



Copyright Legislation Amendment Act 2004

No. 154, 2004

**An Act to amend the law relating to copyright, and
for related purposes**

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

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No. 154, 2004

An Act to amend the law relating to copyright, and for related purposes

[Assented to 15 December 2004]

The Parliament of Australia enacts:

1 Short title

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

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
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.	15 December 2004
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.	1 January 2005 (paragraph (b) applies)

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.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Copyright Act 1968

1 Subsection 43B(1)

Omit “making of a reproduction”, substitute “making of a temporary reproduction”.

Note: The heading to section 43B is altered by omitting “**Reproduction**” and substituting “**Temporary reproductions**”.

2 Subsection 43B(1)

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

3 Subsection 43B(2)

Repeal the subsection, substitute:

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

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

(i) an infringing copy of the work; or

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

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

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

4 Subsection 111B(1)

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

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

5 Subsection 111B(1)

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

6 Subsection 111B(1)

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

7 Subsection 111B(2)

Repeal the subsection, substitute:

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

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

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

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

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

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

8 Application of items 1 to 7

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

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

Repeal the definition.

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

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.”.

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

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:

- (a) becomes aware that the material is infringing; or
- (b) 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 paragraph (a) or (b).

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

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.”.

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

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:

- (a) becomes aware that the copyright material to which it refers is infringing; or
- (b) 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 paragraph (a) or (b).

14 At the end of section 116AH

Add:

- (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:

- (a) industry practice in relation to the charging of services by carriage service providers, including charging based on level of activity; and
- (b) whether the financial benefit was greater than the benefit that would usually result from charging in accordance with accepted industry practice.

The court may have regard to other matters it considers relevant.

- (4) An act done by a carriage service provider in complying with the prescribed procedure referred to in condition 3 in table item 4 in the table in subsection (1) does not constitute a failure to satisfy condition 2A in that item.

15 At the end of section 130

Add:

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

16 Application of item 15

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

17 Paragraph 132(1)(a)

After “or hire”, insert “or with the intention of obtaining a commercial advantage or profit”.

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

Omit “and”, substitute “or”.

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

Omit “and”, substitute “or”.

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

Omit “and”, substitute “or”.

21 Subparagraph 132(1)(d)(iii)

Omit “and”, substitute “or”.

22 Paragraph 132(2)(a)

Omit “and”, substitute “or”.

23 Paragraph 132(2A)(a)

Omit “and”, substitute “or”.

24 Paragraph 132(2A)(b)

Omit “and”, substitute “or”.

25 Paragraph 132(2A)(c)

Omit “and”, substitute “or”.

26 Subparagraphs 132(5D)(b)(i) and (ii)

Omit “and”, substitute “or”.

27 Subparagraph 132(5DA)(b)(i)

Omit “and”, substitute “or”.

28 Subparagraph 132(5DA)(b)(ii)

Omit “trading and”, substitute “trading or”.

29 Application of items 17 to 28

The amendments made by items 17 to 28 apply in respect of acts done after the day on which this item commences.

30 At the end of section 132B

Add:

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

31 Application of item 30

The amendment made by item 30 applies in respect of sound recordings embodied wholly or partly in records that are supplied either before or after this item commences.

32 Paragraph 135AS(1)(b)

Omit “and”, substitute “or”.

33 Paragraph 135AS(1)(c)

Omit “and”, substitute “or”.

34 Paragraph 135AS(1)(d)

Omit “and”, substitute “or”.

35 Subparagraph 135AS(1)(e)(i)

Omit “and”, substitute “or”.

36 Subparagraph 135AS(1)(e)(ii)

After “for trading”, insert “or”.

37 Subparagraph 135AS(1)(e)(iii)

Omit “and”, substitute “or”.

38 Paragraph 135AS(1A)(d)

Omit “and”, substitute “or”.

39 After subsection 135AS(1B)

Insert:

Offence in relation to use of encoded broadcast that has been accessed without authorisation

(1C) A person commits an offence if:

- (a) a broadcaster makes an encoded broadcast; and
- (b) a broadcast decoding device is used to gain access to the encoded broadcast; and
- (c) the access is gained without the authorisation of the broadcaster; and
- (d) the person receives the broadcast that has been accessed by the device; and

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

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

40 Subsection 135AS(4)

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

41 Application of items 32 to 40

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

US Free Trade Agreement Implementation Act 2004

42 Item 118 of Schedule 9 (heading)

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

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

Insert:

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

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

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

45 After subitem 118(4) of Schedule 9

Insert:

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

46 Subitem 118(6) of Schedule 9

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

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

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

48 Subitem 118(8) of Schedule 9

Insert:

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

49 Subitem 119(1) of Schedule 9

Omit “under item 118 for the determination of reasonable compensation”, substitute “under item 118 of this Schedule for the determination of an amount of reasonable compensation”.

50 Subitem 119(3) of Schedule 9

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

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

Add:

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

52 Item 132 of Schedule 9 (heading)

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

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

Insert:

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

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

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

55 After subitem 132(4) of Schedule 9

Insert:

- (4A) An amount of compensation agreed on or determined under this item or item 133 of this Schedule may only include compensation in respect of:
- (a) costs incurred by the person for the purposes of doing the act mentioned in paragraph (1)(c); and
 - (b) costs incurred, or that may be incurred, by the person as a result of not being able to do that act.

56 Subitem 132(6) of Schedule 9

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

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

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

58 Subitem 132(8) of Schedule 9

Insert:

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

59 Subitem 133(1) of Schedule 9

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

60 Subitem 133(3) of Schedule 9

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

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

Add:

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

*[Minister's second reading speech made in—
Senate on 30 November 2004
House of Representatives on 9 December 2004]*

(204/04)