



## **Australia-United States Free Trade Agreement – Amendments to Criminal Law Provisions of the *Australian Copyright Act 1968***

Australian law criminalises ‘end-user piracy’ within Australian businesses and wilful copyright piracy on a commercial scale.

### *Wilful copyright piracy on a commercial scale*

2. Amendments to the offences in section 132 of the Australian *Copyright Act 1968* (the Act) have been made to implement the obligation under Article 17.11.26 of the AUSFTA that each Party provide for criminal procedures and penalties to apply in cases of wilful copyright piracy on a commercial scale. Under that Article, wilful copyright piracy on a commercial scale includes ‘significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain’ and ‘wilful infringements for the purposes of commercial advantage or financial gain’.

3. The obligation to provide for criminal procedures and penalties for ‘wilful infringements for the purposes of commercial advantage or financial gain’ will be implemented by amendment of the offences in sub-sections 132(1), (2) and (2A) of the Act. Relevant offences will be amended to include the phrase ‘or with the intention of obtaining a commercial advantage or profit’ in addition to acting ‘by way of trade’ or ‘for the purpose of trade’.

4. The obligation to provide for criminal procedures and penalties for ‘significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain’ has been implemented by the new offence in sub-section 132(5DB). This amendment makes it an offence to commit a significant copyright infringement on a commercial scale. In this offence, ‘significance’ is determined by whether the infringement or infringements have a substantial prejudicial impact on the copyright owner.

### *‘End user piracy’*

5. Australian law criminalises use of infringing copies within a business through existing provisions of the Australian *Copyright Act 1968* (the Act) and by amendments to the Act contained in Australia’s AUSFTA implementing legislation. This regime will be further strengthened by the ‘and/or’ amendments referred to above in paragraph 3. The combination of the offences in sub-sections 132(1), (2) and (2A) of the Act and the new offence of infringing copyright on a commercial scale (in sub-section 132(5DB)) have the effect of criminalising forms of reproduction, possession and distribution for activity within a business that involves the use of infringing copies. First, the offences in paragraph 132(1)(a) and sub-section 132(5DB) of the Act have the effect of criminalising reproduction for certain purposes. Under paragraph 132(1)(a), it is an offence to make an infringing copy for the purpose of sale or hire. Under sub-section 132(5DB), it is an offence where a person has made infringing copies on a commercial scale and where the infringement has a substantial prejudicial impact on the owner of the copyright. In addition s132(1)(a) will provide an offence of making an article to obtain a commercial advantage or profit. For example, a person that loads copies of computer software on non-networked computers within a business or on a local area network (eg Intranet) within a business without authorization will commit an offence under subsection 132(1)(a).

6. Second, where a person does not come within the scope of the reproduction offences, they may be committing a possession offence contrary to sub-section 132(2A) of the Act. Under that provision, there is a series of offences where a person is in possession of an infringing copy for certain purposes including sale, letting for hire and distribution. For example, a person may be committing one of the offences under sub-section 132(2A) if they are in possession of infringing copies of computer software for the purpose of making them available across a local area network (eg Intranet) within a business, or to non-networked computers within a business, or to another person outside a business (eg over the Internet).

7. Finally, where a person does not come within the scope of the reproduction or possession offences, they may be committing a distribution offence contrary to sub-section 132(2). For example, where a person had separately loaded a piece of software subject to a one-user licence online on a local area network within a business or to others outside the business they would be committing the expanded distribution offence in sub-section 132(2).

8. The definition of 'article' and 'distribute' in sub-section 132(9) of the Act ensures that the scope of the distribution offence in sub-section 132(2) includes the distribution of infringing material in electronic form within and outside a business. The definition of 'article' includes 'reproduction or copy in electronic form'. The definition of 'distribute' includes 'by way of communication'. Under section 10 of the Act, 'communicate' means 'make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject-matter'. This means that electronic communication across a local area network within a business, or to non-networked computers within a business, or to another person outside a business, is captured by the distribution offence.

9. The operation of these provisions is confirmed by the Explanatory Memorandum to the legislation that introduced those amendments (the *Copyright Amendment (Digital Agenda) Act 2000*) which stated:

'It also provides that for the purposes of the section, "distribute" includes distribute by way of communication. The effect of this definition is to ensure that the offences in s 132 of the Act which relate to distribution apply both to the making available and the electronic transmission of infringing copies in electronic form.'

Rules of statutory interpretation enable a court to have regard to an explanatory memorandum as an aid to interpretation where the meaning of a statutory provision is unclear.

10. Corporations can also be guilty of these offences. The principle of 'organisational blameworthiness' in Part 2.5 of Chapter 2 of the Commonwealth *Criminal Code* means that a corporation can be held responsible for the acts and omissions of its employees, agents or officers, if the relevant person was acting within the actual or apparent scope of their employment or authority. The *Criminal Code* provides that the fault elements of the offence (that is, intention, knowledge or recklessness) must be attributed to the corporation that expressly, tacitly, or impliedly authorised or permitted the commission of the offence. Furthermore, fault may also be attributed where it is established that: a corporate culture existed within the corporation that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or that the corporation failed to create and maintain a corporate culture that required compliance with the relevant provision.