



Australian Government

Attorney-General's Department

**COPYRIGHT EXCEPTIONS FOR PRIVATE
COPYING OF PHOTOGRAPHS AND FILMS**

Review of
Sections 47J and 110AA
Copyright Act 1968

2008

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RECOMMENDATIONS

Recommendation 1

The Department recommends a re-examination of public awareness material and consumer information on the meaning of the format-shifting exceptions to assist people to understand their rights and obligations under the *Copyright Act 1968*.

Recommendation 2

The Department recommends that no change be made to section 47J at this time. However it would be beneficial to provide further public information in relation to copyright in photographs taken professionally for a family or private occasion.

Recommendation 3

The Department recommends that no change be made to section 110AA at this time. However, the Department will continue to monitor the evolution of relevant markets to determine if new products are introduced as anticipated by the film industry.

CHAPTER 1

INTRODUCTION

Background

1.1 The Attorney-General's Department has carried out a review of the operation of two copyright exceptions that permit 'format-shifting'. These exceptions are sections 47J and 110AA of the *Copyright Act 1968* which permit photographs and cinematograph films to be reproduced in a different format for private use, subject to certain conditions.

1.2 Copyright is a form of intellectual property that protects the rights of creators in certain original forms of expression, including photographs and cinematograph films. It rewards creative effort, and economic investment in creative effort, by granting a number of exclusive economic rights. These rights provide an incentive to encourage the generation and flow of new material to the public. One of the core rights granted by copyright is the right to prevent other persons from copying a work. While copyright does not guarantee a proportionate return for the work involved, the ability to require other persons to pay for copying can give creators and investors some security for the skill, time and resources necessary to produce new works.

1.3 The Act also provides many exceptions which limit the scope of copyright. These exceptions are an integral part of copyright, recognising that in some circumstances the usual rights of copyright owners should not apply. Exceptions may be adopted for various reasons; such as to permit incidental uses that do not cause significant harm to copyright owners or because a particular limitation of copyright serves the broader public interest. The nature and scope of exceptions reflect decisions by Parliament on balancing public and private interests.

Reasons for the review

1.4 New exceptions to provide a better balance between the legitimate interests of copyright owners and consumers in the digital environment were enacted in the *Copyright Amendment Act 2006* which commenced on 11 December 2006. Included in the new exceptions were sections 47J and 110AA which allow for 'format-shifting' or allowing a consumer in certain circumstances to copy a photograph or a film into a different format for private use. Some common reasons for format-shifting might be to store a photograph collection in a portable playing device or to take advantage of newer technology.

1.5 Sections 47J and 110AA were introduced to recognise reasonable consumer use of copyright material that does not cause substantial harm to copyright owners. However, the new exceptions were also innovative and contentious. Some interests considered the new provisions might unfairly restrict the economic rights of rights

holders while other interests believed that wider exceptions should be adopted to benefit consumers.

1.6 In particular, some interests believed the present scope of sections 47J and 110AA to be unnecessarily limited in comparison to the wider exception (section 109A) also introduced in the Copyright Amendment Act 2006 for copying sound recordings for private use. Those with this view have proposed that consumers should have generally similar exceptions for copying audio and audio-visual material.

1.7 In response to these different views, the previous Government introduced changes to the amending legislation requiring that the Attorney-General must review the operation of sections 47J and 110AA by the end of 31 March 2008. The Explanatory Memorandum stated that:

32. This review will enable consideration to be given to whether these new copyright exceptions should be expanded with respect to digital audio-visual materials in a way which complies with our international treaty obligations. The review will consider how to achieve an appropriate balance between the legitimate interests of rights holders and users of copyright material.¹

The amendments also require that the report of this review is to be tabled in Parliament within 15 sitting days after the report is completed. (See the Note added to Schedule 6 of the *Copyright Amendment Act 2006* which is reproduced at Appendix 2).

Conduct of the review

1.8 The Attorney-General announced the review by a media release on 22 January 2008, and invited submissions by 29 February 2008. An Issues Paper and details of the review were placed on the Department's website.

1.9 The Department received 33 submissions which are listed at Appendix 1. Submissions have been placed on the Department's website for ease of access by the public.

1.10 The Department in conducting the review consulted with a number of Australian Government agencies, including the Department of Broadband, Communications and the Digital Economy, the Department of the Environment, Water, Heritage and the Arts, the Department of Foreign Affairs and Trade and the Treasury.

Acknowledgements

1.11 The Department thanks those organisations and individuals who made submissions to the review.

¹ Copyright Amendment Act 2006, Further Supplementary Explanatory Memorandum, p 7

CHAPTER 2

OVERVIEW OF THE EXCEPTIONS

Reproducing photographs in a different format

2.1 Under section 47J it is not an infringement of copyright if the owner of a photograph makes a reproduction of it for his or her private and domestic use instead of the original photograph. This exception allows a photograph in hardcopy form to be reproduced in electronic form or a photograph in electronic form to be reproduced in hardcopy form.

2.2 One example of a reproduction permitted by section 47J is printing a paper copy from a digital photograph. Other copying envisaged by this exception is scanning a hardcopy photograph in digital form in the memory of a personal computer or of a portable playing device. In the latter example, section 47J allows for the technical process of making an intermediate or temporary copy in a personal computer as part of the technical process of copying a photograph to a portable digital player (provided the intermediate or temporary copy is not retained). Except with respect to temporary copies, section 47J does not allow digital-to-digital copying nor does it permit hardcopy to hardcopy copying (eg photocopying).

2.3 Section 47J contains a number of other conditions. One is that the original photograph must not be an infringing copy. This prevents an infringing copy being used to make a reproduction which does not infringe copyright because of the operation of section 47J.

2.4 Another important condition is that at the time of making a reproduction of the original photograph the owner must not have made, or be making, another reproduction of the original photograph in a form substantially identical in form to the earlier reproduction. This condition essentially prevents the owner from using the original photograph to make multiple reproductions in substantially the same form. There is a further condition which prevents 'serial copying' ie a reproduction made from the original photograph may not be used to make further reproductions.

2.5 Section 47J prohibits specified dealings with a reproduction made under this exception. Sale, hire, trading in or distribution of a reproduction has the effect that the exception is taken never to have applied to the making of the reproduction (though the owner may lend a reproduction to a family or household member).

2.6 Finally the exception is taken never to have applied if the owner of the original photograph disposes of it to another person. The purpose of this condition is to prevent a person acquiring a photograph, reproducing it in a different form for future use and then passing ownership of the original to another person who can repeat the process.

Copying a film in a different format

2.7 Section 110AA, which allows for the copying of a cinematograph film, is narrow and specific in scope. It simply permits the owner of a videotape embodying a cinematograph film in analogue form to copy the film in electronic form for his or her private and domestic use.

2.8 Section 110AA contains a number of conditions that are broadly similar to those in section 47J outlined above.

2.9 The primary application of this exception is to allow the owner of a VHS video cassette to make a digital copy of the film content, eg on a DVD or a computer hard drive. This exception allows consumers to continue to be able to view films purchased on video cassette without the need to maintain a video cassette player which are increasingly obsolescent.

2.10 This exception does not allow any form of digital-to-digital copying. It is not legally possible to copy a film that is embodied in a DVD. Even where a film is copied from a videotape in an electronic form it is not permitted to make a further electronic copy, such as to a portable audio-visual player.

2.11 One reason for the limited scope of section 110AA is that unrestricted digital-to-digital copying could allow consumers to reproduce the full picture quality and features provided in commercially produced digital film content.

2.12 When the new exceptions were introduced into Parliament, the possible implications of private copying exceptions on new digital markets for feature films and television programs were unclear. The Issues Paper published by the Department asked for submissions on whether better information is now available.

Comparison to s 109A – sound recordings

2.13 Much of the concern about the conditions imposed in sections 47J and 110AA arises from comparison with the wider copying permitted under section 109A.

2.14 Section 109A applies to copying sound recordings for private use. It is a 'space' or 'device' shifting exception that allows the owner of a non-infringing copy of a sound recording to copy it for his or her use with another playing device that the person owns. An obvious difference is that section 109A allows for digital-to-digital copying. For example, a person who purchases a music album embodied in a CD may make several copies for playing on their personal computer, their portable MP3 player or their car's sound system.

2.15 Appendix 2 contains the provisions referred to above.

CHAPTER 3

OVERVIEW OF POSITIONS AND ISSUES

- 3.1 Generally speaking, submissions to the Department supported one of the following three positions:
- (a) the exceptions are too restrictive for users of copyright material and should be expanded;
 - (b) significant change is not justified at this time either because the exceptions are operating satisfactorily or it is too early to assess the impact of change on markets; and
 - (c) the exceptions unjustifiably erode the economic right of copyright owners and should be restricted.
- 3.2 Expansion of the format-shifting exceptions is supported by organisations representing consumers and other users of copyright material. This position is also supported by organisations that manufacture consumer electronics devices together with the free-to-air (FTA) television networks.
- 3.3 Choice supports allowing digital-to-digital format-shifting for all media saying that the present provisions are too confusing for consumers and put consumers at risk of losing access to legally acquired media due to technology upgrades.² Electronic Frontiers Australia states that consumers should also have a right to make back-up copies.³ Choice argues that the lack of wider exceptions may stifle innovation and may cause harm to the very markets the provisions were intended to protect.⁴ These submissions also state that allowing private copying will not harm copyright owners.⁵
- 3.4 Support for retaining sections 47J and 110AA in their present form was received from organisations representing film production studios, film distributors and owners of a cinema chain. This position was also supported by the subscription TV industry, the largest national broadcaster and, to a lesser extent, by some bodies representing small creators.⁶ These organisations generally suggest the present exceptions should be maintained and that wider exceptions are not needed - or at least that it is too early to predict the impact of further change on new markets.
- 3.5 Finally, submissions that recommend winding-back the 2006 amendments were received from the Australian Copyright Council and the Media, Entertainment and Arts Alliance. This position is supported by Viscopy, a body which administers copyright licences in artistic works, and some other collecting societies. Generally

² Submission 24, p 3

³ Submission 19, p 3

⁴ Submission 24, p 6

⁵ Ibid, p 7; Submission 19, p 1 and 4

⁶ Submission 3, p 2; Submission 17, p 2

speaking, these bodies argue for a copyright ‘maximalist position’ which strengthens the rights of copyright owners and opposes exceptions that benefit users of copyright material unless financial compensation is paid to rights holders. This view generally considers that uncompensated exceptions should be made as narrow as possible to minimise potential loss to rights holders.⁷

Overview of key issues

3.6 The general positions outlined above with respect to the two format-shifting exceptions are based upon different perspectives taken in relation to a number of key issues. These issues are summarised below.

Copyright and innovation

3.7 Copyright aims to further the public interest by promoting investment in, and access to, the results of creative effort. It involves balancing the interests of rights holders with the interests of users of copyright material. In this sense, copyright is largely complementary to the processes of competition by which producers strive to provide consumers with the benefits of new products and services.

3.8 Copyright law, through defining and enforcing the interests of rights holders and users, is crucial to an effective system of innovation. The creation of new material can involve substantial investment in creative skill and resources. To make these outlays, creators and producers need to receive an appropriate return from the value that users place on the outputs of the creative process. This means it is necessary to discourage ‘free riding’ - the appropriation of benefits by those who avoid contributing a fair share of the costs of production.

3.9 However, it is also necessary to minimise the potential for the exclusive rights conferred on copyright owners to be used to restrict unduly the diffusion and use of the results of creative effort. For this reason, the Copyright Act contains a number of exceptions to balance between incentives to invest in creative effort and incentives for innovation in using material protected by copyright.

3.10 Broadly, the opposing views with respect to the format-shifting exceptions reflect differing perspectives with respect to innovation. Supporters of wider exceptions argue that consumer technology which promotes and depends, in part, upon free-riding can enhance innovation which will ultimately benefit rights holders or at least without causing substantial financial harm. An example of technology supporting this point of view may be the video cassette recorder which, initially opposed by film rights holders, eventually provided new home entertainment markets and significant profits for the film industry. On the other hand, the industry argues that making commercial films is an expensive business which cannot operate without an adequate profit. Free-riding, even if innovative, is not necessarily harmless. Another example which demonstrates those concerns is the loss suffered by some creative industries due to the illegal distribution of copyright material through peer-to-peer networks operating over the Internet.

⁷ Submission 16, p 2, Submission 32, p 1

3.11 The Department notes the submissions favouring broader exceptions in order to encourage innovation. However, sections 47J and 110AA deal with making copies for private use. The scope of this review does not cover wider public access to information for research or education nor with the creation and distribution of new works. Even with respect to consumer electronic devices, no practical example is given as to how sections 47J and 110AA may be stifling innovation.

3.12 On balance, the Department notes that submissions sceptical of the value of strong copyright protection generally ignore its successful history in supporting innovation.

Copyright and technological protection measures

3.13 In recent years, the use of technological protection measures by rights holders has been a matter of public debate. On one hand, the use of such measures is recognised as a legitimate way to reduce financial loss caused by the widespread distribution of unauthorised copies. However, consumer groups have expressed concern over the potential for rights holders to expand their rights or to cancel out exceptions available to users of copyright material.⁸

3.14 Submissions from consumer and user organisations propose that format-shifting should be allowed where rights holders do not apply technological protection measures.⁹

3.15 The Department notes that this view does not take into account the following factors. First, not all rights holders will be in a position to use such measures. This may particularly be the case for some Australian photographers and film-makers. The Australian Copyright Council notes that the use of technological protection measures by photographers is rare and they would have very limited protection against unauthorised copying if the provisions were to allow digital-to-digital copying.¹⁰ In addition, Screenrights observes that Australian film producers are more dependent upon unprotected distribution means than are overseas producers.¹¹ More importantly, it is questionable whether the public interest in maintaining a balance between owners' rights and exceptions should be completely subject to the use or otherwise of technological protection measures. Encouraging the greater use of such measures may not benefit public access to copyright material.

Consistency of copyright exceptions

3.16 Submissions that support widening sections 47J and 110AA so that they are more like s 109A in scope argue that the differences between format-shifting exceptions are confusing for consumers and undermine public regard for copyright law.¹² On the other hand, bodies seeking to narrow the scope of sections 47J and

⁸ Submission 24, p 5

⁹ Submission 24, p 3; Submission 19, p 4

¹⁰ Submission 16, p 8

¹¹ Submission 15, p 2

¹² Submission 24, p 5; Submission 8, p 2

110AA support the inclusion of additional conditions which may add to complexity and confusion.

3.17 The Department recognises the advantages of consistency and simplicity. This was largely the position before the 2006 amendments – consumers were not permitted to format-shift any copyright material for personal use. The 2006 amendments altered that situation to recognise legitimate consumer interests that do not cause substantial financial harm to copyright owners. The test of financial harm must be applied to particular markets. Markets for digital music, photographs and films are very different. This will produce differences in exceptions unless they are drafted in a common form which causes no substantial harm to any copyright market. That approach may not benefit consumers because it would be necessarily limited.

3.18 Nevertheless, the Department recognises the practical difficulty that complex exceptions may cause for individual consumers. Following the 2006 amendments, a number of public information sheets were prepared to explain the new exceptions to the public. Other copyright bodies also provided information on the new provisions. These measures should be re-examined to see if it is possible to assist people further to understand their rights and obligations under the Act.

Recommendation 1

3.19 The Department recommends a re-examination of public awareness material and consumer information on the meaning and effect of format-shifting exceptions to assist people to understand their rights and obligations under the *Copyright Act 1968*.

International treaty obligations

3.20 The Issues Paper outlined the necessity for sections 47J and 110AA to comply with Australia's international treaty obligations, and in particular the international standards for copyright exceptions and limitations referred to as the 'three-step test' (as included in the *Berne Convention for the Protection of Literary and Artistic Works* and the WTO Agreement on *Trade-Related Aspects of Intellectual Property Rights*.)

3.21 It is apparent that those who take a copyright 'maximalist position' regards the test as extremely limiting so as to almost rule out unremunerated exceptions.¹³ On the other hand, proponents of wider exceptions regard the test as allowing great flexibility with respect to personal use.¹⁴ The Department notes that both views would deprive the test of any real purpose and are often used to buttress opposing positions of principle.

¹³ Submission 16, p 3

¹⁴ Submission 19, p 2

CHAPTER 4

OPERATION OF SECTION 47J

4.1 The Department received a number of submissions proposing that section 47J should be expanded. It has been proposed that section 47J should:

- (a) allow the owner of a photograph to undertake digital-to-digital copying for private use;¹⁵ and
- (b) be extended to apply to all artistic works.¹⁶

4.2 The argument for allowing digital-to-digital copying of photographs is essentially that section 47J is unreasonably restrictive in that the present wording impedes persons who wish to store digital images in more than one location or to make back-up copies. Under the present provision, in order to copy a hardcopy photograph to digital devices it would be necessary to digitise the photograph separately for each device (eg to a personal computer, digital photo frame or portable player). It is said that it would be more convenient for users to be able to make serial digital copies devices from one location.¹⁷

4.3 Electronics Frontiers Australia submits that section 47J should allow digital-to-digital copying of photographs for back up purposes in case a digital memory is lost or fails. It may be impossible to make another digital copy if an original hardcopy photograph has also been lost or destroyed or the original photograph was obtained in a digital form.¹⁸

4.4 In addition, Apple suggests there is no policy reason for photographs receiving different treatment from artistic works generally as individuals expect to be able to store copies of other material such as cartoons, catalogues and advertising material.¹⁹

4.5 On the other hand, the Department received opposing arguments from bodies representing photographers. These submissions express concern about further erosion of the ability of photographers to earn income from licensing the use of their works, especially without clear justification.²⁰

4.6 The Department notes that most submissions are argued essentially from points of principle with respect to reasonable consumer expectations or creators rights. Neither side has provided information concerning the likely market effect of change. In this situation, the Department considers the parties proposing legislative

¹⁵ Submission 19, p 3

¹⁶ Submission 9, p 5

¹⁷ Submission 5, p 2

¹⁸ Submission 19, p 3

¹⁹ Submission 9, p 5

²⁰ Submission 26, p 2

change should have the primary onus for establishing the justification for, and consequences of, that change. At this stage, the Department considers that the onus has not been met.

4.7 The Department notes the argument for widening section 47J refers, in part, to ordinary domestic photograph collections. Copyright issues are less likely to arise in relation to photographs taken by family members than in film in a domestic setting. Issues may arise in relation to copying photographs taken by professional photographers.

4.8 However, the potential copyright problems posed with respect to professional photographs may be less than some consumer interests believe. Under the Act, where a person makes, for valuable consideration, an agreement with another person for the taking of a photograph for a private or domestic purpose by that person, the first named person will own the copyright in a photograph made in pursuance of the agreement (see s 35(5)). Thus individuals may own the copyright in photographs taken professionally for a family or private occasion. The Act expressly provides that 'private or domestic purpose' includes a portrait of family members, a wedding party or children (s 35(7)). This provision could extend to a much wider range of private occasions. However, the position is subject to contractual arrangements with the photographer. For example a person commissioning a professional photographer to take wedding photographs may sign an agreement giving the photographer the copyright and the right to control the making of further copies. In that situation, widening section 47J may not help a member of the public as it is possible the contract may operate to exclude a copyright exception.

4.9 Equally, there does not appear to be a persuasive argument for changing the copyright balance in relation to other artistic works. The Department notes that at least some of the additional copying proposed may already be permitted. For example, artistic works such as cartoons may already be copied for private use by format-shifting where the artistic work is contained in a book, newspaper or periodical publication (see s 43C).

4.10 The Viscopy submission states that the introduction of section 47J limits its ability to licence the use of works made by its photographer members to their detriment.²¹ The submission supports proposals by the Australian Copyright Council that, in addition to the existing conditions, section 47J should apply only if the photograph has been purchased by the owner, a copy in the required format is not available for purchase, and a copy of the required format cannot be made under licence (whether contractual or not).²² The Australian Institute of Professional Photography also supports this position.²³

4.11 These submissions claim that section 47J, even in its present form, is robbing photographers of income. No data to support this view is provided. Consequently, the Department is not aware that Viscopy has, or is likely to have, a significant market for licensing the copying of photographs for private use. If section 47J is not extended to include digital-to-digital copying, this will leave scope to see whether

²¹ Submission 26, p 1

²² Submission 16, p 5

²³ Submission 25, p 1

such a market does develop. The proposal to add additional conditions to section 47J appears intended simply to narrow its scope to the point where it would provide little practical benefit for consumers.

4.13 In conclusion, the Department considers that there is insufficient information available that would justify further reducing the rights of photographers or other creators of artistic works. Equally the Department does not consider there is sufficient information that would justify a narrowing of the scope of section 47J. The present form of section 47J appears, for the present, to provide a reasonable balance between the interests of rights holders and users.

Recommendation 2

4.14 The Department recommends that no change be made to section 47J at this time. However it would be beneficial to provide further public information in relation to copyright in photographs taken professionally for a family or private occasion.

CHAPTER 5

OPERATION OF SECTION 110AA

5.1 In general, submissions from organisations associated with the film industry argue that section 110AA should not be changed. These organisations include bodies representing international and Australian film makers and distributors as well as owners of a cinema chain.

5.2 The Australian Visual Software Distributors Association (AVSDA) argues there is no need for the Government to support changes to section 110AA.²⁴ The submission states that the film industry has a philosophy of ensuring that its content can be viewed by the consumer in whatever way the consumer wishes to acquire and purchase the content in order to maximise consumer enjoyment and commercial return.²⁵ It points to continuing efforts to develop new distribution models for film and TV products which will meet consumer needs.²⁶

5.3 The AVSDA submission argues that consumer practices such as those which lead to the introduction of a wider format-shifting exception for music (s 109A) do not apply to film.²⁷ It refers to the recent attempt to launch ReelTime Media that offered new release audio-visual content for download in the Australian market. AVSDA goes on to state that ReelTime Media went into receivership in February 2008, implying there is a general lack of demand for this type of digital product at this time.²⁸ This example is given as evidence of the willingness of the film industry to support new markets but also, in contrast to music, the lack of significant demand at present by Australian consumers to pay for legal downloads of film material over the Internet.

5.4 The AVSDA submission outlines a number of current and forthcoming business models that would provide new DVD products.²⁹ The Department notes that some of these models are expressly designed to allow consumers to make managed copies of content in different formats.³⁰ ‘Managed copy’ is the film industry’s term for an authorised copy of film made in a different format from a legitimate original DVD where the copy has technological protection applied to it (i.e. to prevent further unauthorised copying and distribution). The film industry believes that the provision of managed copies will substantially meet legitimate consumer expectations as to choice and flexibility.³¹ For example, the film industry suggests that Australian consumers who wish to own a copy a film in a Windows or Apple format for use on a

²⁴ Submission 13, p 3

²⁵ Ibid, p 9

²⁶ Ibid, pp 10-12

²⁷ Ibid, p 13

²⁸ Ibid, p 9

²⁹ Ibid, pp 10-12

³⁰ Ibid, p 10

³¹ Ibid, pp 10-11

portable player will soon be able to buy DVDs that allow that kind of managed copy to be made.³²

5.5 The new business models go beyond DVD products. They include the possible use of set-top boxes capable of receiving content that is downloaded or streamed over the Internet or rented downloads carried in a portable device.³³

5.6 AVSDA and AFACT argued that the film industry depends on technological protection measures (such as CSS and AACS) for the distribution of DVDs for home use.³⁴ They express concerns that the widening of format-shifting exceptions to include digital-to-digital copying would encourage the circumvention of such measures.³⁵

5.7 The view of organisations representing consumers and other users is that copyright exceptions should be expanded to allow digital-to-digital format-shifting for all media that is not protected by technological protection measures. The reasons put forward to support this position include:

- (a) the exceptions for format-shifting contain different conditions which makes it difficult for consumers to know what they are and are not allowed to do;
- (b) wider exceptions would not encourage commercial piracy or cause financial loss to rights holders;
- (c) restrictive exceptions will stifle innovative uses of new technology; and
- (d) acceptance that consumers should be permitted to transfer analogue videotapes to DVDs should be extended into a general right to format-shift to newer technology.

5.8 Submissions received from manufacturers of consumer electronic devices (Sony Australia, Panasonic and Apple) support widening section 110AA.

5.9 The Australian Copyright Council supports a substantial narrowing of the scope of section 110AA. It suggests, among other new conditions, that consumers should not be permitted to copy a videotape if the content is available for purchase in digital form.³⁶ In contrast, Screenrights, a collecting society representing rights holders in films, suggests that the present scope of the present exception can be tolerated.³⁷

5.10 The Department particularly sought information on the source of the film material that might be used for format-shifting if section 110AA were to be extended in scope. On one view, format-shifting should be permitted where DVDs do not use

³² Ibid, p 10

³³ Submission 13, pp 11-12

³⁴ Submission 13, p 14, Submission 18, pp 6-7

³⁵ Submission 13, p , Submission 18, p 2

³⁶ Submission 16, p 4, Submission 32, p 2

³⁷ Submission 15, p 1

technological protection measures to prevent copying.³⁸ On this argument, rights holders could decide whether consumers may format-shift by not using technological protection measures.³⁹

5.11 The arguments made to oppose this position include:

- (a) such an extension would be of little practical value to consumers as technological protection measures are used with some 90% of commercially produced DVD;⁴⁰
- (b) it would disproportionately harm Australian film producers who are more dependant upon distribution means that do not use technological protection measures;⁴¹ and
- (c) an extension would introduce contradictions and confusion thereby promoting the circumvention of technological protection measures.⁴²

5.12 The Department acknowledges that increasing numbers of consumers are likely to value the ability to format-shift film material to different playing devices. There is reason to believe that film content owners wish to adapt their business models to meet market demand and changing consumer wishes. A key question is whether a change to section 110AA at this time would be necessary to assist markets to adapt?

5.13 In considering this issue, the Department notes the importance of the home entertainment market for film rights holders. At present, 99% of the video market consists of DVDs.⁴³ AVSDA statistics indicate that in 2007 the net revenue from DVD sales in Australia was \$1.3 billion.⁴⁴ This compares with gross box office sales for feature films in 2007 of \$895.4 million.⁴⁵ It may be imprudent to embark on legislative change affecting a home entertainment market of this value without clear indications that intervention is appropriate and is likely to be effective.

5.14 Also a major concern of film rights holders is that extending section 110AA to allow digital format-shifting may encourage the circumvention of technological protection measures. That is, the public may not appreciate the distinction between permission to copy but a continuing prohibition against circumvention. AFACT states that once measures are circumvented for the purpose of format-shifting it would then be possible for unprotected copies to be limitlessly reproduced or made available online for distribution thereby undermining the opportunity of copyright owners to receive financial returns from exploitation of their works.⁴⁶

³⁸ Submission 19, p 4

³⁹ Ibid

⁴⁰ Submission 13, p 14

⁴¹ Submission 15, p 2

⁴² Submission 18, p 9

⁴³ Submission 13, p 5

⁴⁴ <http://www.avsda.com.au/statistics.asp?format=dvd>

⁴⁵ <http://www.afc.gov.au/gtp/wcfast.html>

⁴⁶ Submission 18, p 7

5.15 The Department considers there is insufficient evidence available to indicate that further legislative change at this time would be beneficial with respect to commercial markets for DVDs. However, the Department sees benefit in continuing to monitor the evolution of relevant markets to determine if new products are actually introduced to meet consumer expectations as anticipated by the film industry.

5.16 The submissions received from Free TV and Apple propose a different source of film material that should be able to be format-shifted under section 110AA - feature films and programs included in television broadcasts.⁴⁷ At present section 111 allows radio and television material to be recorded for the purpose of listening to or viewing at a more convenient time (often referred to as 'time-shifting'). It has been submitted by Free TV and Apple that section 110AA should allow material recorded under section 111 to be copied for 'format-shifting'. Free TV considers that expansion of section 110AA would recognise the modern realities of consumer behaviour in the home and capabilities of consumer electronics devices.⁴⁸

5.17 The Department considers that this proposed linking of sections 110AA and 111 does not sufficiently appreciate a fundamental difference between the two exceptions. Section 111 deals with a situation where it is not convenient for a person to view a television broadcast at the time of broadcast. It allows the person to make a limited-term recording to view later. This provision does not allow a recording to be retained indefinitely. On the other hand, section 110AA allows the owner of a legitimate videotape to make another permanent copy. Linking the two provisions would allow consumers to make permanent 'library' copies of feature films and television programs. No evidence is provided by proponents of such change that this would cause no substantial financial harm to copyright owners. In contrast, submissions from many film rights holders stress the financial importance of selling film and television material for private use.

5.18 The Australian Subscription Television & Radio Association considers it is too early to make a decision on these issues at this time.⁴⁹

5.19 The Department considers it would be premature to extend section 110AA to allow permanent copies to be made of film material recorded from television broadcasts without reliable information as to the likely market impact.

Recommendation 3

5.20 The Department recommends that no change be made to section 110AA at this time. However, the Department will continue to monitor the evolution of relevant markets to determine if new products are introduced as anticipated by the film industry.

⁴⁷ Submission 23, p 4; Submission 9, p 2-3

⁴⁸ Submission 23, p 1

⁴⁹ Submission 33, p 2

CHAPTER 6

OTHER ISSUES RAISED IN SUBMISSIONS

Computer games

6.1 The Interactive Entertainment Alliance of Australia submission states there is no current need, or public support, for an exception which permits format-shifting of computer games for private use.⁵⁰ The Department considers this review was not provided with sufficient evidence to amend section 110AA with respect to computer games.

Contracts

6.2 Electronic Frontiers Australia proposed that contracts should not be allowed to undermine reasonable private copying exceptions for consumers.⁵¹ Universities Australia referred more generally to exceptions being protected by inalienability.⁵²

6.3 In 2002 the Copyright Law Review Committee examined this issue in a report entitled *Copyright and Contract*.⁵³ The Government has not yet responded to this report.

6.4 The Department considers that the use of contract terms to modify or reduce copyright exceptions is a broader issue which is outside the scope of the present review. The views expressed will be considered by the Department in its further work on copyright and contract.

Commissioned photographs

6.5 The Arts Law Centre of Australia proposes that s 35(5) of the Act should be amended to allow a professional photographer to use a commissioned photograph for indirect commercial purposes.⁵⁴

6.6 The Department notes this issue is outside the scope of the present format-shifting review but that further consideration is appropriate.

⁵⁰ Submission 22, p 3

⁵¹ Submission 19, pp 4-5

⁵² Submission 6, p 2

⁵³ www.ag.gov.au/clrc

⁵⁴ Submission 17, p 3

APPENDIX 1

SUBMISSIONS RECEIVED

1. Christian King
2. Robert Taylor
3. Arts Law Centre of Queensland Inc
4. Janet Hawtin
5. John Darrington
6. Universities Australia
7. Sally Hawkins
8. Federal Magistrate Driver, Federal Magistrates Court of Australia
9. Apple Inc.
10. Professor Brian Fitzgerald, Professor Stuart Cunningham and Jessica Coates
11. Samantha Murphy
12. Panasonic (Matsushita Electric Industrial Company Ltd)
13. Australian Visual Software Distributors Association Ltd
14. Australian Broadcasting Corporation
15. Screenrights
16. Australian Copyright Council
17. Arts Law Centre of Australia
18. Australian Federation Against Copyright Theft
19. Electronic Frontiers Australia
20. Law Council of Australia – Intellectual Property Committee
21. Media, Entertainment and Arts Alliance
22. Interactive Entertainment Association of Australia
23. Free TV Australia
24. CHOICE
25. Australian Institute of Professional Photography
26. Viscopy
27. Screen Producers Association of Australia

28. Sony Australia Ltd
29. Australian Digital Alliance
30. Law Society of New South Wales
31. Village Roadshow Limited
32. Australasian Performing Rights Association/Australasian Mechanical Copyright Owners' Society
33. Australian Subscription Television and Radio Association

APPENDIX 2

Provisions of the Copyright Act relevant to the review

NOTES TO THE COPYRIGHT ACT 1968 – TABLE A

Copyright Amendment Act 2006

Schedule 6

9AA Review of new sections 47J and 110AA

- (1) The Minister must cause to be carried out by the end of 31 March 2008 a review of the operation of sections 47J and 110AA of the *Copyright Act 1968*.
- (2) The Minister must cause a copy of the report of the review to be laid before each House of the Parliament within 15 sitting days of that House after the report is completed.

COPYRIGHT ACT 1968 - SECT 47J

Reproducing photograph in different format for private use

- (1) This section applies if:
 - (a) the owner of a photograph (the original photograph) makes a reproduction (the main copy) of it for his or her private and domestic use instead of the original photograph, and
 - (b) the original photograph itself is not an infringing copy of a work or published edition of a work, and
 - (c) either:
 - (i) the original photograph is in hardcopy form and the main copy is in electronic form, or
 - (ii) the original photograph is in electronic form and the main copy is in hardcopy form, and
 - (d) at the time the owner makes the main copy, he or she has not made, and is not making, another reproduction of the original photograph that embodies the original photograph in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the original photograph incidentally made as a necessary part of the technical process of making the main copy.

- (2) The making of the main copy is not an infringement of copyright:
 - (a) in the original photograph, or
 - (b) in a work, or published edition of a work, included in the original photograph.

Dealing with main copy may make it an infringing copy

- (3) Subsection (2) is taken never to have applied if the main copy is:
 - (a) sold, or
 - (b) let for hire, or
 - (c) by way of trade offered or exposed for sale or hire, or
 - (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

Reproducing main copy may infringe copyright

- (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of a reproduction of the main copy.

Disposal of original may make the main copy an infringing copy

- (6) Subsection (2) is taken never to have applied if the owner of the original photograph disposes of it to another person.

Status of temporary reproduction

- (7) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary reproduction of the original photograph as a necessary part of the technical process of making the main copy, then:
 - (a) if the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy--the making of the temporary reproduction does not infringe copyright in the original

photograph or a work, or published edition of a work, included in the original photograph, or

- (b) if the temporary reproduction is not destroyed at that time--the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the original photograph or a work, or published edition of a work, included in the original photograph.

COPYRIGHT ACT 1968 - SECT 110AA

Copying cinematograph film in different format for private use

(1) This section applies if:

- (a) the owner of videotape embodying a cinematograph film in analog form makes a copy (the main copy) of the film in electronic form for his or her private and domestic use instead of the videotape, and
- (b) the videotape itself is not an infringing copy of the film or of a broadcast, sound recording, work or published edition of a work, and
- (c) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the film in an electronic form substantially identical to the electronic form in which the film is embodied in the main copy.

For this purpose, disregard a temporary copy of the film incidentally made as a necessary part of the technical process of making the main copy.

- (2) The making of the main copy is not an infringement of copyright in the cinematograph film or in a work or other subject-matter included in the film.

Dealing with main copy may make it an infringing copy

- (3) Subsection (2) is taken never to have applied if the main copy is:
 - (a) sold, or
 - (b) let for hire, or
 - (c) by way of trade offered or exposed for sale or hire, or
 - (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

Disposal of videotape may make the main copy an infringing copy

- (5) Subsection (2) is taken never to have applied if the owner of the videotape disposes of it to another person.

Status of temporary copy

- (6) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary copy of the film as a necessary part of the technical process of making the main copy, then:
- (a) if the temporary copy is destroyed at the first practicable time during or after the making of the main copy--the making of the temporary copy does not infringe copyright in the film or in any work or other subject-matter included in the film, or
 - (b) if the temporary copy is not destroyed at that time--the making of the temporary copy is taken always to have infringed copyright (if any) subsisting in the film and in any work or other subject-matter included in the film.

COPYRIGHT ACT 1968 - SECT 109A

Copying sound recordings for private and domestic use

- (1) This section applies if:
- (a) the owner of a copy (the earlier copy) of a sound recording makes another copy (the later copy) of the sound recording using the earlier copy; and
 - (b) the sole purpose of making the later copy is the owner's private and domestic use of the later copy with a device that:
 - (i) is a device that can be used to cause sound recordings to be heard; and
 - (ii) he or she owns; and
 - (c) the earlier copy was not made by downloading over the Internet a digital recording of a radio broadcast or similar program; and
 - (d) the earlier copy is not an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording.

- (2) The making of the later copy does not infringe copyright in the sound recording, or in a literary, dramatic or musical work or other subject-matter included in the sound recording.
- (3) Subsection (2) is taken never to have applied if the earlier copy or the later copy is:
 - (a) sold; or
 - (b) let for hire; or
 - (c) by way of trade offered or exposed for sale or hire; or
 - (d) distributed for the purpose of trade or otherwise; or
 - (e) used for causing the sound recording to be heard in public; or
 - (f) used for broadcasting the sound recording.

Note: If the earlier or later copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the later copy but also by a dealing with the later copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the earlier copy or the later copy by the lender to a member of the lender's family or household for the member's private and domestic use.