

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED  
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED**

**FAIR USE AND OTHER COPYRIGHT EXCEPTIONS - AN EXAMINATION OF FAIR USE, FAIR  
DEALING AND OTHER EXCEPTIONS IN THE DIGITAL AGE**

**EXECUTIVE SUMMARY**

APRA and AMCOS are performing and mechanical right collecting societies respectively.

In these submissions, APRA/AMCOS say:

1. That the current fair dealing exceptions contained in the *Copyright Act 1968* are reasonable, and reflect real public interests. They achieve an appropriate balance between the interests of copyright owners and users.
2. That the consolidation of the fair dealing provisions into a single provision on the model recommended by the CLRC would achieve only uncertainty and increased cost – particularly legal costs.
3. That the adoption of a US style fair use exception is contrary to Australia's international treaty obligations, and would result in considerable uncertainty and increased legal costs.
4. That an unremunerated exception for time shifting is contrary to Australia's international treaty obligations, and would represent an acquisition of property rights that are currently owned by copyright owners who are entitled to be remunerated for that use. Such exceptions legitimise infringement in the absence of any benefit to the public. The adoption of such a provision would be likely to result in adverse international reaction, including complaints to the WTO and the cessation of income streams currently paid to copyright owners.
5. That an unremunerated exception for format shifting is contrary to Australia's international treaty obligations, and would represent an acquisition of property rights that are currently owned by copyright owners who are entitled to be remunerated for that use. Such exceptions legitimise infringement in the absence of any benefit to the public. The adoption of such a provision would be likely to result in adverse international reaction, including complaints to the WTO and the cessation of income streams currently paid to copyright owners.
6. That private copying of copyright material – particularly music - is so widespread, and poses such problems of enforcement and compliance, that a statutory licence should be introduced. Such a licence would have significant benefits, including compliance with international treaty obligations, ensuring remuneration for use, and avoiding the difficulties of legitimising infringement that has no public benefit.
7. That there should be no statutory licence for backup copying of material other than computer software.

**AUSTRALASIAN PERFORMING RIGHT ASSOCIATION LIMITED  
AUSTRALASIAN MECHANICAL COPYRIGHT OWNERS' SOCIETY LIMITED**

**FAIR USE AND OTHER COPYRIGHT EXCEPTIONS - AN EXAMINATION OF FAIR USE, FAIR DEALING AND OTHER EXCEPTIONS IN THE DIGITAL AGE**

Australasian Performing Right Association Limited (**APRA**) and Australasian Mechanical Copyright Owners' Society Limited (**AMCOS**) (together, **APRA/AMCOS**) welcome the opportunity to make submissions in response to the Attorney-General's Issues Paper titled "Fair Use and Other Copyright Exceptions - an examination of fair use, fair dealing and other exceptions in the digital age" (**Issues Paper**).

APRA is a performing right collecting society established in 1926. Its members are some 38,000 Australian songwriters and music publishers throughout Australia, and it has reciprocal agreements with performing right collecting societies throughout the world. APRA owns or controls the "performing rights" (the rights of performance in public and the right of communication to the public) in the majority of the world's repertoire of musical works (around three million active works), and licenses those rights to more than 60,000 Australian businesses, including broadcasters, website operators, music download providers, hotels and fitness centres.

Of the nearly three million works in the APRA repertoire, Australian and New Zealand composers have contributed approximately 900,000.

APRA seeks to license in Australia all persons and corporations publicly performing or communicating, or authorising the public performance of works within the APRA repertoire.

AMCOS is a mechanical copyright collecting society established in 1976. AMCOS has more than 1500 members - most Australian music publishers and many unpublished songwriters. Its core function is to administer the statutory licence contained in Part III Division 6 of the *Copyright Act 1968 (Act)*, and it also licenses the reproduction of musical works controlled by its members in website applications, as mobile telephone ringtones, television and radio programs.

AMCOS has around 3000 licensees, and in addition issues approximately 1500 single transaction licences each year.

APRA/AMCOS employ around 200 people throughout Australia, and in New Zealand.

More details about the operations, including licence schemes and distribution, of APRA/AMCOS are available at <http://www.apra.com.au>.

APRA and AMCOS control primarily aspects of the copyright in original musical and associated literary works, although AMCOS also controls some subject matter other than works – specifically, some rights in the sound recordings of production music works (often referred to as "library" or "mood" music).

In these submissions, APRA/AMCOS refer to the copyright in works, and the application to works of the exceptions and licences contained in the Act. This reflects the core rights controlled by APRA/AMCOS, and is not intended as a comment on the merits of the same arguments as they apply to subject matter other than works.

APRA/AMCOS respond as follows to the questions posed in the Issues Paper:

1. **The Government seeks your view on the operation of the exceptions in the Copyright Act (particularly the fair dealing exceptions in ss 40-43(2) and ss 103A-103(C) in providing a balance between the interests of copyright owners and copyright users.**
- 1.1 APRA/AMCOS understand this inquiry to be directed towards the operation of the fair dealing exceptions contained in the Act, and not a broader inquiry into all exceptions including statutory licences.
- 1.2 If this inquiry is intended to examine the system of statutory licences under the Act, APRA/AMCOS do not consider the Issues Paper addresses any of the matters that need to be considered.
- 1.3 APRA/AMCOS have an interest in the statutory licences contained in the Act, as follows:
  - (a) section 47 contains an unremunerated “ephemeral” licence for the reproduction of works by a broadcaster for the purpose of broadcast, where the broadcast does not infringe the copyright in the works, in limited circumstances. AMCOS controls the right of reproduction in musical works where the works are reproduced by a broadcaster for the purposes of broadcast;
  - (b) AMCOS is a member of, and receives income from, Copyright Agency Limited and Screenrights, which are declared societies administering the statutory licences contained in Parts VB and VC of the Act respectively;
  - (c) the core function of AMCOS is to administer the statutory licence contained in Part III Division 6 of the Act, for the making of records for retail sale;
  - (d) APRA has agreements with most State governments, and the Commonwealth government, for the performance and communication of musical works for the services of the Crown, under section 183 of the Act; and
  - (e) APRA and AMCOS, as representatives of copyright owners, have a general interest in the rights and revenue streams of copyright owners in Australia, and in all derogations from the rights of copyright owners.
- 1.4 APRA/AMCOS regard the statutory licences as complex and as important parts of the Act and the system of copyright administration in Australia. One aspect of the complexity of the statutory licences is that they are, of course, related to the fair dealing exceptions.
- 1.5 However, if the intention of the government that interested parties make submissions in relation to the existing regime of statutory licence, APRA/AMCOS request a far more detailed process. These submissions are not intended to comment on the system of statutory licensing under the Act, and if it is intended that the submissions do address those matters, APRA/AMCOS request time in which to do so.
- 1.6 APRA/AMCOS support the existing fair dealing exceptions contained in the Act. The fair dealing exceptions allow members of the public to access and use works protected by copyright, with no payment to the copyright owner. As such, they are absolute exceptions to the rights of the copyright owner. In each case, there is a strong public interest for copyright works to be freely available in the circumstances set out in the Act. Without the fair dealing exceptions, there exists the potential for copyright owners to prevent access to copyright material, and in the circumstances set out in sections 40

to 43 of the Act, this would be contrary to the interests of society as a whole, as well as contrary to the interests of particular users. In particular:

- (a) there is a strong public interest in free, fair access to copyright works for the purposes of research or study. This allows students to copy or otherwise use copyright material without recourse to publishers, authors and educational institutions, and without the financial constraints necessarily imposed by the need to obtain permissions (whether or not the permission attracts a copyright payment);
- (b) for similar reasons, there is a strong public interest in free, fair access to copyright works for the purposes of criticism or review. Such access is the hallmark of an open society in which creativity and comment can emerge and flourish;
- (c) also for similar reasons, there is a strong public interest in free, fair access to copyright works for the purposes of reporting news. It is critical that the reporting of news be free from the constraints of the requirement to obtain copyright permissions – including because the reporting of news should not be able to be manipulated by issues relating to access of copyright material, and because the reporting of news requires an immediacy that is not necessarily compatible with obtaining copyright permissions; and
- (d) for obvious reasons, there is a strong public interest in free, fair access to copyright works for the purposes of legal proceedings. There can be no greater public interest in a free society than in the proper administration of justice.

- 1.7 There is a significant level of jurisprudence in Australia regarding the fair dealing exceptions. This has involved detailed consideration of the appropriate balance between the interests of copyright owners and users at all levels of the courts.<sup>1</sup>
- 1.8 The fair dealing exceptions follow the structure of the Act, which is logical and easy to understand. They have a relationship with the statutory licences, which may be affected by changes to the fair dealing exceptions.
- 1.9 There is no evidence to suggest that the practical application of the fair dealing exceptions interferes with legal proceedings, generally inhibits the reporting of news, fetters criticism or review of works, or prevents the conduct of research or study.
- 1.10 Accordingly, APRA/AMCOS supports the retention of the fair dealing exceptions in a form that reflects their present nature and scope.

## **2. The Government seeks your view on whether the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?**

- 2.1 The CLRC recommended that the current fair dealing provisions be consolidated in a single provision.<sup>2</sup>

---

<sup>1</sup> For example, *TCN Channel Nine Pty Limited v Network Ten Limited* (includes corrigendum dated 12 September 2001) [2001] FCA 108 (20 February 2001); *Re: Brian Kelvin De Garis and Matthew Moore And: Neville Jeffress Pidler Pty Limited* No. G1319 of 1988 FED No. 352 Copyright 18 IPR 292 (1991) 20 IPR 605 (1990) 37 FCR 99; *Copyright Agency Ltd v Charles Sturt University* (No 2) [2001] FCA 1145 (24 August 2001); *Copyright Agency Ltd v University of Adelaide* [2000] FCA 1894 (21 December 2000)

<sup>2</sup> Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners (1998) CLRC

- 2.2 APRA/AMCOS do not support the consolidation of the current fair dealing provisions in a single provision. APRA/AMCOS support the retention of the fair dealing exceptions in their present form, including for the reasons set out above.
- 2.3 The Act is currently organised so that the exceptions to infringement generally follow the provision specifying the nature of the particular copyright.
- 2.4 In the view of APRA/AMCOS it is logical for the exceptions to infringement to follow those clauses that set out the subject matter and nature of copyright.
- 2.5 Consolidation of the fair dealing provisions would:
- (a) be inconsistent with the scheme of the Act; and
  - (b) in any event, not assist laypersons in understanding the scheme of the Act.
- 2.6 Consolidation of the fair dealing provisions would also result in a need for further litigation to determine the scope of the new provisions, and would necessarily result in a period of considerable uncertainty. These factors would increase transaction costs for owners and users.
- 2.7 The most recent examination of the fair dealing provisions of the Act, the series of litigation regarding *The Panel*, shows no confusion or difficulty with the structure or content, or the interpretation, of the provisions.
- 3. The Government seeks your view on whether the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.**
- 3.1 APRA/AMCOS believe that the suggestion that the Act should be amended to incorporate such a provision is based on the wrong impression that amendments to the Act that followed Australia's Free Trade Agreement with the US means that Australia has adopted an American approach to copyright law. Specifically, the view has been expressed that the extension of term of protection and the strengthening of copyright owners' rights in relation to Technological Protection Measures (**TPM**) are US style provisions, and should be tempered with a US style fair use exception.
- 3.2 In fact, the strengthening of copyright owners' rights in relation to TPM reflects Australia's obligations under international treaties, and in addition was the subject of considerable domestic industry pressure for a number of years. The extension of the term of copyright protection to the life of the author plus 70 years merely brings Australia into line with most of the developed world, including all of Europe, which had adopted this term of protection prior to the US.
- 3.3 APRA/AMCOS oppose the expansion of the current specific fair dealing exceptions to an open ended exception, including because there is no demonstrated problem with the fair dealing exceptions in their current form.
- 3.4 In addition, APRA/AMCOS oppose the inclusion of a fair use exception for the following reasons:
- (a) an open ended fair exception would not offer the same level of certainty as the current specific fair dealing exceptions;

- (b) an open fair use exception is likely to lead to higher transaction costs for owners and users as a result of an increased need for legal advice and litigation;
- (c) APRA/AMCOS believe an open ended exception is inconsistent with Australia's obligations under the *Berne Convention*;
- (d) an open ended exception is not necessary for the proper operation of the Act;
- (e) an open ended exception would result in the balance between the interests of copyright owners and the interests of copyright users being too heavily in favour of users; and
- (f) an open ended exception would constitute an abrogation of parliament's role in determining important public matters.

3.5 A general exception to infringement would be a departure from comparative legislation in a number of common law countries (United Kingdom: *Copyright, Designs and Patents Act 1988*, for example sections 29 and 30; New Zealand: *Copyright Act 1994*, section 42, part 3; Canada: *Copyright Act R.S. 1985*, section 29ff).

3.6 The current specific exceptions offer a level of certainty that would not be replicated if Australia were to adopt an open ended fair use exception. As the Act currently operates the exceptions to infringement are limited to certain specified exceptions which are limited in scope (for example, the fair dealing exception for the purpose of research or study is limited so that it is only where the Act which would otherwise constitute an infringement is undertaken for "research" and "study" as those terms have been defined in a number of cases). Adopting an open fair use exception would give rise to uncertainty where the use did not fall into one of the current specified exceptions. In this regard, APRA/AMCOS note that jurisprudence from the United States in relation to the *US Copyright Act* section 107 is:

- (a) at the most persuasive in Australian courts; and
- (b) made against the backdrop of the United States constitution tenet of free speech, which is not part of the Australian legal system. In addition, the US jurisprudence contains many principles that simply are not part of Australian law.

3.7 The uncertainty engendered by an open fair use exception is likely to give rise to considerable litigation that would defeat the purpose of adopting such an exception. It is likely that fair use would be raised as a defence to many allegations of copyright infringement, adding significantly to costs of legal advice and to the costs of litigation. Litigation would also be significantly protracted by claims of fair use. At least while the provisions were new, many cases would be likely to be pursued into the appeal courts.

3.8 Even if the United States jurisprudence in relation to the fair use provisions was able to be followed, or if a similar approach were to be taken by Australian courts, a fair use style exception may not deliver the perceived benefits to users. There would seem to be little public benefit in significantly amending the law, with the consequent increases in transaction costs, if the intended result were not to be delivered.

3.9 The decision of a United States court under the *US Copyright Act* to the effect that time-shifting does not constitute an infringement of copyright (*Sony Corp v Universal City Studios Inc* 464 US 417 (1984)) does not necessarily mean that an Australian court

determining a matter under general fair use exception would come to the same result. In any event, it is clear that the decision does not provide that format shifting is a fair use. Further, for the reasons developed below at 4, it is likely that time shifting as it is now practised would also not be protected by the Betamax decision. Additionally, any Australian interpretation will only result from litigation. It is questionable whether amending the Act to provide for a general fair use exception in anticipation of a particular interpretation by the Courts in litigation is a warranted use of resources.

- 3.10 Carving out of copyright protection a broad exception which may reduce returns to copyright owners fails to strike an appropriate balance between public interest and copyright protection. It also fails to comply with Australia's international treaty obligations.
- 3.11 The rights accorded under the Act derive from several international agreements for the protection of intellectual property to which Australia is a party. The scope of any statutory exceptions to those rights must also be determined by reference to the exceptions allowed for in those international agreements.
- 3.12 In relation to considering the permissible exceptions to the exclusive rights of copyright owners, the relevant international agreements are the Berne Convention, the Rome Convention and the TRIPS Agreement.
- 3.13 Australia has been a party to the Berne Convention since 1928 (and prior to that as part of the British Empire).
- 3.14 The main purpose of the Berne Convention is to protect the rights of authors in respect of literary and artistic works. There are limitations imposed by the Convention in relation to the exercise of rights where fair use is concerned and provisions for compulsory licences have been made. Membership of the Berne Convention is now almost universal.
- 3.15 Australia's international treaty obligations must be the starting point for any consideration of copyright law and policy. In particular, the Berne Convention provides the template against which standards of protection, and exceptions to those standards are to be measured.<sup>3</sup>
- 3.16 Article 9(2) of the Berne Convention expounds the so called three-step test that has come to be regarded as the international yardstick for exceptions to exclusive copyright rights<sup>4</sup>. Australia has been bound by the Article since 1 March 1978.
- 3.17 Articles 9(1) and 9(2) provide:
- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form.*
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*
- 3.18 The separate steps of the test in Article 9(2) note that reproductions:

---

<sup>3</sup> *The Three-Step Test, Deemed Quantities, Libraries and Closed Exceptions* prepared for the Centre for Copyright Studies Ltd by Sam Ricketson, Barrister, Victorian Bar at page 1

<sup>4</sup> Ibid at page 2

- (a) may be permitted in certain special cases (narrow in scope);
- (b) must not conflict with the normal exploitation of the work (having regard to both existing and potential uses of the work); and
- (c) must not unreasonably prejudice the legitimate interests of the author (including economic and moral rights interests).

3.19 A broad based fair use exception to copyright owners' rights does not, in the submission of APRA/AMCOS, comply with the first limb of the three step test. It is too broad to be described as being confined to certain special cases – the cases are uncertain by definition.

3.20 The US joined the Berne convention as a powerful developed country with a wealth of copyright interests. It already had an entrenched fair use doctrine. APRA/AMCOS submit that the position of Australia – already a member of Berne – is quite different, and that it is unacceptable to introduce new law that is inconsistent with treaty obligations. Such a step would certainly result in international sanction – by way of complaint to the WTO, and by way of ceasing payment to Australian copyright owners who currently participate in income from blank media levy schemes.

**4. The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recording and live performances – and if so, under what conditions.**

4.1 APRA/AMCOS understand time shifting to be what occurs when a person records a broadcast for the purpose of watching or listening to it at a more convenient time. The practice is widespread throughout Australia. Television and radio broadcasts contain vast numbers of musical works controlled by APRA/AMCOS, as well as other copyright material.

4.2 The term “home taping” connotes the use of analogue video tapes of relatively limited duration used in machines that must be set to record at particular times. Changes in programming details and times, and the length of the tape, make videos of television programs an inefficient and relatively unsatisfactory mode of viewing any but individual programs. None of these factors diminishes the infringing nature of the conduct.

4.3 However, technology has significantly changed the quality and ease of recording.

4.4 The recently launched Foxtel IQ is a personal digital recorder with a hard disc drive recording device. Foxtel IQ allows a consumer to record up to sixty hours of television programming with special features such as the ability to pause, rewind and fast forward live television. In addition, through access to the Foxtel Digital Guide and Foxtel Digital programming, a consumer is able to plan and programme in advance the recording of an entire upcoming series of a particular television show via use of a personal planner and then allows the user to access and view any of the recorded programmes with relative ease. Two shows can be recorded at the same time whilst the consumer also watches another pre recorded show.

4.5 Recent developments in radio also mean that radio broadcasts can be “podcast” to MP3 players for a fee, to be listened to at a later time. Podcasting is a method of publishing files to the internet allowing users to subscribe to a feed and receive new files automatically. Podcasting allows radio programs to be accessed online and copied and

stored on an MP3 player for use and reuse. Recent media reports have confirmed that podcasting trials have proven very successful for networks such as Radio National in Australia. “The podcasting trial has exceeded expectations, growing from 19,000 downloads on June 19 to 74,000 last week”.<sup>5</sup> (Of particular concern is the ability of broadcasters to podcast music programs without any digital rights management information or restrictions (such as the prevention of further copies or communication)).

- 4.6 These types of recording do not constitute time shifting in the traditionally accepted sense of the term. The quality of the copy and the size of the storage media mean that users can retain copies for a long period of time. The copies are in no way transient. In the case of podcasting, it is the broadcaster who determines what can be copied. This demonstrates the difficulty of defining what constitutes time shifting. Even if the exception prohibited storage for any length of time, the legislation would be faced with the same enforcement and compliance issues that are present in the current Act.
- 4.7 The basic principle of fair dealing exceptions (other than compliance with the three step test as discussed above) is that there must be a public interest in the fair dealing. The exceptions are free, and in order to justify removing the copyright owner’s right there needs to be a public interest in the statutory removal of the exclusive right.
- 4.8 Time shifting is not about public interest - it is about convenience. Broadcast material is freely available, or available on a subscription basis. Time shifting is a means by which users can store program material for later and subsequent reuse at their convenience.
- 4.9 Statutory licences are in place to enable off air taping by educational institutions, where there is a clear public interest in providing access to the material. Even in that case, the legislature has recognised that copyright owners should be compensated for the use of their material. Copyright owners have a legitimate expectation of compensation for the copying of their works by other members of the public.
- 4.10 Exceptions to the rights of copyright owners to allow time shifting may not comply with the first limb of the three-step test. A broad right to reproduce copyright material for the general convenience of the user (who wants to use the material at a time that is different to the time it is offered) is not sufficiently certain or special to satisfy the test. The test is necessarily strict, because it involves an exception to an exclusive property right granted by law.
- 4.11 In addition, time shifting conflicts with the normal exploitation of works. For example, broadcasters already provide copies of television programs to members of the public, and AMCOS licenses the reproduction of musical works for that purpose. Copyright owners receive income from educational institutions that copy broadcast material off air. Accordingly, time shifting prejudices the legitimate interests of copyright owners, who are entitled to expect income from use.
- 4.12 A free exception for time shifting effectively legitimises infringement, and would be a statement that copyright owners should accept the widespread infringement of their rights without compensation. It would also be an appropriation of property on other than just terms, which is contrary to law.
- 4.13 APRA/AMCOS accept that time shifting is so widespread a practice, conducted in such circumstances, that it is virtually unstoppable. For that reason, APRA/AMCOS submit

---

<sup>5</sup> “Podcasts Booming on Radio National” page 18 The Australian – Thursday June 30 2005 Amanda Meade

that time shifting must not be allowed as an exception to copyright rights unless a private copying levy on blank recording media ensures that copyright owners are compensated for the derogation from their legislated rights. This is the only way that time shifting exceptions can be consistent with Australia's current international treaty obligations. This is the approach taken in most other countries, for example, in the European Union where the EU Directive on the Information Society requires private copying to be subject to equitable remuneration. This submission is expanded below at 7.

**5. The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.**

5.1 APRA/AMCOS understand format shifting to be what occurs when a user moves copyright content from one format (currently usually a physical product, like a CD) to another format (like an iPod, or a computer hard disc). From a computer, it is a simple matter to transfer works back to a physical product, like a CD or a DVD. In this way a musical work contained on a CD can be copied without limitation and without a realistic prospect of detection, onto various formats.

5.2 CD/DVD burning allows copyright works to be copied for free. (Burn is a colloquial term meaning to write content to a CD/DVD or other recordable disc. DVD and CD drives with recording capabilities (sometimes called DVD or CD burners) etch data onto the discs with a laser.)

5.3 Format shifting is a prime example of users infringing copyright for convenience. In no other case is it expected that a consumer is entitled to have more than one item of property, for the price of a single item, so that the item can be used in more than one place. There is no broad public interest in ensuring that users can own multiple copies of musical works in various formats. It is clear, however, that format shifting is widespread and unstoppable. To allow it to occur without compensation to copyright owners would be to legitimise infringement and justify the erosion of the copyright owner's right to be paid for use.

5.4 Consumers in the past have been expected – and have – paid for the convenience of new technologies. Many vinyl record collections have been superseded by CDs. The legislature made a policy decision that the duplication of copyright material using new technology should be compensated, when it introduced the blank tape levy. In no other industry do consumers expect or demand free replacement product when a new technology is developed. Computers and televisions, for example, are replaced regularly.

5.5 For the reasons set out above in relation to time shifting, exceptions to the rights of copyright owners to allow format shifting may not comply with the first limb of the three-step test. A broad right to reproduce copyright material for the general convenience of the user (who wants to use the material in a format in which the user has not acquired it) is not sufficiently certain or special to satisfy the test.

5.6 Format shifting conflicts with the normal exploitation of works. Format shifting of musical works has the potential to interfere seriously with the normal markets for distribution of those works, particularly where there are no real methods to restrict use to the parameters of the exception (such as personal use where the original is owned by the user). For the same reasons, format shifting prejudices the legitimate interests of the copyright owner, who is entitled to expect income from use.

- 5.7 APRA/AMCOS submit that format shifting must not be allowed as an exception to copyright unless a private copying levy on blank recording media ensures that copyright owners are compensated for the derogation from their legislated rights. This is the only way that a format shifting exception can be consistent with Australia's current international treaty obligations. This submission is expanded below at 7.
- 6. The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.**
- 6.1 The CLRC report on Computer Software Protection in 1994 understood that it was “common practice for many businesses to back up their work each day. This usually means that everything stored on the business’ computer, including data and programs, is down loaded onto another form of storage such as magnetic tape or floppy disc. This copy is then stored in a safe place as a precaution against unforeseen disasters such as fire, earthquake or even terrorist attack. Such back-up copies are usually retained only for a limited period as their usefulness is short lived... Accordingly, the Committee recommends that the making of an ephemeral back-up copy of a computer program that is incidental to the normal back-up copying of business data for security purposes should not be an infringement of copyright” (Recommendation 2.20)<sup>6</sup>
- 6.2 The justification for the computer software exception is the expense of software, its susceptibility to damage or corruption and the related business expenses that the user incurs if software is damaged or destroyed. These factors are completely absent in the case of an entertainment medium such as a CD, where the user is not exposed to anything like comparable costs and where the user will, inevitably, retain the original format.
- 6.3 Those who argue for such an exception claim that it is the susceptibility of computers generally to crash and lose the information they contain that suggests the back up exception is necessary for material other than computer programs. In answer to those claims, APRA/AMCOS say:
- (a) the availability and content of legal download services in Australia currently is such that it is highly unlikely that any consumer of music or films has an entire collection on computer of legally downloaded material that replaces a physical copy of the collection;
  - (b) as to physical copies of music and films, ample protection is offered in standard insurance contracts;
  - (c) no other property is protected by a free back up copy; and
  - (d) it is a fiction to say that copies of musical works retained by users are for back up purposes – users acquire or create copies of musical works for the purpose of use. A user does not store a CD collection on an iPod to protect against the destruction of the physical CDs, neither does a user burn copies of CDs to back up a computer that might be susceptible to crashing. All copies are for listening to.
- 6.4 In these circumstances, APRA/AMCOS do not support any exception for the purpose of making a back-up copy.

---

<sup>6</sup> CLRC Computer Software Protection 1994 at paragraph 10.18

- 7. The Government seeks your view on whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances.**
- 7.1 If the Government intends to introduce any sort of exception for private copying of musical works and subject matter other than works that embody musical works, APRA/AMCOS cannot support such a provision without compensation to copyright owners. It is the strong submission of APRA/AMCOS that if such an exception is to be introduced, it must be in the form of a statutory licence.
- 7.2 Statutory licences emanate from situations where infringement has become so widespread that it is impossible to enforce owners' rights. By way of contrast, fair dealings reflect public interest, and are those uses of copyright material where there is a public interest in free access, as detailed above at 1.6.
- 7.3 The difference between fair dealings and statutory licences is that fair dealings are exceptions to the rights of the owner; statutory licences are limitations on the rights of the owner, compensated by remuneration. This properly places time shifting in the category of uses that, if anything, require a statutory licence rather than a fair dealing exception to the rights of the copyright owner.
- 7.4 Statutory licences are intended to draw a legislative balance between the rights of copyright owners and the interests of some third parties who desire access to the copyright material – crucially, where the parties cannot reach resolution on the terms for access. That is, statutory licences do not reflect a broader public interest – they exist to accommodate the needs of a smaller group of users.
- 7.5 In particular, statutory licences exist where users are in a position to access copyright material without a real prospect of enforcement of the copyright owners' rights – including because of the ease of use, the difficulty of detection of infringement, and because of the transaction costs of litigation relating to individual instances of infringement.
- 7.6 Historically, statutory licences have been introduced where technology has developed to an extent such that cheap, good quality, multiple copies of copyright material can be made and disseminated without corresponding ease of detection and enforcement on the part of the owner.
- 7.7 The statutory licence for educational copying, for example, was introduced not to allow mere access to copyright material. Students already had free access to copyright material for the purposes of research or study under the fair dealing exception. Technology had developed in the form of the photocopier to a point where multiple copying had become easy and commonplace. Copyright owners had difficulty in obtaining evidence of infringement, as set out in *University of New South Wales v Moorhouse* (1975)133CLR1. The educational statutory licence allows educational institutions to copy material, provided the copyright owner is remunerated. This is because it was clear that widespread infringement of copyright was taking place within educational institutions, which copyright owners were virtually powerless to prevent.
- 7.8 The statutory licence contained in Part III Division 6 of the Act was not – contrary to the proposition contained in the Issues Paper – introduced to prevent copyright owners from restricting access for manufacturers to make records of musical works. Rather, it was introduced to ensure that the owners of copyright in musical works would be appropriately compensated when manufacturers reproduced works in records using the available technology.

- 7.9 The other characteristic of circumstances that properly give rise to statutory licences is the risk potential for market failure. Because the goods involved are for the most part public goods, intervention may be necessary to prevent market failure. The nature of copyright material invites free riders. Users may argue that a single free use does not damage the copyright owner's ability to earn income from exploitation of the copyright material. However, even if the marginal cost of a unit of production of the carriers of the material is low, the cost of creation is high (particularly given the low potential for a musical work to yield any significant income levels).
- 7.10 In the present circumstances, APRA/AMCOS consider that there is a risk of market failure. There is no doubt that time and format shifting are widespread. No single instance would significantly damage an individual copyright owner. However, the multitude of instances may indeed damage the copyright owners' legitimate economic expectations.
- 7.11 APRA/AMCOS also submit that if time and format shifting are legitimised without compensation to copyright owners, that would represent an acknowledgement that infringement would not be prevented and that the laws of the Commonwealth cannot be upheld. This would be contrary to the broader public interest. There would also be a significant reduction of income opportunities for copyright owners, which would have a corresponding impact on the incentive to create new material.
- 7.12 The technological capacity of users to make high quality digital copies from physical product (regardless of the actual ownership of that product) and to communicate those digital copies to portable carriers and to other users, means that far fewer copies of musical works need to be purchased (whether in physical form or otherwise).
- 7.13 The best efforts of some copyright owners have been directed towards litigation, and digital rights management/technological protection measures. It is the submission of APRA/AMCOS that the results of these efforts are disappointing.
- 7.14 Litigation of the kind undertaken by record companies around the world is prohibitively expensive, and has uncertain results. In particular, APRA/AMCOS do not support the institution of expensive litigation (or threats of litigation) against members of the public who are not engaged in copyright infringement for commercial purposes.
- 7.15 TPM are also an unsatisfactory method of controlling infringement. First, the vast majority of CDs sold in Australia were made before the advent of TPM and accordingly have no copy protection.
- 7.16 Secondly, TPM restrict public access to copyright material. They encourage some copyright owners to prevent the easy access to copyright material that it is the purpose of copyright law to ensure.
- 7.17 Of additional concern is the fact that TPM and associated Digital Rights Management (**DRM**) cannot attach to copies of underlying musical works embodied in sound recordings. (TPM are sometimes labelled DRM, although DRM is a much broader concept which also includes metadata.) It is only the maker of the sound recording who can attach TPM/DRM to recordings – the owner of the copyright in the work has no control over the making of the recording, or the TPM/DRM that is included with it (due to the operation of the Part III Division 6 statutory licence). It is the experience of AMCOS in its negotiations with digital download providers that record companies do not provide with recordings any meaningful information in relation to musical works themselves.

- 7.18 Finally, TPM are not always successful – many (particularly those attaching to physical product in the form of copy protection) are easily circumvented with basic actions. Still more can be circumvented by those with technical expertise. The following paragraphs set out some results of testing TPM in products currently available.
- 7.19 Since the end of 2003 a handful of Digital Service Providers (**DSP**) have launched in Australia, offering legitimate digital music downloads ‘protected’ by TPM. As a general rule, the TPM rules set by record labels allows for one download to a PC, 3 burns to CD, unlimited transfer of files to two portable devices and up to two replacement files in the case of computer crashes (see Annexure A).
- (a) Using three month old Dell PC, ADSL connection, Windows Media 9, Bigpond Music account, we were able to:
    - (i) Downloaded music from Telstra’s BPM;
    - (ii) burn the DRM encoded file as an audio CD; and
    - (iii) rip tracks into mp3 files using iTunes version 4.8 (for Windows).
  - (b) No copy control can be maintained if an audio CD is produced, unless there was some way of preventing users from creating an actual audio burn of the songs. However if this was possible, the data CDs would not be able to be played on the vast majority of CD players. It was such an easy process that any suggestion that TPMs contained in these digital downloads is effective, is simply wrong. The process merely involved burning to CD and then ripping from that CD back into iTunes (or any other music program). CDs produced by Digital Download consumers do not contain any of the TPM currently being included in the Copy Control CDs being produced by various record labels. This test replicates what many consumers are already doing.
- 7.20 Using a three month old Dell PC, ADSL connection, Bigpond Music account and Sonic: *Record Now* software – which came packaged with the computer, we were able to:
- (a) download music from Telstra’s Bigpond Music;
  - (b) burn DRM encoded file as an audio CD; and
  - (c) repeat the above process two more times. At the fourth attempt to burn, the DRM prevented another reproduction.
  - (d) All of the resulting CDs could be ripped into unencrypted mp3 files. It is unclear whether a reproduction from those audio CDs (created from the digital downloads) is circumventing TPM, as it could be argued those burns do not contain any TPM.
  - (e) The second part of this test was to burn the WMA files as data, to attempt to transfer them to a second computer and to then try and play them and the pop-up window indicated the file was not licensed and linked us to the Bigpond website to purchase the tracks again. Therefore it seems the TPM were effective in preventing WMAs being played on another computer.
- 7.21 For over two years some record labels have employed Copy Control on physical CD products. Copy Control technology claims to be able to prevent the ripping of music

tracks from the CD. The following is a warning included on CDs which contain Copy Control:



This disc may incorporate Copy Control technology. Copy Controlled discs are designed to be compatible with CD audio players, DVD players and PCs with OS Windows 95, Pentium 2, 233Mhz, 64MB RAM or higher. This technology prevents the consumer from making digital copies. For further information please visit <http://www.emimusic.info>  
Contact Details: [copycontrol@emi.com.au](mailto:copycontrol@emi.com.au)

7.22 Using Three month old Dell PC, Sonic *Record Now* version 7 software which came standard with the computer and various Copy Control CDs we did the following:

- (a) **Coldplay – ‘X&Y’** – released 6 June 2005 (the release date is important as it can be assumed this disc would contain the latest version of the Copy Control technology). Using Sonic *Record Now* software, by using the ‘Exact Disc Copy’ function, we were able to make a full copy of the album – including all of the so called Copy Control components;
- (b) **Daft Punk – ‘Human After All’** – released 14th March 2005. Again, using Sonic *Record Now* software by using the ‘Exact Disc Copy’ function, a full copy of the album was made; and
- (c) **Chemical Brothers – ‘Press the Button’** - released 24th January 2005; *Record Now* software and the ‘Exact Disc Copy’ function made yet another perfect copy.

7.23 The images here illustrate not only did the Copy Control CD get recognised by iTunes, the software also allowed us to rip the ‘copy protected’ songs into MP3s.

7.24 This test was also conducted on an Apple G4 computer running OS X 10.3. Again no problems were experienced ripping all the music tracks into MP3s.

A screenshot of the iTunes interface showing the metadata for a copied track. The track title is 'Robot Rock (4:47)' by Daft Punk from the album 'Human After All'. The artwork area is empty with the text 'No Artwork Available'. The metadata includes: Kind: MPEG audio file, Size: 4.4 MB, Bit Rate: 128 kbps, Sample Rate: 44.100 kHz, Date Modified: 22/06/2005 9:02 AM, Format: MPEG-1, Layer 3, Channels: Joint Stereo, ID3 Tag: v2.2, and Encoded with: iTunes v4.8.0.32.

No Artwork Available		Robot Rock (4:47) Daft Punk Human After All
<b>Kind:</b> MPEG audio file	<b>Format:</b> MPEG-1, Layer 3	
<b>Size:</b> 4.4 MB	<b>Channels:</b> Joint Stereo	
<b>Bit Rate:</b> 128 kbps	<b>ID3 Tag:</b> v2.2	
<b>Sample Rate:</b> 44.100 kHz	<b>Encoded with:</b> iTunes v4.8.0.32	
<b>Date Modified:</b> 22/06/2005 9:02 AM		

7.25 Using a three month old Dell PC, Sonic *Record Now* version 7 software which came standard with the computer and a purchased copy of *The Carpenters GOLD* DVD we:

- (a) placed Carpenters Gold DVD in the drive;
- (b) opened up Sonic: *Record Now* program;
- (c) chose ‘Exact Disc Copy’;

- (d) pressed 'Record' button;

A pop up window alert saying "this disc is copyright protected" appeared. No reproduction was possible using this function. We then:

- (e) placed the original Carpenters DVD into drive;
- (f) a new folder was created on the computer desktop;
- (g) the VIDEO\_TS and AUDIO\_TS folders were copied from original DVD into new folder;
- (h) opened up Sonic: *Record Now* program;
- (i) named session/disc: THE\_CARPENTERS\_GOLD – the same as the original DVD; and
- (j) burned a full copy of the Carpenters Gold DVD to a DVD-R.

7.26 Using a four year old Power Macintosh G4 733 MHz, *Fast DVD Copy 3* backup software (which is widely available on the net) and a purchased copy of *The Carpenters GOLD* DVD we:

- (a) opened up DVD copy software;
- (b) placed Carpenters Gold DVD in the drive;
- (c) pressed 'make copy'; and
- (d) the entire DVD reproduction took place in approximately fifteen minutes.

7.27 Using other freely available OSX software we:

- (a) ripped files using *DVD Backup* software program;
- (b) compressed files using *DVD2oneX* program;
- (c) transferred files into Toast 6 Titanium; and
- (d) burnt a DVD session/disc named: THE\_CARPENTERS\_GOLD – using the DVD-ROM (UDF) function\.

7.28 After downloading 'permanent copies' any computer upgrade means transferring those files across to a new computer is virtually impossible without circumventing TPM. We estimate consumers upgrade their computer hardware on average at least every three to four years.

7.29 In the circumstances, APRA/AMCOS strongly advocate the introduction of a statutory licence for private copying.

7.30 The idea of a blank media royalty is of course not new in Australia. In the second reading speech of the Copyright Amendment Bill 1988 the then Attorney General said that the measures were introduced because "home taping is widespread in the community. Under the present law this practice is in breach of copyright yet, clearly, it cannot be controlled by copyright owners either by technical means or by legal action."

It was not said to be about access, or public interest. It was expressly about the “convenience of the public”.

- 7.31 There are schemes operating with a levy on analogue blank carriers, digital carriers and data CDs in almost all developed countries throughout the world, with the notable exceptions of the United Kingdom, Australia and New Zealand.
- 7.32 Private Copying Levies and DRM Private copying levies were introduced in the 1960s and have since been established in different ways in many European countries. They were introduced to compensate right holders for reproductions made for private use (**Private Copying**). Private Copying is a limitation to the exclusive reproduction rights of authors, performers and producers. The Copyright Directive (2001/29/EC) to some extent harmonises the scope of the Private Copying limitation across Europe, where no commercial aims are pursued and fair compensation is provided to the rightsholder. Private Copying must also be compatible with the three-step test.<sup>7</sup>
- 7.33 Remunerated private copying is allowed in some circumstances under the US Digital Home Recording Act. The main features of the scheme are it<sup>8</sup>:
- (a) requires payment only in relation to digital recording devices and media;
  - (b) requires payment by people who import and distribute, or manufacture and distribute, such devices and media – it does not apply to people who manufacture or import but do not distribute, or who distribute but do not manufacture or import;
  - (c) prohibits the manufacture, importation and distribution of digital recording devices [and interface devices] that do not include a serial copying material system;
  - (d) does not allow “serial copying” – that is, it does not allow the further copying of a copy made under the scheme; and
  - (e) does not apply to digital downloads (eg downloading MP3 files from the Internet to a computer hard disk), or copying music from a computer to a portable listening device.
- 7.34 Private copying may in some circumstances be allowed under the fair use provision.
- 7.35 In Canada, the Canadian Private Copying Collective (**CPCC**) collects levies from manufacturers and importers of blank audio media according to a tariff schedule and then distributes the amounts to eligible authors, performers and producers of recorded musical works copied by individuals for personal use in Canada. The Copyright Board of Canada issued a ruling on 12 December 2003 imposing a levy of up to \$25.00 on non-removable memory permanently embedded in digital audio recorders (such as MP3 players).
- 7.36 In Japan, a remuneration scheme for digital copying for private purposes was introduced in 1992. The levies are payable on digital audio tape recorders, digital compact cassettes and mini discs. In 2001 the levy of DAT recorders was 2% of the retail price with a ceiling of 1000 yen. The levy on digital recording media was 3% (reviewable after 3 years). The levy on specified digital video recording devices and on

---

<sup>7</sup> “*Intellectual Property Rights and Digital Rights Management Systems*” Information Society European Union September 2004 Fact Sheet at page 2

<sup>8</sup> Ibid at page 11 paragraph 4.3

specified digital video recording media was 1% of the standard price. From July 1999, a 1% levy has been payable on digital image recording devices (devices that use digital video cassette recorder and data video home system formats).<sup>9</sup>

- 7.37 The Issues Paper notes that while copyright users in European Member States may have greater private copying rights than users in the United States, there is a problem with TPM that stop users from making copies as permitted under national law.
- 7.38 APRA/AMCOS do not consider this to be an insurmountable problem. One answer might be to legislate so that rights owners must make available the means to take advantage of a private copying scheme. Another is to institute a remedy against the rights owner where TPM prevent licensed copying. TPM exist throughout the world in conjunction with blank media levies. There is no single standard reliable system of TPM that protect works, and in any event, TPM exist to prevent piracy, not legitimate copying.
- 7.39 APRA/AMCOS agree with the advantages of a blank media levy scheme, as set out in the Issues Paper – it legalises an unstoppable illegal practise, copyright owners receive financial compensation for the use of their work, and there is a general public interest in having an effective and credible copyright law. In addition, such a scheme would comply with Australia’s treaty obligations which a broad based fair use exception or time and format shifting free exceptions would not.
- 7.40 While a blank media levy or statutory licence scheme does involve administrative costs, issues of efficiency and transparency, and requires consideration of distribution issues – these are the type of issues that are dealt with routinely and effectively by collecting societies. All statutory licences involve difficulties of this type. But these schemes provide very real sources of income for copyright owners. The schemes also have the overwhelming benefit that they do not legitimise infringement.
- 7.41 The model for such a scheme would require consideration. The model could be a statutory licence, involving some kind of records of use for distribution purposes. With the benefit of the High Court decision in *Australian Tape Manufacturers v Commonwealth* 1993 176 CLR 480, it may be that a tax is in fact the preferable model, with revenue to be hypothecated to copyright owners on the basis of a comprehensive survey of use.
- 7.42 The advantages of a private copying tax would include certainty, administrative simplicity, flexible application by regulation, and broad compliance.
- 7.43 Another option would be to bundle licences with the blank media, with the consumer able to receive a refund of the levy if the use did not involve the reproduction of copyright material. Such a scheme would operate in a manner similar to the facility for overseas visitors to obtain refunds of GST/VAT.
- 7.44 It is the strong expectation of APRA/AMCOS that if free exceptions for time and format shifting are introduced into Australian law by whatever mechanism, complaints will be made to the WTO in respect of Australia’s non compliance with its international treaty obligations. In addition, large numbers of Australian copyright owners who currently receive income from foreign private copying schemes are likely to have that income removed, if the foreign copyright administrations determine that treatment will no longer be on a national basis, but will rather be reciprocal.

---

<sup>9</sup> “Remuneration for private copying in Australia: A Discussion Paper” Prepared by the Australian Copyright Council September 2001 at pages 16 – 17 paragraph 4.5(c)

**8. The Government seeks your views on whether the Copyright Act should be amended to include other specific exceptions or statutory licences, and if so under what conditions**

8.1 APRA/AMCOS do not see the need for any additional statutory licence or exceptions in the Act.

8.2 If any additional statutory licences were to be introduced, APRA/AMCOS submit that it is essential that the terms of those licences should be subject to the jurisdiction of the Copyright Tribunal.

**9. The Government seeks your view on other options for implementing reform, and the costs and benefits of those options.**

9.1 APRA/AMCOS have no further submissions at this stage of the inquiry.

**10. The Government seeks your view on any other matters arising out of this Issues Paper.**

10.1 APRA/AMCOS have no further submissions at this stage of the inquiry.

**Annexure A**

**BigPond Music Terms and Conditions Terms of Service and Sale (Terms)**

**6 Usage Rules**

When you purchase a Music File, you become authorised to do certain things with that file so that you can enjoy it within the following rules (Usage Rules):

- (a) Your purchase of a Music File, authorises you, for your own personal use, to:
  - (i) download the Music File once, to one stand-alone personal computer;
  - (ii) copy the Music File an unlimited number of times to up to two portable devices registered to you which operate with Microsoft Windows Media Player version 9;
  - (iii) burn the Music File up to 3 times onto CD-R or CD-RW; and
  - (iv) download up to two replacement Music Files at no additional charge if you have had problems installing the licence or if the original file on your stand-alone personal computer is lost or destroyed.
- (b) These Usage Rules are strict because of intellectual property rights in the recordings. You must not:
  - (i) do anything with the Music File that is not authorised in (a) above (including re-sale, rental or allowing or assisting anyone else to do the same); or
  - (ii) attempt to circumvent or modify any technological measure used to apply these Usage Rules to your Music File (or allow or assist anyone else to do the same).
- (c) You must not use or reproduce any Music Files unless you have paid us, or will pay us when due and payable, the charges for those Music Files, and the payment is not dishonoured or charged back to us.
- (d) Also, you must not do anything with Streamed Music other than streaming it. Specifically, you must not attempt to circumvent or modify any technological measure used to prevent reproductions or downloading of Streamed Music (or assist anyone else to do the same).
- (e) Please do not use internet services that promote the illegal distribution of copyrighted music. Please note that the Copyright Act 1968 (Cth) provides for civil remedies against, and criminal penalties for, people who engage in the unauthorised reproduction, distribution and digital communication of copyrighted sound recordings.

## Articles/Links

### **Mother faces jail for child's music downloads**

June 22, 2005

A British teenager's penchant for the bands Coldplay and Oasis has left her mother contemplating prison. Sylvia Price has received a demand for £4000 (\$A9500) in compensation by solicitors acting for the music industry after her daughter Emily was caught illegally downloading songs by her favourite artists. A nationwide crackdown organised by the British Phonographic Industry is under way to try to stop illegal downloaders. Earlier this month, Coldplay's new album, X&Y, was leaked to the internet before its European release. Other artists have had to bring forward releases after their music appeared online before reaching the shops. Note: Coldplay's label uses Copy Protection technology. Interesting to see how effective it was in preventing the new album being leaked to the Net!

<http://www.smh.com.au/news/breaking/mother-faces-jail-for-childs-music-downloads/2005/06/21/1119321735459.html#>

### **The pen is mightier than copy-protection**

13 May 2002

Controversial copy-protection mechanisms on CDs could be negated with something as simple as a marker pen. According to one German geek who sent the tip to technical magazine *Chip.de*, a variety of copy-protection systems, including Cactus Data Shield and KeyAudio, which also stop music CDs being played in CDRom drives, can be circumvented with a felt-tip pen. Copy-protection systems work by adding a corrupt data track to the outside edge of a CD. This track is ignored by common audio CD players but prevents copying, and sometimes playing, in the more sensitive PC CD drives. By covering up a portion of the dividing line and outside track on the CD, without touching the last audio track, it is possible to fool the CD player into thinking that the extra corrupt data track does not exist. The marker pen line can easily be wiped away afterwards with a soft cloth.

<http://www.vnunet.com/news/1131719>

<http://www.zeropaaid.com/bbs/archive/index.php/t-2097.html>

### **The nitty-gritty of circumvention**

J u l y 1 5 , 2 0 0 3

One of the more diverting features of the digital copyright wars is the choice of *nom de guerre* that hackers take. Numbnut, for example, is not a name that predisposes one to take the owner all that seriously. But it is reportedly the nickname of a bloke in Queensland (where else) who is responsible for an open source modchip design for Microsoft's Xbox. The design is being offered for free download by a mob doing business as AussieChip. And in doing that, one can only imagine that Numbnut and his mates are making some serious enemies. That's because modchips undermine the games-licensing/distribution business model - and the income streams of Microsoft licensed designers and distributors. As such, the boys in Queensland may be heading for a showdown. The likely point of any attack will be that they infringe s.116A of the Copyright Act, the notorious anti-circumvention provision. Microsoft or Xbox game designers could potentially invoke the section on the basis that the modchip circumvents access or copy controls protecting the Xbox games, such as region encoding.

<http://www.theage.com.au/articles/2003/07/14/1058034930703.html>

### **Labels to dampen CD burning?**

Wednesday 2 June, 2004

The recording industry is testing technology that would prevent consumers from making copies of CD "burns," a piracy defence that could put some significant new restrictions on legally purchased music. Tools under review by the major labels would limit the number of backups that could be made from ordinary compact discs and prevent copied, or "burned," versions from being used to create further copies, according to Macrovision and SunnComm International, rivals that are developing competing versions of the digital rights management (DRM) software.

<http://news.com.com/2100-1027-5224090.html>

### **C o p y r i g h t a n d w r o n g s**

The arrival of improved DVD burners highlights how many people break the law without knowing it.

<http://enewsletters.f2network.com.au/cgi-bin/l6/DM/y/hayZ0DCMc40JhK0BHMN0Aj>

### **'Controlled' Music Copying Okay - ARIA**

ARIA says it's not opposed to a certain amount of copying by consumers, as long as it can be controlled. It seems the labels are about to embrace new DRM technology that's embedded within actual CDs.

<http://news.zdnet.co.uk/business/legal/0,39020651,39159288,00.htm>

### **Copy protection to extend to multiple but limited burns**

The two most prominent suppliers of copy protection for music compact discs, are set to come back to the market with rethought offerings whereby CD copying is allowed, but limited to a set number. This strategy, dictated by the record labels as “where they are trying to get,” will emerge in new offerings from market leader Macrovision and SunnComm, during the course of 2004.

[http://www.theregister.co.uk/2004/06/10/copy\\_brotection\\_burn/](http://www.theregister.co.uk/2004/06/10/copy_brotection_burn/)

<http://www.siliconvalley.com/mld/siliconvalley/business/columnists/gmsv/8957022.htm>

### **Why there's not going to be a blank media levy in Australia**

One of the perennial controversies of the music business is the issue of a levy on blank media. The idea is consumers would pay more for blank CDs, hard drives, memory sticks - anything you could record onto. The money would be divvied up between the copyright holders. But there's no need to rush out and buy a truckload of blank media - it's probably not going to happen. And not because it's a bad idea: it's industry infighting that will kill this one off. Simply put, the multinational record companies are opposed to the idea.

<http://rocknerd.org/article.pl?sid=04/08/24/0643214&mode=nocomment&tid=20>