (f) the person uses, or authorises the use of, the broadcast by  
4 way of trade or with the intention of obtaining a commercial  
5 advantage or profit.

6 Note: See section 135AL for the definition of *profit*.

7 **40 Subsection 135AS(4)**

8 Omit “or (1B)”, substitute “, (1B) or (1C)”.

9 **41 Application of items 32 to 40**

10 The amendments made by items 32 to 40 apply in respect of encoded  
11 broadcasts made after the day on which this item commences.

12 ***US Free Trade Agreement Implementation Act 2004***

13 **42 Item 118 of Schedule 9 (heading)**

14 Omit “for agreements”, substitute “for certain agreements”.

15 **43 After paragraph 118(1)(c) of Schedule 9**

16 Insert:

- 17 (ca) that time is no later than 2 years from the US FTA  
18 commencement day; and

19 **44 Paragraphs 118(3)(a) and (4)(a) of Schedule 9**

20 Omit “compensation that is reasonable in all of the circumstances”,  
21 substitute “an amount of reasonable compensation”.

22 **45 After subitem 118(4) of Schedule 9**

23 Insert:

- 24 (4A) An amount of compensation agreed on or determined under this item or  
25 item 119 of this Schedule may only include compensation in respect of:  
26 (a) costs incurred by the person for the purposes of doing the act  
27 mentioned in paragraph (1)(c); and  
28 (b) costs incurred, or that may be incurred, by the person as a  
29 result of not being able to do that act.

30 **46 Subitem 118(6) of Schedule 9**

1 Omit "pay reasonable compensation", substitute "pay an amount of  
2 reasonable compensation".

3 **47 Paragraph 118(6)(a) of Schedule 9**

4 After "ceased to subsist", insert "and before the end of 2 years from the  
5 US FTA commencement day".

6 **48 Subitem 118(8) of Schedule 9**

7 Insert:

8 *US FTA commencement day* means the day on which the  
9 Australia-United States Free Trade Agreement, done at Washington DC  
10 on 18 May 2004, comes into force for Australia.

11 **49 Subitem 119(1) of Schedule 9**

12 Omit "under item 118 for the determination of reasonable  
13 compensation", substitute "under item 118 of this Schedule for the  
14 determination of an amount of reasonable compensation".

15 **50 Subitem 119(3) of Schedule 9**

16 Omit "the amount of compensation that it considers to be reasonable in  
17 all of the circumstances", substitute "an amount of reasonable  
18 compensation".

19 **51 At the end of subitem 119(3) of Schedule 9**

20 Add:

21 Note: The amount of compensation may only include compensation in respect of certain costs:  
22 see subitem 118(4A) of this Schedule.

23 **52 Item 132 of Schedule 9 (heading)**

24 Omit "for agreements", substitute "for certain agreements".

25 **53 After paragraph 132(1)(c) of Schedule 9**

26 Insert:

27 (ca) that time is no later than 2 years from the US FTA  
28 commencement day; and

29 **54 Paragraphs 132(3)(a) and (4)(a) of Schedule 9**

30 Omit "compensation that is reasonable in all of the circumstances",  
31 substitute "an amount of reasonable compensation".

---

---

1 **55 After subitem 132(4) of Schedule 9**

2 Insert:

3 (4A) An amount of compensation agreed on or determined under this item or  
4 item 133 of this Schedule may only include compensation in respect of:

- 5 (a) costs incurred by the person for the purposes of doing the act  
6 mentioned in paragraph (1)(c); and  
7 (b) costs incurred, or that may be incurred, by the person as a  
8 result of not being able to do that act.

9 **56 Subitem 132(6) of Schedule 9**

10 Omit “pay reasonable compensation”, substitute “pay an amount of  
11 reasonable compensation”.

12 **57 Paragraph 132(6)(a) of Schedule 9**

13 After “ceased to subsist”, insert “and before the end of 2 years from the  
14 US FTA commencement day”.

15 **58 Subitem 132(8) of Schedule 9**

16 Insert:

17 *US FTA commencement day* means the day on which the  
18 Australia-United States Free Trade Agreement, done at Washington DC  
19 on 18 May 2004, comes into force for Australia.

20 **59 Subitem 133(1) of Schedule 9**

21 Omit “under item 132 for the determination of reasonable  
22 compensation”, substitute “under item 132 of this Schedule for the  
23 determination of an amount of reasonable compensation”.

24 **60 Subitem 133(3) of Schedule 9**

25 Omit “the amount of compensation that it considers to be reasonable in  
26 all of the circumstances”, substitute “an amount of reasonable  
27 compensation”.

28 **61 At the end of subitem 133(3) of Schedule 9**

29 Add:

30 Note: The amount of compensation may only include compensation in respect of certain costs:  
31 see subitem 132(4A) of this Schedule.