TR 2026/2 - Income tax: royalties - character of payments in respect of software and intellectual property rights

There is a Compendium for this document: **TR 2026/2EC** .

Status: **legally binding**

Taxation Ruling

Income tax: royalties – character of payments in respect of software and intellectual property rights

Relying on this Ruling

This publication is a public ruling for the purposes of the *Taxation Administration Act 1953*.

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

Table of Contents **Paragraph**

What this Ruling is about

1. This Ruling considers when a payment under a software intermediation arrangement is subject to withholding tax[1] because it is a royalty as defined in subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936).[2] It focuses on cross border payments:

- for the use of, or right to use, copyright or other like property or right
- that may otherwise fall within another element of the definition of a 'royalty'.

2. This Ruling does not consider:

- whether the payment is assessable income under sections 6-5 or 15-20 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- the application of the transfer pricing rules in Division 815 of the ITAA 1997 or former Division 13 of Part III of the ITAA 1936
- the potential application of Part IVA to software intermediation arrangements

[1] Under section 128B of the *Income Tax Assessment Act 1936*.
[2] Most of Australia's tax treaties have the standard tax treaty definition of 'royalty'. Where that definition applies and is satisfied, then a payment will also be a 'royalty' within the domestic tax law definition.

- assessability of receipts of a software intermediary in respect of software and the treatment of software as trading stock under subsection 70-10(1) of the ITAA 1997.

3. All further legislative references in this Ruling are to the ITAA 1936, unless otherwise indicated.

Previous and other rulings

4. This Ruling finalises draft Taxation Ruling TR 2024/D1 *Income tax: royalties – character of payments in respect of software and intellectual property rights*, which replaced draft Taxation Ruling TR 2021/D4 *Income tax: royalties - character of receipts in respect of software*, which in turn replaced Taxation Ruling TR 93/12 *Income tax: computer software*.

5. Taxation Ruling IT 2660 *Income tax: definition of royalties* sets out our view on the meaning of royalties in subsection 6(1) and in the context of various tax treaties.

Class of entities and scheme

6. This Ruling applies to cross-border payments made under a software intermediation arrangement by:

- an Australian resident, or
- a non-resident, where a payment is related to or connected with a permanent establishment in Australia.

Definitions

7. The definition of terms used in this Ruling are contained in Table 1 of this Ruling:

Table 1: List of terms and their meanings

Term	Meaning
Access control technological protection measure (ACTPM)	As defined in subsection 10(1) of the *Copyright Act 1968*.
Agreements Act	*International Tax Agreements Act 1953.*
Computer program	This has the same meaning as in the definition of 'computer program' in subsection 10(1) of the *Copyright Act 1968*, being a set of statements or instructions to be used directly or indirectly in a computer to bring about a certain result.[3]
Copyright	The exclusive right to do certain acts under the *Copyright Act 1968*.[4]
Copyright Act	*Copyright Act 1968*

[3] See also section 47AB of the Copyright Act, regarding the meaning of computer program. The parts of computer software that are computer programs are protected by copyright as a 'literary work' (subsection 10(1)). Other material incorporated into software may also be separately protected by copyright. See also section 47AB of the Copyright Act, regarding the meaning of computer program.

[4] In relation to works, see subsections 31(1) and 13(2) of the Copyright Act. A 'computer program' is protected by copyright as a 'literary work' under the Copyright Act. Other material incorporated into software may also be separately protected by copyright under the Copyright Act, for example, text, graphics, moving images, music and sound recordings.

Term	Meaning
Cross-border payments	Any payment or credit made by a resident of Australia (or a permanent establishment in Australia) to, or for the benefit of, a non-resident of Australia (or a permanent establishment of an Australian resident).
Software intermediary[5]	An entity: • in a position to earn income (directly or indirectly through another intermediary) from the use of, or right to use, software, and • who is not the owner of the IP in relation to that software.
Domestic tax law definition of royalty	A reference to 'royalty or royalties' as defined in subsection 6(1).
Intellectual property or IP[6]	Any copyright, patent, design, model, plan, secret formula or process, trademark, or other like property or right.
Organisation for Economic Co-operation and Development (OECD) Commentary or OECD Commentaries	These terms refer to the commentaries to the OECD Model Convention.[7]
OECD Model or OECD Model Convention	Unless otherwise stated, the 'OECD Model' or 'OECD Model Convention' are references to the 2017 version.
Other like property or right	This has the same meaning as in the definition of 'royalty or royalties' in subsection 6(1).
Paid or payment	References to an amount 'paid' are taken to include a reference to an amount credited. Similarly, references to a payment should be taken to include a reference to a credit.
Software intermediation arrangement[8]	An agreement, arrangement or scheme under which a software intermediary makes payment or payments directly or indirectly[9] to the owner or licensee (as the case may be) of the copyright (or other IP) in software which enables it to be in a position to earn income relating to the use of, or right to use, the software.
Standard tax treaty definition	Any definition of 'royalty or royalties' found in a tax treaty that includes a provision in the same, or substantially the same, terms as the following[10]: 1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State may be taxed in that other State. 2. However, those royalties may also be taxed in the Contracting State in which they arise, and according to the law of that State … 3. The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or

[5] Sometimes referred to as a distributor.
[6] This is a broader term than 'intellectual property' as defined in subsection 995-1(1) of the ITAA 1997.
[7] Organisation for Economic Co-operation and Development (OECD) (2019) *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris https://doi.org/10.1787/g2g972ee-en.
[8] Sometimes referred to as a distribution agreement.
[9] Refer to paragraph 79 of this Ruling for an explanation on indirect payments.
[10] This version of the definition is sourced from Article 12 of the *Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, and Protocol* [2007] ATS 36.

Term	Meaning
	computed, to the extent to which they are made as consideration for: a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark or other like property or right; b) the supply of scientific, technical, industrial or commercial knowledge or information; c) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in subparagraph a) or any such knowledge or information as is mentioned in subparagraph b); … f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.
Tax treaty	A comprehensive agreement given the force of law in Australia by the Agreements Act.[11]

8. As at the date of publication of this Ruling, the tax treaties where the definition of 'royalty or royalties' has some material differences from the standard tax treaty definition are Australia's tax treaties with the:

- Kingdom of the Netherlands[12]
- Republic of Italy[13]
- Republic of Singapore[14]
- United States of America (US)[15]
- United Mexican States.[16]

9. These differences from the standard tax treaty definition of 'royalty or royalties' may result in some of the principles set out in this Ruling being not applicable to a software

[11] For our general approach to interpretation of tax treaties, see Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements*.
[12] *Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol* [1976] ATS 24.
[13] *Convention between Australia and the Republic of Italy for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol* [1985] ATS 27.
[14] *Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1969] ATS 14.
[15] *Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1983] ATS 16.
[16] *Agreement between the Government of Australia and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [2004] ATS 4.

intermediation arrangement.[17] Ultimately, it is the specific text of the treaty that must be considered. For example, the Netherlands tax treaty does not define 'royalties' by reference to 'forbearance', but nonetheless this Ruling provides relevant guidance on other elements of the definition. The Singapore tax treaty departs from the standard tax treaty definition in more significant ways.

Ruling

Scope – domestic tax law definition and standard tax treaty definition

10. This Ruling provides guidance on whether payments under a software intermediation arrangement are 'royalties' within the meaning of subsection 6(1), to the extent that definition is consistent with the standard tax treaty definition set out in paragraph 7 of this Ruling.[18] It focuses on arrangements involving payments to parties in jurisdictions that have entered into a tax treaty with Australia containing the standard tax treaty definition. The standard tax treaty definition is used in most of Australia's tax treaties.

11. Where an amount paid under a software intermediation arrangement is a royalty under a standard tax treaty definition, it will also be a royalty under the domestic tax law definition.

How to characterise what payments are consideration for

12. The character of payments under a software intermediation arrangement depends upon the facts and circumstances of the particular case. This includes the express and implied terms of any agreements between the parties, and can include the conduct of the parties. Valuation evidence and the identification of the various monetary and non-monetary undertakings passing under the agreements can also be relevant.[19]

13. The orthodox principles for the construction of a commercial agreement require that the terms of a commercial contract are determined by what a reasonable businessperson would have understood the terms to mean. This requires a consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract.[20]

14. An amount may be a royalty even if it is not paid periodically and howsoever the payment is described or computed. For example, payments made under an agreement need not be described as being for, or calculated with reference to, the use of, or right to use, specified IP rights for them to be royalties.

15. The standard tax treaty definition of 'royalty' requires, for a payment to be a royalty, that an amount is paid 'as consideration for' certain listed things. 'Consideration' does not

---

[17] The significance of the material differences in the US and United Mexican States tax treaties is discussed in paragraphs 21 to 25 of Taxation Ruling TR 2008/7 *Income tax: royalty withholding tax and the assignment of copyright*. The significance of the material difference in the Singapore tax treaty is discussed in ATO Interpretative Decision ATO ID 2012/67 *Income Tax: Singaporean resident company receiving Australian sourced royalties*. The tax treaties with the Kingdom of the Netherlands and Republic of Italy are materially different from the standard tax treaty because they do not contain 'forbearance' as an element of their definition of royalty.

[18] The standard tax treaty definition of 'royalties' is consistent with paragraphs (a), (c), (d) and subparagraphs (f)(i) to (ii) of the domestic tax law definition of 'royalty' in subsection 6(1).

[19] See *Commissioner of Taxation v PepsiCo Inc* [2025] HCA 30 (*PepsiCo*), at [174] and [173] respectively.

[20] *PepsiCo* at [51], [126] and *Commissioner of Taxation v Esso Australia Resources Pty Ltd* [2024] FCAFC 151 at [59].

have its narrow technical meaning in contract law. In this context, 'consideration' is what moves the payment, it is the payment's purpose, basis or condition[21], and is something of value given in exchange for it. That is, the payment is only a royalty to the extent there is a causal connection between the consideration and something in the definition of royalty.[22] Whether or not an agreement is a single, integrated and indivisible transaction will also be relevant.[23]

When a payment is a royalty

16. A payment is a royalty if it is consideration for the:

(a) grant of a right to use IP[24], regardless of whether that right is exercised – for example, the grant of the right to reproduce software, whether or not it is reproduced by the grantee

(b) use of any IP right[25] – for example, the use of a copyright right consists of doing any act comprised in the copyright of a work that the owner of the copyright has the exclusive right to do, including the exclusive right to authorise a person to do those acts

(c) supply of know-how[26]

(d) supply of assistance furnished as a means of enabling the application or enjoyment of anything referred to in subparagraphs 16(a) to (c) of this Ruling[27]

(e) the right to use, or use of, any IP right in software that is embedded in tangible goods

(f) total or partial forbearance in respect of the use or supply of any property or right referred to in this paragraph.

Apportionment

17. Where an amount is consideration for several things, apportionment of that amount may be required to reflect the extent to which it is a royalty. Apportionment is to be done on a fair and reasonable basis.

When a payment is not a royalty

18. A payment is not a royalty if it is:

(a) consideration for, and only for, the grant of a right to distribute copies of a computer program made by the holder of the copyright, and not for the use of, or right to use, any IP rights

(b) consideration wholly for the assignment of all rights relating to the copyright in software[28]

[21] See *PepsiCo* at [160], per Gordon, Edelman, Steward and Gleeson JJ.
[22] *PepsiCo* at [161], per Gordon, Edelman, Steward and Gleeson JJ.
[23] See *PepsiCo* at [51], per Gageler CJ, Jagot and Beech-Jones JJ.
[24] See paragraph (a) of the standard tax treaty definition.
[25] See paragraph (a) of the standard tax treaty definition.
[26] See paragraph (b) of the standard tax treaty definition.
[27] See paragraph (c) of the standard tax treaty definition.
[28] See TR 2008/7.

(c) a payment from a distributor that is consideration wholly for the acquisition of a tangible good with embedded software, provided that the distributor does not use, and is not granted the right to use, any IP right in the embedded software

(d) a payment from a distributor that is consideration wholly for the acquisition of physical media on which software is stored, provided that the distributor does not use, and is not granted the right to use, any IP right in the software stored on that media

(e) consideration wholly for the provision of services that are unrelated to any IP right referred to in paragraph a) of the standard tax treaty definition or any knowledge or information mentioned in paragraph b) of the standard tax treaty definition.

Example 1 – performance of contract requires use of copyright rights

19. *International Corporation (International) is a worldwide provider of software (Programs). It is a resident of the US and parent company of the International Group.*

20. *Ireland Enterprises Limited (IEL) is a company registered in Ireland and a member of the International Group. IEL owns all the IP in the Programs in all territories outside of the US. Operational Business Australia Co (OBA) is an Australian resident company and head company of the Australian tax consolidated group.*

21. *OBA became the principal distributor of the Programs in Australia by entering into a Licence Agreement with IEL. The key terms of the Licence Agreement are:*

- *Clause 1 – OBA is appointed and authorised as a non-exclusive distributor of the Programs and Cloud Software Services in Australia.*
- *Clause 2 – IEL retains all IP rights in the Programs, including all copyright.*
- *Clause 3 – OBA is granted a right to market, promote, distribute, copy (for the limited purpose of permitting end-users to make copies for their internal use) and sell licences for the Programs to end-users.*
- *Clause 4 – the distribution rights permit OBA to enter into end-user licence agreements (EULAs) or cloud services agreements for the Programs or Cloud Software Services with end-users in Australia.*
- *Clause 5 – OBA must pay fees to IEL that are set by reference to a targeted operating margin for OBA, in consideration for the rights granted under Clause 3. This clause states that the rights granted under Clause 3 are provided royalty-free.*

22. *End-users obtain use of the Programs through one of 3 ways: electronic download, via cloud services hosted on servers controlled by IEL, or through physical copies shipped to them by IEL. In each situation, end-users are required to first enter into an EULA or cloud services agreement with OBA. After entering into an EULA or cloud services agreement, OBA will invoice the end-user and receive payment from them.*

Application of our view

23. *The relevant 'royalty' definition is found in Article 13 of the Irish tax treaty.*[29] *For the purposes of this Ruling, this definition is a standard tax treaty definition. In our view, the rights granted to OBA under the Licence Agreement include rights to use copyright in the Programs.*

Authorised reproduction

24. *The right to reproduce a work in a material form is an exclusive right of the copyright owner.*[30] *When the Program is installed on an end-user's computer, the Program is reproduced on the device's storage as part of the installation process.*

25. *Under Clause 3, OBA permits end-users to make copies of the Programs for their own use by downloading and installing purchased programs. This reflects the circumstance that OBA has been granted a licence to exercise a right of the copyright holder, being the right to authorise end-users to reproduce the Programs.*

Communication

26. *The right to communicate a literary work to the public is an exclusive right of the copyright owner.*[31] *Although communication of the Programs originates from IEL, this does not preclude OBA from being an entity responsible for determining the content of the communication.*[32]

27. *OBA's role in communicating the Programs to the public arises from rights granted by IEL. Under Clause 3, IEL grants OBA the right to distribute and sell Cloud Software Services, and under Clause 4, IEL grants OBA the right to enter into cloud services agreements with end-users in Australia. Entry into a cloud services agreement between OBA and the end-user is a precondition to the Program being made available to the end-user. The cloud services agreement grants the end-users limited rights in respect of the Programs. Accordingly, under the Licence Agreement, OBA is one of the entities responsible for communicating the Programs to the public and has been granted the right to communicate the Programs to the public.*

Copyright or other like property or right

28. *The rights to authorise reproduction, to communicate the Programs, and to grant access are acts comprised in copyright, and therefore use of a copyright right, as they facilitate the use of copyright in a computer program by the end-user. Alternatively, these rights are 'other like property or rights' within paragraph (a) of the standard tax treaty definition of 'royalty', being valuable rights which entitle OBA to exploit the copyright in Programs by distributing use of the Programs to end-users.*

---

[29] *Agreement between the Government of Australia and the Government of Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains* [1983] ATS 25.
[30] Subparagraph 31(1)(a)(i) of the Copyright Act.
[31] Subparagraph 31(1)(a)(iv) of the Copyright Act; the definition of 'literary work' in subsection 10(1) of the Copyright Act includes 'a computer program or compilation of computer programs'.
[32] Subsection 22(6) of the Copyright Act.

<u>*Characterisation of payment*</u>

29. *How the payments under the Licence Agreement are characterised depends upon the proper construction of that agreement – that is, what the parties have agreed to objectively.*[33] *The labels attached to the Licence Agreement are relevant to, but not determinative of, the characterisation of the payment.*[34] *The payments under the Licence Agreement are characterised from what a reasonable businessperson would understand the terms to mean. Neither the use of the term 'distributor' in Clause 1, nor the grant of a right to 'distribute' in Clause 2, are determinative of the character of the payment. Similarly, the fact that Clause 5 states the fee is 'royalty-free' does not determine the character of the fee.*

30. *An objective assessment of the whole arrangement and the commercial context indicates that performance of the contract requires OBA to use copyright rights. The use of these rights was neither separate nor severable from the other rights and benefits granted, such as the rights to market and promote the Programs. OBA does not acquire any 'copies' of software which it licenses out and makes available to its customers. Therefore, its payments to IEL cannot be characterised as for copies of software but are properly characterised as a royalty within the meaning of the Irish tax treaty, and also the domestic tax law definition of royalty. Australian royalty withholding tax will apply to all payments made by OBA to IEL under the Licence Agreement at the rate of 10%.*

Example 2 – agreement lacking in specificity regarding the parties' rights and obligations

31. *An agreement between AusCo and its foreign parent ForeignCo does not set out all the necessary rights and obligations between the parties to give effect to the software intermediation arrangement. However, it does include the following key terms:*

- (a) *AusCo is granted the non-exclusive right to resell ForeignCo's products in Australia.*
- (b) *ForeignCo sells products to AusCo for resale by AusCo in Australia.*
- (c) *AusCo is to maintain and enhance the brand and image of ForeignCo and its products in Australia.*
- (d) *ForeignCo's products are*
  - (i) *computer software available for download from servers owned by ForeignCo and installation onto customer's personal devices, and*
  - (ii) *access to 'cloud-based' software via the internet, which is installed and executed on servers owned by ForeignCo.*

---

[33] See paragraphs 66 to 71 of this Ruling.

[34] A payment may be a royalty however that payment is described or computed. This is consistent with a general principle that a label is not determinative. For example, see *Radaich v Smith* [1959] HCA 45, where McTiernan J quotes Denning LJ in *Facchini v Bryson* (1952) 1 TLR 1386:

> … the parties cannot by the mere words of their contract turn it into something else. Their relationship is determined by the law and not by the label they choose to put on it … .

(e) *AusCo is not granted any express right, title or interest to any intellectual property, or any express licence related to any intellectual property to which ForeignCo has rights or licences.*

(f) *ForeignCo also provides to AusCo*

(i) *order fulfillment services (for example, allowing customers who purchase products from AusCo to download or access software from ForeignCo's computer servers)*

(ii) *information for the promotion of products.*

(g) *For the grant of the non-exclusive right to distribute ForeignCo's products in Australia, and as consideration for ForeignCo's products purchased by AusCo, AusCo must pay ForeignCo an amount calculated as AusCo's net profit from the sale of the products, less a small margin representing an arm's length fee for distribution services.*

32. *Customers in Australia enter into a standardised contract which states that AusCo is the entity with which they contract for the purchase of the products and customers in Australia pay AusCo for the products.*

33. *Upon a customer in Australia contracting with AusCo and paying the subscription fee for the purchase of the products to AusCo, ForeignCo grants a limited IP licence and contractual indemnity to the customer directly and grants the customer relevant access to the computer software from a computer server it controls. No further payment from the customer is required for these grants by ForeignCo.*

34. *ForeignCo owns or has rights to all the IP in the products and also provides AusCo with the right to use trademarks, brand and designs of ForeignCo, and access to confidential information and know-how regarding the products. ForeignCo is not a party to the sales contract with customers in Australia for the products. However, ForeignCo is a party to the IP licensing agreement with the customer which accompanies AusCo's contract with the Australian customers.*

Application of our view

35. *The payment by AusCo to ForeignCo is a royalty because, although ForeignCo is not paid directly by customers in Australia, customers pay AusCo to obtain the right to use the software as described in subparagraph 31(d) of this Ruling. Such rights and entitlements cannot be provided by AusCo for sale to the customers without the right to authorise the customer to reproduce the software by downloading or, in the case of cloud services, to communicate online the software by granting access to the services to its customers. In addition, we consider the payment AusCo makes to ForeignCo is a royalty because under this indivisible arrangement, AusCo:*

(a) *obtains the rights to use trademarks, brand and designs of ForeignCo*

(b) *obtains the supply of technical or commercial information and know-how from ForeignCo either to itself or to the customer by ForeignCo or some other associate*

(c) *obtains services ancillary and subsidiary in nature to enable the application or enjoyment of the technical and commercial knowledge or information, copyright and other property or right outlined in this example*

(d) *provides access to software protected by access control technological protection measures with the permission of ForeignCo.*

36. *If AusCo or ForeignCo had sufficient evidence which established that the distribution right (or other rights falling outside the definition of royalties) had value independent of the right to use the copyright and other intellectual property, a fair and reasonable apportionment could be applied.*

Date of effect

37. This Ruling applies both before and after its date of issue.

38. TR 93/12 applied to some arrangements covered by this Ruling. The date of effect for this Ruling does not prevent TR 93/12 applying prior to its withdrawal on 1 July 2021, to the extent that that Ruling has been appropriately relied upon.

Commissioner of Taxation
4 September 2026

Appendix – Explanation

This Explanation is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.

Context

39. Since 1993, when TR 93/12 was published, the way that software is distributed and sold has changed significantly due to ever-evolving business models and rapid changes in technology. The traditional concepts of distribution in respect of physical goods are less relevant or sufficient and adequate to resolve novel and complex questions which arise in this context.

40. Software is now commonly supplied by electronic means using IP rights. Such rights, although restricted in scope, may be granted to local subsidiaries or third-party intermediaries to distribute the software, as well as to end-users to access or use the software. Such changes in business practices were not addressed by the Federal Court decision in *International Business Machines Corporation v Commissioner of Taxation* [2011] FCA 335 (*IBM Corporation*) handed down in 2011.

41. Many software intermediation agreements contain the grant of rights or the imposition of obligations that are within the standard tax treaty definition of 'royalty'. However, some contemporary agreements contain a narrower grant of rights than was considered in *IBM Corporation*. Among the many issues that arise is how the use, and the right to use, provisions in domestic law and treaty provisions are to be applied to parties to transactions dealing with software rights where the software is supplied by electronic means.

Introduction

42. This Explanation is divided into 4 parts:

- Part 1 discusses the definition of royalties
- Part 2 discusses copyright and what constitutes the use of copyright
- Part 3 discusses non-copyright rights
- Part 4 discusses software embedded in tangible goods.

Part 1 – Royalties

Consequences of a payment being a royalty

43. A payment is characterised as a royalty if it satisfies the definition within subsection 6(1). The recipient is liable to pay Australian income tax for the receipt of income derived that consists of a royalty.[35] Under section 128B, the taxation is on the derivation of income by a non-resident that consists of a royalty paid to the non-resident, not the receipt of the payment. The obligation to withhold withholding tax is imposed upon an Australian-resident payer of a royalty who paid that royalty to a non-resident.[36]

[35] Subsection 128B(5A).
[36] Section 12-280 of Schedule 1 to the *Taxation Administration Act 1953.* See also section 12-285 of Schedule 1 to the *Taxation Administration Act 1953*.

44. Where a tax treaty applies, the royalty definition in the treaty will only trigger a withholding tax obligation to the extent it is also covered by the domestic tax law definition of 'royalty'.

45. This Ruling focuses on how the standard tax treaty definition applies. For the purposes of this Ruling, payments that are a 'royalty' within the standard tax treaty definition will also be royalties under the domestic tax law definition. This is because the inclusive domestic tax law definition of 'royalty' is broader than the standard tax treaty definition.[37]

46. By contrast, the standard tax treaty definition is exhaustive, but narrower in scope than the inclusive domestic definition and it is the former definition that will apply for the purposes of determining the extent to which the tax treaty limits the operation of section 128B.

47. The payer's obligation to withhold tax depends on whether the payment to the recipient is a royalty[38] under the relevant tax treaty, and the operation of section 12-280 of Schedule 1 to the *Taxation Administration Act 1953*. Under the standard tax treaty definition, royalties can be taxed in the country in which they arise by withholding tax, with a ceiling on the tax rate specified in the tax treaty.[39] Royalties are deemed to arise in Australia where the payer is a person who is a resident of Australia.[40] As the royalty arises in Australia, it is governed by Australian law and is a royalty to which the resident of the other country is beneficially entitled or owns.[41]

Domestic tax law definition of a royalty

48. Relevantly, for the purposes of section 128B, the term 'royalty' is defined in subsection 6(1) as:

> ***royalty*** or ***royalties*** includes any amount paid or credited, however described or computed, and whether the payment or credit is periodical or not, to the extent to which it is paid or credited, as the case may be, as consideration for:
>
> (a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trade mark, or other like property or right;
>
> …
>
> (c) the supply of scientific, technical, industrial or commercial knowledge or information;
>
> (d) the supply of any assistance that is ancillary and subsidiary to, and is furnished as a means of enabling the application or enjoyment of, any such property or right as is mentioned in paragraph (a), any such equipment as is mentioned in paragraph (b) or any such knowledge or information as is mentioned in paragraph (c);
>
> …
>
> (f) a total or partial forbearance in respect of:

[37] The domestic tax law definition of royalty is inclusive and covers amounts that would fall within the ordinary meaning of a royalty consistent with Australian case law.

[38] *Seven Network Limited v Commissioner of Taxation* [2014] FCA 1411 (*Seven Network Ltd – first instance*) at [6], per Bennett J.

[39] For example, paragraph 2 in Article 12 of the *Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, and Protocol* [2007] ATS 36 specifies that 'the tax so charged shall not exceed 5 per cent of the gross amount of the royalties'.

[40] For example, see paragraph 5 in Article 12 of the *Agreement between the Government of Australia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1990] ATS 45.

[41] *Seven Network Ltd – first instance* at [23], per Bennett J.

(i) the use of, or the granting of the right to use, any such property or right as is mentioned in paragraph (a) or any such equipment as is mentioned in paragraph (b);

(ii) the supply of any such knowledge or information as is mentioned in paragraph (c) or of any such assistance as is mentioned in paragraph (d);

…

Interaction between the domestic tax law definition of 'royalty' and the standard tax treaty definition of 'royalty'

49. Our view on interpreting Australia's tax treaties is set out in Taxation Ruling TR 2001/13 *Income tax: Interpreting Australia's Double Tax Agreements*. The interpretive approach is to begin with the text and have regard to the context, object and purpose of the tax treaty provisions.[42] In simple terms, tax treaties allocate taxing rights between the contracting states which are given effect by domestic law.

50. Treaties are incorporated into Australian domestic law by the Agreements Act.[43] To the extent of any inconsistency, the Agreements Act and the tax treaties listed[44] in it both prevail over other provisions of the ITAA 1936 (excluding Part IVA) and the ITAA 1997.[45] If the royalty article of a tax treaty does not capture a payment that is otherwise a royalty under the domestic tax law definition of 'royalty', section 128B does not apply.[46] In this way, the definition of 'royalties' contained in a tax treaty is given primacy over that in the ITAA 1936 by subsections 4(2) and 17A(5) of the Agreements Act.[47]

51. Where expressions used in a provision of a tax treaty are not defined, they have the meaning those expressions have under Australian law, where Australia is applying the tax treaty.

52. Ordinarily, in relation to the standard tax treaty definition, royalties are deemed to arise in Australia if the payer is a resident of Australia for tax purposes or a permanent establishment situated in Australia. As the royalty arises in Australia, it is governed by Australian law.[48] This applies equally to the domestic tax law definition of royalty.

53. The standard tax treaty definition of royalty sets out various specific IP rights and also extends to any 'other like property or right'. Therefore, all rights that can be characterised as IP rights are included in the standard tax treaty definition of royalties.[49] As such, for the purposes of the standard tax treaty definition, a royalty includes a payment that is consideration for[50]:

- the use of an IP right

[42] *IBM Corporation* at [10], per Bennett J, citing *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [38]. See also *A v Minister for Immigration & Ethnic Affairs* [1997] HCA 4; (1997) 142 ALR 331 at [350–352], per McHugh J.

[43] Many current agreements are given the force of law by section 5 of the Agreements Act, but not all. For example, the Singapore tax treaty is incorporated into Australian domestic law by virtue of section 7 of the Agreements Act.

[44] See section 5 of the Agreements Act.

[45] See subsection 4(2) of the Agreements Act; *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [11].

[46] See *Seven Network Ltd – first instance* at [7], per Bennett J.

[47] *Seven Network Ltd – first instance* at [8], per Bennett J. See also *IBM Corporation* at [7] and *Commissioner of Taxation v Seven Network Limited* [2016] FCAFC 70 (*Seven Network Limited*) at [8–16], per Kenny, Perram and Davies JJ.

[48] *Seven Network Ltd – first instance* at [23], per Bennett J.

[49] *IBM Corporation* at [11], per Bennett J.

[50] *IBM Corporation* at [13], per Bennett J.

- the right to use an IP right
- the supply of certain knowledge or information, and
- assistance furnished to enable the application or enjoyment of an IP right or certain knowledge or information.

Payment for services

54. Generally, a payment for services will not constitute the payment of a royalty. However, whether or not a payment for services constitutes a royalty depends on the nature and purpose of the software intermediation arrangement giving rise to the payment. For instance, a payment for services will constitute a royalty if those services are ancillary and subsidiary to and furnished as a means of enabling the application or enjoyment of, any property or right that is covered by the definition of royalty. Our view on the distinction between royalties and payments for services rendered is contained in IT 2660.[51]

Other like property or right

55. The standard tax treaty definition of royalty states (emphasis added):

> The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:
>
> a) the use of, or the right to use, any copyright, patent, design or model, plan, secret formula or process, trademark or **other like property or right** …

56. The standard tax treaty definition of royalty includes payments that are consideration for the use of, or the right to use, 'other like property or right'. The use of these words 'creates a genus of rights known as intellectual property rights'.[52] In *Seven Network Limited v Commissioner of Taxation* [2014] FCA 1411 (*Seven Network Ltd – first instance*), it was held that[53]:

> … "Other like right" means an intellectual property right of either country that has received the recognition of the domestic legal system of that country. In terms of copyright, this means the recognition of a "work" or "a subject matter other than a work" which has been given statutory protection.

57. The expression 'other like right' can extend the operation of a royalty to other categories of intellectual property – even those that were not recognised under the domestic law at the time the treaty was entered into – so long as they are within the nature or class of intellectual property rights.[54] It recognises that different legal systems may deal with IP rights differently and accommodates specific rights being property as IP rights under the domestic law of that country.[55] An IP right exists only to the extent it is created by the domestic law of the relevant territory, and includes all such rights that can be characterised as IP rights.[56] For example, see the discussion of 'technological protection measures' at paragraphs 138 to 146 of this Ruling.

58. A payment is characterised as a royalty under Australian law where a payment is made by an Australian resident to a foreign resident for the use of IP rights (or the right to

[51] See paragraphs 25 to 34 of IT 2660.
[52] *Seven Network Ltd – first instance* at [129], per Bennett J, citing *IBM Corporation*.
[53] *Seven Network Ltd – first instance* at [142], per Bennett J.
[54] *Seven Network Ltd – first instance* at [133], per Bennett J.
[55] Generally, *Seven Network Ltd – first instance* at [140], per Bennett J.
[56] *Seven Network Ltd – first instance* at [132], per Bennett J.

use an IP right). This is the case even if the right used or granted is not protected by IP law in the foreign country.[57]

Elements of a royalty

59. The standard tax treaty definition of royalty states relevantly (emphasis added):

> The term "royalties" in this Article means payments or credits, whether periodical or not, and **however described or computed**, **to the extent** to which they are made as **consideration for:**
>
> a) the **use** of, or right to **use** …

60. Paragraphs 62 to 77 of this Ruling discuss the components of the definition of 'royalties' as payments.

- however described or computed
- consideration
- for
- to the extent
- use.

61. Although the explanation (in paragraphs 63 to 65 of this Ruling) of the meaning of 'consideration' is separated from the explanation of the meaning of 'for', we recognise that a composite phrase should not be pulled apart into its constituent words, with the meaning given to each word divorced from its context.[58] Thus, the explanation of each term has been separated out for the benefit of the reader but reflects an interpretation that considers the terms in the context of each other.

However described or computed

62. The way a payment is described or computed does not determine whether it is properly characterised as a royalty.[59] The term 'described or computed' indicates that both the description and allocation of any payment under or pursuant to an agreement can be disregarded in some circumstances, for example, where the substance and legal form do not align. That is, regardless of how a payment is described or computed in any agreement between the parties, it is necessary to perform an objective assessment of what the payment is 'for' to properly determine its character. For example, a payment is properly characterised as a royalty to the extent it is consideration for the use of, or the right to use, copyright regardless of whether the agreement under which the payment is made states that the right to use the copyright is 'royalty-free'.

Consideration

63. The term 'consideration' in the royalty definition is not legislatively defined, but has various legal meanings, including meanings in contract law, conveyancing and revenue

---

[57] *Seven Network Ltd – first instance* at [130], per Bennett J.
[58] *Sea Shepherd Australia Limited v Commissioner of Taxation* [2013] FCAFC 68 at [34], per Gordon J, citing various authorities.
[59] See the definition of 'royalty or royalties' in subsection 6(1) and paragraph 15 of IT 2660. The High Court noted this in *PepsiCo* at [161], per Gordon, Edelman , Steward and Gleeson JJ and at [44] and [59], per Gageler CJ, Jagot and Beech-Jones JJ.

statutes.[60] In the law of contract, the term is associated with reciprocity, or a 'quid pro quo' between offer and acceptance. However, other meanings of 'consideration' are concerned with a 'moving cause' or a 'material cause' for the payment.[61] Where a word has more than one legal meaning, the appropriate meaning is governed by the context.[62]

64. In *Commissioner of Taxation v PepsiCo Inc* [2025] HCA 30 (*PepsiCo*), the High Court held that the term 'consideration' in the royalty definition took on a meaning that was broader than simple contract and extended to the 'purpose' of the payment or conveyance, or the 'basis' or 'condition' upon which it is made.[63]

65. In our view, the 'purpose, basis or condition' of the payment must be established objectively, and this does not represent a limitation of the principles in the stamp duty cases.

For

66. A payment is a royalty to the extent it is consideration 'for' one or more of the things contained in the royalty definition. However, how the parties to an agreement treat any right granted, or anything supplied, under that agreement is not determinative of whether it is a right of the copyright holder under the Copyright Act[64], nor is the way in which the parties describe a subject matter determinative of its legal character.[65]

67. As the High Court stated in *PepsiCo*[66]:

> … the word "for" connotes a causal connection between the making of a promise to pay or confer some other benefit and the receipt of a right to use the intellectual property.

68. Therefore, what a payment is 'for' is ultimately a question of fact.[67] The terms of any agreement, including whether any use of an IP right is an implied term of the contract[68], is the starting point, but other matters may also be relevant. These matters can include pricing and payment terms, valuation evidence about the pricing, and whether or not the parties are at arm's length or dealing at arm's length.[69]

69. The objective purpose, basis or condition of the payment must be determined by having regard to the circumstances of the payment, including the commercial purpose or objects to be secured by the contract, the relationship between the parties and the manner in which any rights granted will be used. Different payments or benefits under an arrangement may each have a different purpose, basis or condition. For instance, payments for 'copies' of software would typically be determined by list prices for the software ordered. On the other hand, payments which are not referable to any particular purchase order may simply be consideration for rights granted under the contract. The relevance of surrounding circumstances does not displace orthodox principles of

---

[60] See *Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW)* [1948] HCA 28; *Berry v Federal Commissioner of Taxation* [1953] HCA 70; *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)* [2015] FCA 1092; *Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd* [2005] HCA 3; *Commissioner of Taxation v Ludekens* [2013] FCAFC 100; *Commissioner of Taxation v Bogiatto* [2020] FCA 1139; *Commissioner of Taxation v Scully* [2000] HCA 6.
[61] *PepsiCo* at [160], per Gordon, Edelman, Steward and Gleeson JJ.
[62] *Re Bidie (decd); Bidie v General Accident Fire & Life Assurance Corp Ltd* [1949] Ch 121.
[63] *PepsiCo* at [160], per Gordon, Edelman, Steward and Gleeson JJ.
[64] *Seven Network Ltd – first instance* at [100], per Bennett J.
[65] *Seven Network Ltd – first instance* at [121], per Bennett J.
[66] At [161].
[67] *Oracle Corporation Australia Pty Ltd v Commissioner of Taxation* [2025] FCAFC 145 at [83].
[68] See *PepsiCo* at [141], per Gordon, Edelman, Steward and Gleeson JJ.
[69] See, generally *PepsiCo* at [174], per Gordon, Edelman, Steward and Gleeson JJ.

contractual interpretation, but recognises that, in appropriate cases, objective facts may inform what a payment is for.

70. For a royalty withholding tax liability to arise, the payment or credit must constitute income derived by the non-resident.[70] However, the standard tax treaty definition of royalty does not specify to whom the payment must be made. The payment need only be consideration 'for' one of the things specified in the royalty definition. For instance, the payment or credit does not need to be to the IP owner directly to 'come home' to them[71], rather it could be to an intermediary or related party on behalf of the IP owner.

71. Similarly, we consider that the word 'for' in the definition of royalty requires a connection or relationship between the consideration and one or more things in the definition. This has been expressed as requiring a 'causal connection'.[72] For example, in the context of copyright, it is necessary to identify a connection or relationship between the consideration and the use of, or right to use, the copyright for the consideration to be 'for' that use or right.

To the extent (apportionment)

72. If it is ascertained that a payment is 'consideration for' one or more things mentioned in the royalty definition, that payment will be a royalty. However, the words 'to the extent' anticipate that an apportionment of the payment may be necessary, for example, where the payment is also consideration for other things. Apportionment is to be done on a fair and reasonable basis considering all the relevant facts and circumstances of the particular case. That is, a payment is a royalty to at least some extent, even if it is also for other things that are not within the standard tax treaty definition of a royalty.

73. If an undissected amount is paid as consideration 'for' things, all of which are sufficiently connected with the things mentioned in the definition of royalty, the whole amount of the payment will be a royalty.

74. However, it does not necessarily follow that because an amount is paid as consideration for several things that it is paid only in part for each of them. For example, where any IP rights granted are inseparable, from a practical and business point of view, from any other things for which the consideration is paid, the payment may be entirely 'consideration for' the IP rights (see Example 1 of this Ruling).

IBM Corporation case

75. An example of where no apportionment was necessary is *IBM Corporation*. This case involved payments from an Australian resident company to US residents in respect of a software licence agreement. In consideration for all the rights granted under the agreement, the Australian resident paid to the US residents who held the rights, an agreed percentage of all the revenue derived from authorising, licensing and distributing IBM programs. The relevant definition of royalties was found in the US tax treaty. The Federal Court found it unnecessary to focus on the interactions between the tax treaty and the domestic tax law definition of 'royalty'.

76. Taking the whole of the agreement into account, the Federal Court found that the US residents granted such IP rights as were necessary for the use, marketing and

[70] See subsections 128B(2B) to(2C).
[71] See *PepsiCo* at [157], per Gordon, Edelman, Steward and Gleeson JJ citing *Commissioner of Taxes (SA) v Executor Trustee and Agency Company of South Australia Limited* [1938] HCA 69; 63 CLR 108 at [155]; *Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation* [1965] HCA 58; 114 CLR 314 at [318].
[72] *PepsiCo* at [161], per Gordon, Edelman, Steward and Gleeson JJ.

distribution of the relevant products by the resident company. However, the agreement was not simply a distribution agreement which conferred distribution rights independently of the grant of IP rights. All the amounts paid under the agreement for the bundle of rights were royalties under the US tax treaty, so no apportionment was necessary. As a consequence, royalty withholding tax was payable on all the amounts paid under the agreement.

Use

77. Our view is that the 'use' of an IP right covers all forms of use of the right or property short of an outright sale of the right.[73]

Relevance of OECD Commentary

78. Our view on interpreting Australia's tax treaties is set out in TR 2001/13, including the use of the OECD Commentaries as an aid to interpretation. The text of a treaty has primacy in the interpretative process and the OECD Commentaries should not be considered to the exclusion of the words in the treaty.[74] Nonetheless, the OECD Commentaries are an important guide on the interpretation and application of the OECD Model and will often need to be considered where the wording of a tax treaty is ambiguous.[75]

79. Paragraph 8.5 of the OECD Commentary on Article 12 considers where a person is granted the use of, or the right to use, property covered by the royalty definition, that they may be granted that right on an exclusive basis. The person who owns that property may agree not to supply or grant to anyone else that right. Payments made to secure such exclusivity fall under the definition of royalties, as they are payments 'of any kind received as a consideration for ... the right to use' the property.

80. Paragraph 10.1 of the OECD Commentary on Article 12 states that payments made solely in consideration for obtaining the exclusive distribution rights of a product or service in a given territory do not constitute royalties as they are not made in consideration for the use of, or the right to use, an element of property included in that definition.

81. In the context of computer software transactions, the OECD Commentary states the character of payments 'depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program'.[76] A transaction for the acquisition of partial rights in copyright[77]:

> … will represent a royalty where the consideration is for the granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright.

82. Paragraph 14 of the OECD Commentary on Article 12 contains guidance on transactions where copyright rights acquired are limited to those necessary to enable end-users to operate the program. It states that the rights are commonly for the acquisition of a 'program copy' and the rights transferred are specific to the nature of computer programs.

---

[73] See paragraph 16 of IT 2660.
[74] Paragraph 105A of TR 2001/13.
[75] Paragraphs 104 to 108 of TR 2001/13.
[76] Paragraph 12.2 of the OECD Commentary on Article 12.
[77] Paragraph 13.1 of the OECD Commentary on Article 12.

83. Paragraph 14.4 of the OECD Commentary on Article 12 contains an example that illustrates the limited circumstances in which payments for the right to distribute copies of a program will not constitute a royalty. It states:

> Arrangements between a software copyright holder and a distribution intermediary frequently will grant to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program. In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Thus, in a transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits in accordance with Article 7. This would be the case regardless of whether the copies being distributed are delivered on tangible media or are distributed electronically (without the distributor having the right to reproduce the software), or whether the software is subject to minor customisation for the purposes of its installation.

84. In the example in paragraph 14.4 of the OECD Commentary on Article 12, the payer acquires copies of a program but does not make that copy. The copy has therefore been made by someone else with the right to make that copy. The payer distributes the already existing copy. The example does not refer to a case where the distributor does not acquire a copy of the program.[78]

85. In our view, the conclusion that the payment from the distributor to the copyright holder is not a royalty is a consequence of what the payment is in truth 'consideration for'. That is, under the standard tax treaty definition, a royalty includes any payment to the extent it is made as consideration 'for' the use of, or the right to use, any copyright. The example in paragraph 14.4 of the OECD Commentary on Article 12 states that 'distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights'. The fact that the distributor does not use, and is not granted, the right to reproduce the software, or to use any other right in the software copyright, has the consequence that the consideration is not 'for' use of, or right to use, the copyright.

86. While the example contained in paragraph 14.4 of the OECD Commentary on Article 12 may apply to many software intermediation arrangements in practice, it cannot be relied upon where the substance of an agreement or arrangement differs from the facts in the example, such as arrangements where a distributor can independently make software available to download without further action by a software company. Furthermore, its relevance and application depends upon the relevant domestic law of the country (particularly copyright law) from which the payment was made. Accordingly, whether a cross-border payment from Australia under a software intermediation arrangement is a royalty depends on how Australian copyright law applies.

Forbearance

87. The definition of 'royalty' includes amounts paid or credited for a total or partial forbearance in respect of the use of, or right to use, any property or right referred to in the

[78] The example in paragraph 14.4 of the OECD Commentary on Article 12 also does not deal with the question of whether the distributor uses, or has the right to use, any other intellectual property rights of the software owner to carry out the software intermediation arrangement.

definition.[79] An example of this is contained in IT 2660[80] as being where a person who has acquired the right to use an industrial process or technology that is protected by patent or copyright, pays the owner of the process or technology not to make the process or technology available to any other person.

88. In *Commissioner of Taxation v Seven Network Limited* [2016] FCAFC 70 (*Seven Network Limited*), the Full Federal Court considered that payments made by Seven Network in relation to the broadcast of the Olympic Games were not royalties because there was no cinematograph film in which copyright subsisted under the Copyright Act.[81] The payments made by Seven Network were therefore not for 'forbearance' because they were merely for commercial exclusivity or contractual constraints that were unrelated to the use or supply of another element of the royalty definition.[82]

89. In the context of software intermediation arrangements, careful identification of the relevant copyright, or other like right, that is used, or in respect of which rights are granted is required. Once the property or right referred to in the royalty definition has been identified with precision, it is only then that it can be determined whether any payment is as consideration for the total or partial forbearance in respect of the use or supply of that property or right. For example, a software owner may grant a software intermediary the right to undertake all activities necessary to facilitate software to be made available to customers within Australia. Where the software intermediary puts in place control measures that are ACTPMs in the course of those activities, the entity will need to consider whether those ACTPMs amount to the copyright owner refraining from exercising its copyright or other like rights, and therefore whether any part of the payment is for that forbearance.

Part 2 – Copyright

Payment for any copyright

90. The standard tax treaty definition of royalty states (emphasis added):

> The term "royalties" in this Article means payments or credits, whether periodical or not, and however described or computed, to the extent to which they are made as consideration for:
>
> a) the use of, or the right to use, any **copyright** …

Copyright

91. The standard tax treaty definition of royalty uses the term 'copyright' in an undefined sense. Our view on the interpretation of undefined terms in a tax treaty is contained in TR 2001/13.[83]

92. Where a term in a tax treaty is not defined, it will take its meaning from the domestic law of the country applying the tax treaty.[84] The term 'copyright' is used in the standard tax treaty definition but is not defined in the tax treaty, nor is it defined in subsection 10(1) of the Copyright Act.

---

[79] As noted at paragraph 24 of IT 2660, this element of the royalty definition was added to remedy a defect exposed by the Victorian Supreme Court's decision in *Acktiebolaget Volvo v Federal Commissioner of Taxation* 78 ATC 4316; 8 ATR 747.
[80] Paragraph 24 of IT 2660.
[81] *Seven Network Limited*, at [75–79], per Kenny, Perram and Davies JJ.
[82] *Seven Network Limited*, at [97–99], per Kenny, Perram and Davies JJ.
[83] In particular, at paragraphs 63 to 71 of that Ruling.
[84] *Seven Network Limited* at [63], per Kenny, Perram and Davies JJ.

93. The 'general definitions' article within most tax treaties contains words similar to[85]:

> In the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State from time to time in force relating to the taxes to which this Agreement applies.

94. Under Australian law, the existence of copyright is determined by the language of the Copyright Act, given a liberal interpretation but not departing altogether from its language and principles.[86]

95. Copyright is a statutory right that subsists, and is determined and characterised, in accordance with the Copyright Act.[87] Copyright constitutes personal property.[88] The rights comprised in copyright are distinct from the thing in which copyright subsists.[89] For example, copyright in a literary work is different from ownership of an item in which that literary work subsists, such as a book.

96. The *Copyright (International Protection) Regulations 1969* provides for some Copyright Act protections to extend to works made or first published in specified countries.[90]

97. The Copyright Act recognises categories of subject matter that may be subject to copyright.[91] The term 'copyright' is a reference to any exclusive right of the copyright owner in a work[92], or subject-matter other than works[93], to which Australian copyright law applies. A 'computer program' is protected under the Copyright Act as a 'literary work'. 'Software' is the computer program or programs and other operational information used by a computer to operate or perform specific tasks, and may include other material separately protected by copyright, for example, text, graphics, moving images, music and sound recordings.

98. The owners of copyright in a computer program possess a number of exclusive rights to control the way in which their work is used. Refer to paragraphs 99 to 124 of this Ruling.

Copyright rights

99. The Copyright Act defines the exclusive rights of a copyright owner. The phrase 'an act comprised in the copyright' is defined in subsection 13(1) of the Copyright Act and is directed at those sections of the Act that specify a copyright owner's exclusive right to do various acts.[94] Under subsection 31(1) of the Copyright Act, the exclusive rights of the owner of copyright in a computer program include the right to do all or any of the following acts:

- reproduce the work in a material form[95]

---

[85] For example, see paragraph 3 in Article 3 of *Agreement between the Government of Australia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income* [1990] ATS 45.
[86] *Computer Edge Pty Ltd v Apple Computer Inc* [1986] HCA 19; 161 CLR 171 at [188], per Gibbs CJ.
[87] *Seven Network Ltd – first instance* at [46], per Bennett J.
[88] Subsection 196(1) of the Copyright Act.
[89] See *Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation* [1970] HCA 36; 121 CLR 154 at [165–170], per Windeyer J.
[90] Subregulation 4(1) of the *Copyright (International Protection) Regulations 1969*.
[91] *Seven Network Ltd* at [46], per Bennett J.
[92] In section 10 of the Copyright Act, the definition of 'work' means a 'literary, dramatic, musical or artistic work'.
[93] See Part IV of the Copyright Act.
[94] *Take-Two Interactive Software, Inc v Anderson (No 2)* [2024] FCA 1459 at [71], per Nicholas J.
[95] Subparagraph 31(1)(a)(i) of the Copyright Act.

- publish the work[96]
- perform the work in public[97]
- communicate the work to the public[98]
- make an adaptation of the work[99]
- enter into a commercial rental arrangement[100], and
- authorise a person to do an act.[101]

100. The Copyright Act also protects the right of copyright owners (and exclusive licensees) to control access to a work through technological protection measures by providing legal remedies against the circumvention of such measures (see paragraphs 138 to 146 of this Ruling).

101. Current software intermediation arrangements now commonly involve the things mentioned in paragraphs 99 and 100 of this Ruling. This is the case whether or not the contractual agreements between the parties (who are often related) explicitly refer to these rights. Payments by software distributors to the extent that they are for the use of, or right to use, any copyright rights will be royalties. These rights are explained further in paragraphs 102 to 133 of this Ruling.

Reproduction right

102. An exclusive right in relation to a copyright work is the right to reproduce the work in a material form.[102] This right includes reproducing a substantial part of the work.[103] The concept of 'reproduction' in subsection 31(1) of the Copyright Act connotes the copying of a work in which copyright subsists. For example, copying software onto a hard drive or an external storage device constitutes reproduction of that work.[104]

103. Software acquired under licence is reproduced for the purposes of subparagraph 31(1)(a)(i) of the Copyright Act when it is copied as part of the technical process of installing it on a computer or device. Reproduction also occurs when software is downloaded onto a computer or device, because this results in a copy of the software being stored on the hard drive. Reproduction may similarly occur when a software component is downloaded onto a computer or device, such as to enable 'offline' functionality or to enhance the 'online' user experience.

[96] Subparagraph 31(1)(a)(ii) of the Copyright Act. A work will be taken to have been 'published' if reproductions of the work have been supplied (whether by sale or otherwise) to the public (section 29 of the Copyright Act).
[97] Subparagraph 31(1)(a)(iii) of the Copyright Act. This may include, for example, demonstrating software in a public forum.
[98] Subparagraph 31(1)(a)(iv) of the Copyright Act. 'Communicate' is defined in the Copyright Act to mean 'make available online or electronically transmit' (subsection 10(1)).
[99] Subparagraph 31(1)(a)(vi) of the Copyright Act.
[100] Paragraph 31(1)(d) of the Copyright Act.
[101] Subsection 13(2) of the Copyright Act.
[102] Subparagraph 31(1)(a)(i) of the Copyright Act. For the purposes of this Ruling, this right is also referred to as the 'reproduction right'.
[103] Paragraph 14(1)(b) of the Copyright Act.
[104] Subsection 21(1A) of the Copyright Act.

Communicate the work to the public

104. Another exclusive right in relation to a copyright work is the right to communicate the work to the public.[105] The exclusive right to communicate a copyright work to the public covers 2 classes of acts.[106]

105. The first class of act involves electronically transmitting the work, whether that transmission occurs over a path, or a combination of paths, provided by a material substance or otherwise. For example, a communication over the internet may involve transmission over copper wire and optic fibre cables.

106. The second class of act involves making a copyright work available online, irrespective of whether it is electronically transmitted. This does not require that there be an actual communication of the work in the ordinary meaning of that word.[107] A communication may occur in the relevant sense when software is made available for download or for use via a remote server (for example, in the 'cloud' or as 'software-as-a-service'), without being downloaded in its entirety onto the end-user's computer or device.

Determining the content of the communication

107. A communication is taken to have been made by the person responsible for determining the content of the communication.[108] This was illustrated in *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 (*Roadshow*)[109], which involved determining who was responsible for making available online infringing films using BitTorrent software. The Court held that each BitTorrent user who had installed the software on their computer, so as to respond to a request for the film, was responsible for the communication.[110]

To the public

108. The Copyright Act defines 'to the public' as to the public within or outside Australia.[111] The phrase 'to the public' is broader than the phrase 'in public'[112] – the place where the communication occurs is irrelevant.[113] That is, the communication to individual members of the public in a private or domestic setting is nevertheless a communication to the public. We think it is arguable that where the communication of a copyright work occurs in a commercial setting to customers with registered accounts, it is appropriately seen as being a communication to a section of the public.

'Software-as-a-service' – communication

109. In a 'software-as-a-service' arrangement, the software may be located on one or more overseas servers, with end-users in Australia accessing the software online via the internet. We think the software is made available online, notwithstanding the fact that end-

---

[105] Subparagraph 31(1)(a)(iv*)* of the Copyright Act.
[106] See the definitions of 'communicate' and 'to the public' in subsection 10(1) of the Copyright Act. The High Court has held that the expression 'to the public' can encompass a communication to a single person: *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* [1997] HCA 41 (*Music on hold case*), per Dawson and Gaudron JJ.
[107] *Roadshow Films Pty Limited v iiNet Limited* [2011] FCAFC 23 (*Roadshow*) at [661].
[108] Subsection 22(6) of the Copyright Act.
[109] Affirmed in *Roadshow Films Pty Ltd v iiNet Limited* [2012] HCA 16.
[110] *Pokémon Company International, Inc. v Redbubble Ltd* [2017] FCA 1541 at [48], per Pagone J citing *Roadshow* at [337], per Jagot J.
[111] Subsection 10(1) of the Copyright Act.
[112] For example, the phrase 'in public' is used in subparagraph 31(1)(a)(iii) of the Copyright Act.
[113] *Music on hold case* 191 CLR 140 at [155], per Dawson and Gaudron JJ.

users may obtain by electronic transmission only some parts of the software that are necessary for it to function, or the software may be executed on the remote server without the software being reproduced in its entirety on the end-user's computer. In either case, access to or enjoyment of the function of the software by the end-user is a consequence of the software being made available online.

110. We think that software may be made available online by more than one person under a software-as-a-service arrangement. A distributor may be responsible for determining, alone or together with the IP owner, the content of the communication where it enters into an agreement with the end-user that specifies the content, such as particular software or software features, that will be made available to an end-user, and the terms on which access will be provided.

111. An entity that controls the server hosting the software may also be a person responsible for determining the content of the communication. This could occur where the entity stores the software on its server (or a server operated on its behalf), maintains the server's active operation, or either connects the server to the internet or takes no steps to disconnect it.[114]

Make an adaptation

112. An adaptation includes an adaptation of a substantial part of the work.[115] Whether an adaptation has occurred is a question of fact and degree, depending on the circumstances of each case. Whether a part is 'substantial' depends on the quality of that part, rather than its quantity.[116] Attention is directed to the significance or importance of the part compared to the whole of the work. In the context of computer code, this involves ascertaining whether the part is essential or material in the context of the work as a whole. Whether features are 'essential or material' is determined by the originality of the part, rather than whether it is essential to the operation of the computer code.[117] There should be an objective similarity between the original work and the purported adaptation of it.[118]

113. In relation to a literary work that is a computer program, an 'adaptation' means a version of the work (whether or not in the language, code or notation in which the work was originally expressed) not being a reproduction of the work.[119]

114. The Explanatory Memorandum to the Copyright Amendment Bill 1984, which introduced the change to the definition of an 'adaptation' for computer programs, states that the definition is intended to cover translations either way between 'source code' and 'machine code' or 'object code'. It is also intended to cover situations where a process, such as compilation followed by de-compilation, results in differences so substantial that the final product is derived from the original but is not a 'reproduction'.[120] The High Court held that Parliament did not intend the word 'version' to cover a situation where, although the functionality of a computer program was copied, original code had been written to perform that function.[121] Consistent with the fundamental principle that copyright protects

[114] See *Roadshow* at [166], per Emmett J, at [338], per Jagot J, and at [685], per Nicholas J.
[115] Paragraph 14(1)(a) of the Copyright Act.
[116] *Sheldon v Metrokane* [2004] FCA 19 (*Sheldon*) at [32], per Conti J, citing Lord Pearce in *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 WLR 273 at [293].
[117] *Hytera Communications Corporation Ltd v Motorola Solutions Inc* [2024] FCAFC 168 at [789–792], per Beach, O'Bryan and Rofe JJ.
[118] *Sheldon* at [32], per Conti J, citing Lockhart and Fitzgerald JJ in *Zeccola v Universal City Studios Inc* (1982) 46 ALR 189 at [193].
[119] Paragraph (ba) of the definition of 'adaptation' in subsection 10(1) of the Copyright Act.
[120] Paragraphs 13 and 14 of the Explanatory Memorandum to the Copyright Amendment Bill 1984.
[121] *Data Access v Powerflex Services* [1999] HCA 49 at [109], per Gleeson CJ, McHugh, Gummow and Hayne JJ.

expression not ideas, the focus is on the copying of the code rather than copying of the idea or function underlying the code.[122]

Authorisation

115. The exclusive right to do an act in relation to a work includes the exclusive right to authorise a person to do that act in relation to that work.[123] Where a person holds a licence from a copyright owner to authorise others to do those exclusive acts, that person is entitled to exercise a right that is the exclusive right of the copyright owner.

116. The term 'authorize' is not defined in the Copyright Act, but is used in subsections 13(2), 36(1A) and 184(1A) of that Act. Notwithstanding the authorisation of an act comprised in copyright is an exclusive right of the copyright owner, the concept of authorisation has arisen most commonly in infringement proceedings. For example, the High Court in *University of NSW v Moorhouse* [1975] HCA 26 (*Moorhouse*) noted that authorise 'has been held … to have its dictionary meaning of "sanction, approve, countenance"'.[124] It has also been held to mean 'permit' and applies both to an express and an implied permission or invitation.[125]

117. In *Real Estate Tool Box Pty Ltd v Campaigntrack Pty Ltd* [2023] HCA 38 (*Campaigntrack*), the Full Court of the High Court affirmed the circumstances previously identified as relevant to 'authorisation' in an infringement context, but emphasised that whether involvement was sufficient to amount to authorisation depended upon a close focus upon all the facts, not a deconstruction of the dictionary definitions of notions such as 'sanction', 'approve' and 'countenance'.[126] Nonetheless, it is not clear how the courts would apply principles from the infringement cases, or to that extent, to determine the scope of the authorisation right.

Matters relevant to determining authorisation

118. In the context of infringement, the courts have identified a number of propositions relevant to whether conduct amounts to 'authorisation' of an act of copyright. There appears to be no direct authority on the relevance of those propositions outside the infringement context. Nonetheless, section 13 of the Copyright Act does not, on its face, distinguish between the meaning of 'authorisation' in infringement and non-infringement contexts, and the extent to which the ordinary meaning of 'authorisation' has been considered in a copyright infringement context may inform the meaning of the term in a non-infringement context.

119. In *Moorhouse*, Gibbs J sets out 3 propositions about what constitutes an 'authorisation' of an act that infringes Australian copyright[127]:

- the person must have some power to prevent the infringing act

[122] *Data Access v Powerflex Services* [1999] HCA 49 at [110], per Gleeson CJ, McHugh, Gummow and Hayne JJ.
[123] Subsection 13(2) of the Copyright Act.
[124] 133 CLR 1 at [12], per Gibbs J.
[125] *Australasian Performing Right Association Limited v Metro on George Pty Limited* [2004] FCA 1123 at [16], per Bennett J.
[126] *Real Estate Tool Box Pty Ltd v Campaigntrack Pty Ltd* [2023] HCA 38 (*Campaigntrack)* [2023] HCA 38 at [65], per Gageler CJ and Gordon, Edelman, Steward and Jagot JJ.
[127] 133 CLR 1 at [12–13].

- authorisation or permission to undertake the act may be inferred from a person's conduct, including inactivity or indifference to the infringement, even in the absence of formal or expression permission
- mere inactivity will not constitute authorisation if the person 'neither knew nor had reason to suspect that the act might be done'.

120. *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 illustrates that authorisation can occur when a person facilitates, or fails to prevent, another person from doing an act comprised in the copyright in a work without the licence of the owner of the copyright. The Court held that a provider of facilities for communication may 'authorize' any acts carried out using those facilities.[128] The power to prevent an act comprised in a copyright work includes the power not to facilitate the doing of that act. This includes withholding or withdrawing facilities that enable the act to occur.[129]

121. In *Campaigntrack,* the High Court stated that 'indifference' as to the rights of the copyright owner has been used in cases as a strong guide of whether authorisation (of the infringing action) exists.[130] Both the quality of the indifference and the nature of the relationship between infringer and the alleged authoriser must justify concluding that the alleged authoriser's involvement in the infringement constituted authorisation of the infringing activity.[131] However, the term 'indifference', like 'sanction, approve, countenance', is merely a description of the type of conduct that may constitute 'authorisation' of the relevant conduct. The description cannot be treated as conclusive and there must be sufficient involvement of the alleged authoriser to amount to authorisation.

122. Subsection 36(1A) of the Copyright Act contains various matters in determining whether a person has infringed copyright by authorising the doing in Australia of any act comprised in the copyright in a work without the licence of the owner of the copyright. That subsection was introduced to provide a degree of legislative certainty about the steps that should be taken in order to avoid liability for authorising infringements'.[132]

123. By contrast, subsection 13(2) of the Copyright Act specifies that the right to do an act in relation to a work includes the exclusive right to authorise a person to do that act. Because 'authorisation' is a expressly included in the acts comprised in the copyright, infringement by authorisation may arise both directly and indirectly in the statutory description of infringement: expressly in subsection 36(1), and indirectly through the expression 'any act comprised in the copyright'.[133] Thus, an exercise of a right to do an act comprised in copyright will arise where any act that that would infringe on a right the owner of the copyright has the exclusive right to do is authorised to be done.

Inclusion of authorisation in the right to do an act comprised in copyright

124. The recognition that the authorisation right forms part of the exclusive rights of the copyright owner, capable of being used or granted, has several implications:

- The authorisation of any exclusive right of a copyright owner is sufficient to constitute an exercise of the authorisation right. It is immaterial whether the

[128] *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 at [39], per Branson J.
[129] *Cooper v Universal Music Australia Pty Ltd* [2006] FCAFC 187 at [41], per Branson J.
[130] *Campaigntrack* at [66], per Gageler CJ and Gordon, Edelman, Steward and Jagot JJ.
[131] *Campaigntrack* at [77], per Gageler CJ and Gordon, Edelman, Steward and Jagot JJ.
[132] Revised Explanatory Memorandum for the Copyright Amendment (Digital Agenda) Bill 2000, Notes on Clauses at paragraph 57.
[133] *WEA International Inc. & Anor v Hanimex Corporation Ltd* [1987] FCA 571 at [25].

act authorised would amount to infringement or is specifically excluded from infringement.

- For example, a distributor may authorise an end-user to make a temporary reproduction of a copyright work as an incidental and necessary part of the technical process of using the work. Although such temporary reproductions may not infringe copyright under Australian domestic law, the right to reproduce is nevertheless being authorised.[134]
- A person may authorise an act without themselves having the right to do the act being authorised. For example, a person may have the right to authorise the reproduction of a copyright work without having the right to reproduce the work themselves (see Example 1 of this Ruling).

Example 3 – payment for authorising acts comprised in a copyright work

125. *SoftCo owns the copyright in computer programs within a suite of accounting software. AusCo, its Australian subsidiary, distributes the software to Australian customers. Customers cannot use the software unless the software files are first copied onto the customer's device and installed.*

126. *Under its agreement with SoftCo, AusCo may distribute the software in Australia and acquires only those intellectual property rights as are necessary to do so. SoftCo is paid a monthly fee by AusCo.*

127. *AusCo distributes the software by giving customers the credentials or instructions needed to download and install the software. Once installed, the customer's use of the software is governed by a licence agreement entered into during the installation.*

128. *The right to reproduce the software files, and the right to authorise others to do so, is an exclusive right of copyright under Australian law. By agreeing to supply the software to its customers and giving its customers the means to download and install the software, AusCo authorises customers to reproduce the software files. That authorisation is a use of copyright within the meaning of the royalty definition. SoftCo's agreement with AusCo gives AusCo the right to grant that authorisation.*

129. *That conclusion is not affected by whether AusCo and SoftCo are associated entities, the rights in copyright are express or implied, whether a licence key is required to download or install the software, or who provides it, how the fee is calculated, whether the end-user licence agreement is between the customer and AusCo or SoftCo, or how the software is hosted or supplied to customers (although any hosting services performed may require some apportionment, unless they fall within paragraph 6(1)(d) of the domestic tax law definition of royalty).*

130. *The fee paid by AusCo to SoftCo is consideration for the use of, or right to use, the copyright, and is a royalty. Apportionment may need to be considered.*

Software-as-a-service – authorising an act

131. In our view, a payment will be characterised as a royalty when it is consideration either for the 'use' of the right to authorise others (regardless of whether the right is granted expressly) or the 'grant' of that right (regardless of whether the right is used).

---

[134] See section 43B of the Copyright Act.

132. A payment is for the 'use' of the authorisation right only to the extent that the taxpayer has in fact authorised another person to do an act comprised in copyright.

133. In a software-as-a-service context, software is typically hosted on a local or offshore server and accessed by Australian end-users via the internet. Where a local entity undertakes to provide the service to end-users, the arrangement may involve either communication of the software to the public, or the authorisation of an act comprised in copyright. Depending on the facts, this may include the reproduction of software located on offshore servers or the communication of that software, by making it available online. Arrangements allowing for the provision of software-as-a-service may also involve the grant or use of other relevant rights.

Part 3 – Non-copyright rights

134. The focus of this Ruling is on payments for the use of, or right to use, copyright or other like property or right. It falls for consideration whether such a payment is for copyright, or alternatively, as an 'other like property or right'.

135. As discussed at paragraphs 16(b) and 115 to 133 of this Ruling, we are of the view that the right to authorise acts that are themselves the exclusive right of the copyright owner to do is itself an exclusive copyright right. However, a right may itself constitute an 'other like property or right' where it entitles a distributor to exploit the copyright and other IP rights in the computer program when distributing licences to use computer programs to end-users.

136. Software intermediation arrangements also generally contain other rights and obligations which indicate the payments are properly characterised as a royalty (at least to an extent). These rights and obligations enable the distributor to fulfil its role in the software arrangements and often include:

- the use of, or the right to use, other intellectual property granted (for example, trademarks, patents or confidential information)
- know-how, technical or commercial information supplied to the distributor, and
- services ancillary to the use and enjoyment of any such rights or property supplied.

137. The proper characterisation of the payments described depends on the specific facts and circumstances of each software intermediation arrangement. Our views on characterising for royalties are set out in IT 2660.

Technological protection measures

138. The Copyright Act permits copyright owners (and exclusive licensees) a statutory cause of action in relation to the circumvention of a device, product, technology or component (including a computer program) that constitutes a 'technological protection

measure'[135] (TPM), by providing legal remedies against the circumvention of those measures.[136] There are 2 main forms of TPMs, being:

- access control technological protection measures[137], which control access to works or other subject-matter, and
- copyright TPMs[138], which control the exercise of acts in the copyright.

139. The Copyright Act permits copyright owners (and exclusive licensees) to control access to a work by providing a statutory cause of action in relation to the circumvention of ACTPMs without permission.[139] Under the Copyright Act, a copyright owner, or an exclusive licensee, may bring an action in respect of the:

- circumvention of an ACTPM[140], or
- supply of TPM circumvention devices or services.[141]

140. Exceptions exist in respect of each of these causes of actions.[142]

141. The causes of action in relation to TPMs are not for copyright infringement, but rather for statutory torts. They are contained in Division 2A of Part V of the Copyright Act, which also sets out the remedies available for each cause of action.

142. The Explanatory Memorandum to the Copyright Amendment Bill 2006 (Explanatory Memorandum), which introduced the definition of ACTPM, explains that where access to a work, or other subject-matter, is controlled in more than one way, that each control will constitute a separate ACTPM if each type of control could be circumvented independently. If an access control has different functions, but each function cannot be circumvented independently, that would be only one ACTPM.[143] In the context of software intermediation arrangements, an ACTPM may include any computer program that control access to the software, such as authentication programs.

143. The Explanatory Memorandum also indicates that an ACTPM can include a control that blocks the initial acquisition of a computer program.[144] In the context of online software intermediation, we consider that various controls that block the initial acquisition or activation of software may constitute ACTPMs. This includes controls that prevent, inhibit or restrict the functionality of software, or users from acquiring or accessing the software, until certain conditions are satisfied, such as requiring:

- the creation of an online user account to download or activate the software

---

[135] The definition of 'technological protection measure' is contained in subsection 10(1) of the Copyright Act.
[136] Sections 116AN and 132APC of the Copyright Act.
[137] The definition of 'access control technological protection measure' is contained in subsection 10(1) of the Copyright Act.
[138] This explanation uses the term 'copyright TPMs' in reference to the form of TPM that falls within paragraph (b) of the definition of 'technological protection measure' in subsection 10(1) of the Copyright Act because, by virtue of sub-paragraph (b)(ii) of that definition, this form of TPM must prevent, inhibit or restrict the doing of an act comprised in the copyright.
[139] Section 116AN of the Copyright Act.
[140] Subsection 116AN(1) of the Copyright Act.
[141] Subsections 116AO(1) and 116AP(1) of the Copyright Act.
[142] Subsections 116AN(2) to (9), 116AO(2) to (6) and 116AP(2) to (6) of the Copyright Act and section 40 of the *Copyright Regulations 2017*.
[143] See paragraph 12.1 of the Explanatory Memorandum.
[144] Paragraph 12.12 of the Explanatory Memorandum explains why such controls are not properly recognised as geographic market segmentation TPMs. See subparagraph (b)(iii) of the definition of 'technological protection measure' in subsection 10(1) of the Copyright Act, which excludes a device, product, technology or component that controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of work or other subject-matter acquired outside Australia.

- users to input payment details, such as a credit card, before access to the software is made available
- the use of a licence key, activation code, or other form of credentials.

144. In our view, the causes of action in the Copyright Act in relation to the circumvention of TPMs reflect a recognition by the Australian domestic legal system that the use and control of TPMs, are within the genus of IP. Accordingly, the use of, or the right to use, TPMs fall within the standard tax treaty definition of 'royalties'.

145. Furthermore, the role of a distributor in the granting of access to computer programs may be indicative of their use of IP rights, including the authorisation of acts comprised in the copyright. For example, a distributor who issues licence keys to end-users is indicative of a relationship between the distributor and copyright owner – who may also have made the program available for download – that may entail sufficient involvement by the distributor to amount to authorisation of acts comprised in the copyright (see paragraphs 115 to 123 of this Ruling).

146. Under the meaning of copyright TPMs, the act that is prevented, hindered or restricted does not need to be one that may amount to an infringement of copyright. As stated by Nicholas J in *Take-Two Interactive Software, Inc v Anderson* (No 2) [2024] FCA 1459 at [72], 'it is not necessary to show that the prevented, hindered or restricted act would, if performed, be unlicensed or a breach of licence'. In our view, the implementation of controls by a distributor that inhibit or restrict a customer's ability to access software may fall within the scope of a copyright TPM. For example, where a distributor implements controls that restricts a customer's access to software unless certain conditions are met, those controls may fall within the scope of a copyright TPM.

Part 4 – Embedded software

147. Software may be sold under a contract for the sale of a complete product, comprising both a tangible good and software, without being unbundled or separately priced. In this situation, the Ruling refers to the software being 'embedded' in the tangible good.

148. The characterisation of the sale of software embedded in a tangible good is generally analogous to the sale of software on any physical carrying media. If an Australian distributor did not acquire or use any copyright rights and the software embedded in the tangible good only facilitated the operation of that tangible good, generally the sale proceeds would not contain a royalty. For example, any proceeds from the sale to a distributor of mobile handsets which are acquired pre-installed with operating system software is generally not a royalty.

149. Payments by an Australian distributor of a tangible good embedded with software may constitute a royalty if the Australian distributor uses, or is granted the right to use, copyright or another IP right in the software. For example, if the Australian distributor is granted the right to modify or adapt the embedded software, this may involve the grant or use of a copyright right (refer to paragraphs 112 to 114 of this Ruling). In this situation, apportionment of any payment may be necessary to reflect the amount paid for the use or grant of the copyright right rather than the acquisition of the tangible good.

References

Previous draft:

TR 2021/D4; TR 2024/D1

Related rulings and determinations:

IT 2660; TR 2001/13; TR 2008/7

Previous rulings and determinations:

TR 93/12

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 6(1)(a)
- ITAA 1936 6(1)(c)
- ITAA 1936 6(1)(d)
- ITAA 1936 6(1)(f)(i)
- ITAA 1936 6(1)(f)(ii)
- ITAA 1936 128B
- ITAA 1936 128B(2B)
- ITAA 1936 128B(2C)
- ITAA 1936 128B(5A)
- ITAA 1936 Pt III, former Div 13
- ITAA 1936 Pt IVA
- ITAA 1997 6-5
- ITAA 1997 15-20
- ITAA 1997 70-10(1)
- ITAA 1997 995-1(1)
- ITAA 1997 Div 815
- TAA 1953 Sch 1 12-280
- TAA 1953 Sch 1 12-285
- Copyright Act 1968 10(1)
- Copyright Act 1968 13
- Copyright Act 1968 13(1)
- Copyright Act 1968 13(2)
- Copyright Act 1968 14(1)(a)
- Copyright Act 1968 14(1)(b)
- Copyright Act 1968 21(1A)
- Copyright Act 1968 22(6)
- Copyright Act 1968 29
- Copyright Act 1968 31(1)
- Copyright Act 1968 31(1)(a)(i)
- Copyright Act 1968 31(1)(a)(ii)
- Copyright Act 1968 31(1)(a)(iii)
- Copyright Act 1968 31(1)(a)(iv)
- Copyright Act 1968 31(1)(a)(vi)
- Copyright Act 1968 31(1)(d)
- Copyright Act 1968 36(1)
- Copyright Act 1968 36(1A)
- Copyright Act 1968 43B
- Copyright Act 1968 47AB
- Copyright Act 1968 116AN
- Copyright Act 1968 116AN(1)
- Copyright Act 1968 116AN(2)
- Copyright Act 1968 116AN(3)
- Copyright Act 1968 116AN(4)
- Copyright Act 1968 116AN(5)
- Copyright Act 1968 116AN(6)
- Copyright Act 1968 116AN(7)
- Copyright Act 1968 116AN(8)
- Copyright Act 1968 116AN(9)
- Copyright Act 1968 116AO(1)
- Copyright Act 1968 116AO(2)
- Copyright Act 1968 116AO(3)
- Copyright Act 1968 116AO(4)
- Copyright Act 1968 116AO(5)
- Copyright Act 1968 116AO(6)
- Copyright Act 1968 116AP(1)
- Copyright Act 1968 116AP(2)
- Copyright Act 1968 116AP(3)
- Copyright Act 1968 116AP(4)
- Copyright Act 1968 116AP(5)
- Copyright Act 1968 116AP(6)
- Copyright Act 1968 132APC
- Copyright Act 1968 184(1A)
- Copyright Act 1968 196(1)
- Copyright Act 1968 Pt IV
- Copyright Act 1968 Pt V, Div 2A
- Copyright Regulations 2017 40
- Copyright (International Protection) Regulations 1969 4(1)
- International Tax Agreements Act 1953 4(2)
- International Tax Agreements Act 1953 5
- International Tax Agreements Act 1953 7
- International Tax Agreements Act 1953 17A(5)

Cases relied on:

A v Minister for Immigration & Ethnic Affairs [1997] HCA 4; 190 CLR 225; 71 ALJR 381; 142 ALR 331; [1998] INLR 1; 2 BHRC 143

Acktiebolaget Volvo v Federal Commissioner of Taxation 78 ATC 4316; 8 ATR 747

Archibald Howie Pty Ltd v Commissioner of Stamp Duties (NSW) [1948] HCA 28; 77 CLR 143; [1948] 2 ALR 489; 49 SR (NSW) 112; 66 WN (NSW) 51; 22 ALJR 331

Arthur Murray (NSW) Pty Ltd v Federal Commissioner of Taxation [1965] HCA 58; 114 CLR 314; 39 ALJR 262; 9 AITR 673; 14 ATD 98

Australasian Performing Right Association Limited v Metro on

George Pty Limited [2004] FCA 1123; 64 IPR 57

Berry v Federal Commissioner of Taxation [1953] HCA 70; 89 CLR 653; 10 ATD 262; 27 ALJR 660

Chief Commissioner of State Revenue v Dick Smith Electronics Holdings Pty Ltd [2005] HCA 3; 221 CLR 496; 213 ALR 230; 2005 ATC 4052; 58 ATR 241

Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4) [2015] FCA 1092; 2015 ATC 20-535; 102 ATR 13

Commissioner of Taxation v Bogiatto [2020] FCA 1139; 2020 ATC 20-757; 112 ATR 1

Commissioner of Taxation v Esso Australia Resources Pty Ltd [2024] FCAFC 151; 306 FCR 586; 2024 ATC 20-933

Commissioner of Taxes (SA) v Executor Trustee and Agency Company of South Australia Limited [1938] HCA 69; 63 CLR 108; 12 ALJR 407; 1 AITR 416; 5 ATD 98

Commissioner of Taxation v Ludekens [2013] FCAFC 100; 214 FCR 149; 2013 ATC 20-415; 93 ATR 33

Commissioner of Taxation v PepsiCo Inc [2025] HCA 30; (2025) 424 ALR 294; (2025) 99 ALJR 1211.

Commissioner of Taxation v Scully [2000] HCA 6; 201 CLR 148; 169 ALR 459; 2000 ATC 4111; 43 ATR 718

Commissioner of Taxation v Seven Network Limited [2016] FCAFC 70; 241 FCR 1; 103 ATR 253; 2016 ATC 20-570

Cooper v Universal Music Australia Pty Ltd [2006] FCAFC 187; 156 FCR 380

Computer Edge Pty Ltd v Apple Computer Inc [1986] HCA 19; 161 CLR 171; 60 ALJR 313; 65 ALR 33; 6 IPR 1

Data Access v Powerflex Services [1999] HCA 49; 202 CLR 1

Facchini v Bryson (1952) 1 TLR 1386

Hytera Communications Corporation Ltd v Motorola Solutions Inc [2024] FCAFC 168; 308 FCR 68

International Business Machines Corporation v Commissioner of Taxation [2011] FCA 335; 91 IPR 120; 2011 ATC 20-256; 83 ATR 32

Ladbroke (Football) Ltd v William Hill (Football) Ltd [1964] 1 All ER 465; 1 WLR 273

McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation [2005] FCAFC 67; 219 ALR 346; 142 FCR 134; 2005 ATC 4398; 59 ATR 358

Oracle Corporation Australia Pty Ltd v Commissioner of Taxation [2025] FCAFC 145; 2025 ATC 20-975

Pacific Film Laboratories Pty Ltd v Federal Commissioner of Taxation [1970] HCA 36; 121 CLR 154; 44 ALJR 376; 1 ATR 771; 70 ATC 4104

Pokémon Company International, Inc. v Redbubble Ltd [2017] FCA 1541; 351 ALR 676; 129 IPR 1

Radaich v Smith [1959] HCA 45; 101 CLR 209; 33 ALJR 214; [1959] ALR 1253; 69 WN (NSW) 97

Real Estate Tool Box Pty Ltd v Campaigntrack Pty Ltd [2023] HCA 38; 278 CLR 240; 415 ALR 332

Re Bidie (decd); Bidie v General Accident Fire & Life Assurance Corp Ltd [1949] Ch 121; 65 TLR 25; [1948] 2 All ER 995

Roadshow Films Pty Limited v iiNet Limited [2011] FCAFC 23; 275 ALR 1; 194 FCR 285

Roadshow Films Pty Ltd v iiNet Limited [2012] HCA 16; 248 CLR 42; 86 ALJR 494; 286 ALR 466

Sea Shepherd Australia Limited v Commissioner of Taxation [2013] FCAFC 68; 212 FCR 252; 2013 ATC 20-397; 92 ATR 836

Seven Network Limited v Commissioner of Taxation [2014] FCA 1411; 2014 ATC 20-482; 100 ATR 353

Sheldon v Metrokane [2004] FCA 19; 135 FCR 34

Take-Two Interactive Software, Inc v Anderson (No 2) [2024] FCA 1459

Telstra Corporation Ltd v Australasian Performing Right Association Ltd [1997] HCA 41; 191 CLR 140; 71 ALJR 1312; 146 ALR 649; 38 IPR 294; [1997] AIPC 91-344

University of NSW v Moorhouse [1975] HCA 26; 133 CLR 1; 49 ALJR 267; 6 ALR 193; [1976] RPC 151

WEA International Inc. & Anor v Hanimex Corporation Ltd [1987] FCA 571; 17 FCR 274; 77 ALR 456

Zeccola v Universal City Studios Inc (1982) 46 ALR 189; 67 FLR 225; AIPC 90-019

Other references:

Agreement between the Government of Australia and the Government of Finland for the Avoidance of Double Taxation with respect to Taxes on Income and the Prevention of Fiscal Evasion, and Protocol [2007] ATS 36

Agreement between the Government of Australia and the Government of

Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains [1983] ATS 25

Agreement between Australia and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol [1976] ATS 24

Agreement between the Government of Australia and the Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1990] ATS 45

Agreement between the Government of Australia and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income [2004] ATS 4

Agreement between the Government of the Commonwealth of Australia and the Government of the Republic of Singapore for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1969] ATS 14

ATO ID 2012/67

Convention between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income [1983] ATS 16

Convention between Australia and the Republic of Italy for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, and Protocol [1985] ATS 27

OECD, 2019, Model Tax Convention on Income and on Capital 2017 (Full Version), OECD Publishing, Paris

Explanatory Memorandum for the Copyright Amendment Bill 1984

Revised Explanatory Memorandum for the Copyright Amendment (Digital Agenda) Bill 2000

Explanatory Memorandum for the Copyright Amendment Bill 2006

ATO references

NO:	1-BJYYOLO
ISSN:	2205-6122
BSL:	PG
ATOlaw topic:	Withholding taxes and amounts ~~ Dividends, interest and royalties ~~ Royalties