



FAIR USE AND OTHER COPYRIGHT EXCEPTIONS

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AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION

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1. Introduction

ASTRA welcomes the opportunity to submit to the Attorney-General's Department's Inquiry into the examination of fair use, fair dealing and other exceptions contained in the Copyright Act 1968 (Cth) (the Inquiry).

ASTRA represents the interests of subscription television platforms and channel providers/producers. A list of ASTRA's members can be found at www.astra.org.au/members.asp.

ASTRA's members have a vested interest in ensuring that copyright law provides an effective measure of protection of their respective interests as copyright owners and as broadcasters. ASTRA's members invest significant amounts of money in the production and exploitation of films and television programs and have a legitimate interest in ensuring that their rights in works created by them are sufficiently protected from theft, misuse or unauthorised exploitation. A certain legislative environment will ensure continued long term investment in, and exploitation of, new works, both internationally and in Australia.

However, ASTRA also recognises that since the introduction of the Copyright Act 1968 (Cth) (the Act), new technologies have evolved and continue to evolve and mature that were not contemplated when the Act was introduced. In particular, the introduction of the Video Cassette Recorder (**VCR**), DVD players and recorders and, most recently, the personal digital (video) recorder (**PDR**) has had a profound impact on the television broadcasting industry. The VCR was introduced into Australia in 1976. By 2001, it was estimated that 89% of Australian households had at least one VCR, and 26.5% had two or more VCRs in their homes¹. During 2004, there was a 400% increase in the number of DVD recorders purchased in Australia, with some 66,000 DVD recorders sold up to November 2004².

ASTRA's members are certainly not adverse to embracing new technology. FOXTEL introduced the FOXTEL iQ in February 2005, a PDR that enables FOXTEL's subscribers to record a program available on the FOXTEL service to the hard drive of the PDR for subsequent viewing. AUSTAR has announced plans to launch a PDR in 2006 and OPTUS will also offer a PDR service to its subscribers when it commences to provide digital subscription services later this year.

The PDR offers subscribers significant benefits over a VCR and DVD recorder in that a subscriber can choose programs they wish to record for later viewing from an electronic program guide, rather than manually setting times to record programs. Several DVD recorders also have hard drives built into them.

Although VCRs, DVD recorders and PDRs have legitimate uses in domestic residences under the Act, most notably to view pre-recorded tapes and DVDs, and also pursuant to s111 of the Act, which permits the copying of certain live television broadcasts for private and domestic uses, many of the uses of VCRs, PDRs and DVD recorders would or could infringe the Act. As noted in the Attorney General's Department's Issues Paper titled "Fair Use and Other Copyright Exceptions - An examination of fair use, fair dealing and other exceptions in the Digital Age" dated May 2005 (**Issues Paper**). Section 111 does not permit copying of underlying works included in a live

¹ Research conducted by Roy Morgan and A C Nielsen for the National Appliance and Equipment Energy Efficiency Committee ("NAEEEC"); Product Profile: Video Cassette Recorders (VCRs): Australia's Standby Power Strategy 2002-2012, Published October 2003, p.4.

² "It's Fast Forward For DVD Recorders", Mike Barton, Sydney Morning Herald, 31 December 2004, quoting research undertaken by GfK Australia.

broadcast. This means that the domestic recording of any feature film, dramatic television series or pre-recorded documentary or reality television series is illegal under the Act without the permission of the owner or licensee in the copyright of those works, unless that recording falls within one of small classes of permitted exceptions contained in the fair dealing provisions of Part III of the Act. These provisions were introduced into the Act in 1980, before the VCR became widespread in Australian households.

With time, new forms of technology will be developed and exploited to replace or complement existing technologies. It is, of course, impossible to know the extent such future technologies will impact on the Act and the protection offered to copyright owners and licensees under the Act. However, legislation and court decisions from other jurisdictions do provide helpful guidelines in assessing the balance that needs to be made between copyright owners' rights and the ability of consumers to enjoy the benefit from technologies as and when they develop. In order for the Act to maintain its relevance in an increasingly technological world, it is imperative that it be adaptable.

It is to be noted in this regard, that Australia is the only major common law jurisdiction that does not provide a fair dealing or fair use right that permits copyright users at least the right to use video or hard drive recording devices to time-shift television programming. As stated in the Issues Paper, each of the United States (US), the United Kingdom (UK) and New Zealand have amended their legislation (or rely on existing judicial authority) to permit a time-shifting right. The Republic of Ireland also has similar laws in place to those in the UK³. It is incongruous for the Australian position to lag behind these jurisdictions on such an issue, particularly in view of the fact that Australians acquire much of our new technology from these jurisdictions.

At present, the Act does not reflect the reality of the VCR, DVD recorder or PDR, let alone technologies that have yet to be developed. The real danger in maintaining the Act without reference to these technologies is that Australians will regard it as obsolete and irrelevant to their needs as well as to the technology they are using.

In making this submission, ASTRA is only concerned with the direct interest of its members, namely subscription television platforms and channels. ASTRA has not made submissions with respect to the copying of media other than television broadcasts, in particular the copying of DVDs for back up purposes or copying CDs to computer hard-drives and portable playback devices such as iPods. ASTRA understands that submissions will be made from industry participants more directly involved in those media.

³ Copyright and Related Rights Act, 2000, Section 101(1).

2. Summary of Position

ASTRA supports changes to the Act which address the needs of consumers using lawfully acquired copying devices, whilst preserving the interests of copyright owners and broadcasters and protecting their rights to continue to exploit works created or licensed by them in a manner that does not derogate from the long established principles of copyright law in Australia.

ASTRA does not consider that adopting an open-ended 'fair use' exception as applied under US law is appropriate in the circumstances. Rather, ASTRA supports a more certain, if restricted, application of the doctrine that permits recording of a television program (and any work contained in that program) for the purpose of viewing that program at a later point. This will in time, provide a sufficient degree of certainty for copyright owners, whilst also indicating to users that there are limits to which technologies such as VCRs, DVD recorders and PDRs can be legally and legitimately used.

ASTRA submits that the Act should be amended to allow specific additional exceptions to copying prohibitions as follows:

- Exceptions contained in Sections 41 and 103A of the Act should be extended to include caricature, satire, parody and pastiche.
- Copyright users should be permitted to record a television or radio broadcast for the purpose of time-shifting. This should include the right to record any and all underlying copyrighted works contained in that broadcast. However the right should only be for viewing or listening to the broadcast at a later or more convenient time for private and domestic purposes only.
- The right to time-shift should be subject to the exercise of a broadcaster's right to implement a technological protection measure on their broadcasts.
- Time-shifting should not be extended to allowing copyright users to make back-up copies to be kept permanently.
- A statutory licence for time-shifting should not be introduced.

3. Response to Issues Paper

ASTRA's submission responds to specific matters raised in the Issues Paper below.

3.1 **The operation of the current exceptions in the Copyright Act, particularly the fair dealing exceptions, in providing a balance between the interests of copyright owners and copyright users.**

ASTRA believes that the current fair dealing exceptions contained in the Act generally provide a fair, or realistic, balance between the interests of copyright owners and copyright users but due to the development and exploitation of new technologies since the commencement of the Act in 1968, there has been an increasing divergence between the rights granted to copyright users in the Act to use copyrighted works and the manner in which they are using those works. ASTRA believes that some, but not all, of the uses to which these technological devices are put, can be legislated for without upsetting the balance that already exists in the Act. However, when considering this issue, it is important to draw a distinction between copying for professional or educational uses and for domestic or private uses.

Copying for professional, commercial or educational uses

The current legislative position restricts the rights of copyright users to copy works for primarily professional, commercial or educational purposes. Section 5 and Attachment A of the Issues Paper effectively summarises the basis on which a copyright user can copy part or all of a work and for what purpose.

Subject to some comments in the following paragraph, ASTRA considers that the current fair dealing provisions for professional and educational uses are satisfactorily dealt with under the Act and agrees with the general conclusions of the Ergas Committee that an expansion of these rights does not offer sufficient benefits to justify the uncertainties an expansion of these rights could create. Certainly, ASTRA does not favour the position adopted in the US, where much of the decision making as to what constitutes 'fair use' is left to the courts to determine.

ASTRA believes that it is imperative that the Act dictates the rights of copyright users as specifically as possible, so that copyright owners are not required to commence litigation to determine the scope of fair dealing rights. Maintaining certainty is important to program producers who create programs (and therefore are the copyright owners) and it is equally important in cases where there is legitimate utilisation of the current fair dealing exceptions to create programs (news and review in particular). Copyright owners invest significant amounts in the creation of their works and/or acquisition of broadcasting rights (particularly for sporting and premier entertainment events) and should not be placed in a position where they need to litigate to determine the extent of their rights and any limitations that should or would be imposed on them by a fair use doctrine.

ASTRA considers that the exceptions contained in Sections 41 and 103A of the Act should be extended to include caricature, satire, parody and pastiche. These are elements additional

to criticism, review or news that are currently permitted under the Act. The elements of caricature, satire, parody and pastiche are extensions of criticism and review, but do not necessarily come within their scope. They are valid forms of expression that are recognised within the fair use doctrine established by US courts and (save for satire) in the European Union Information Society Directive (Article 5(3)). The extension of the fair dealing rights to include these forms of expression creates greater certainty for copyright users whilst not diminishing the rights of copyright owners. ASTRA's only concern, for its copyright owners and users, in relation to such an extension is that it would need to take into account, and not conflict with, moral rights, in particular, the moral right of integrity.

Copying for private and domestic purposes

The only provision of the Act that permits a copyright user in a domestic residence to copy a television program purely for their personal use is contained in Section 111 of the Act. That section permits the copying of a television broadcast for private and domestic use. As stated in the Issues Paper, Section 111 does not permit the copying of underlying works contained in the television broadcast, such as sound recordings, feature films or dramatic or reality based television series, but rather is restricted to live sporting and news broadcasts (and even then some underlying works may exist in the broadcast of these programs that are prohibited from being recorded). For most people, the application of Section 111 is of limited benefit. The effect of Section 111 is that legal recording to VCRs, DVD recorders and PDRs is of extremely limited use in households.

ASTRA's submissions on the changes it proposes to the Act with respect to copying for private and domestic purposes is dealt with in more detail below under part 3.4 of this Submission.

3.2 Should the Copyright Act be amended to consolidate the fair dealing exceptions on the model recommended by the Copyright Law Reform Commission (CLRC)?

ASTRA does not believe that the Act should be amended in accordance with the model recommended by the CLRC. In its report, *'Simplification of the Copyright Act: Part 1'*, the CLRC recommended that the current fair dealing exceptions be consolidated into a single provision. However, rather than constitute the sole exceptions to infringement, these exceptions would represent examples of exceptions within a broader, open-ended fair use model permitting any form of dealing with a work, provided it satisfied the elements for consideration contained in the current Section 40(2) of the Act. The effect of this approach would be to make Section 40(2) of the Act the benchmark for what constitutes fair dealing in copyrighted works under the Act.

ASTRA believes that the result of such an amendment to the Act would result in greater uncertainty for both copyright owners and users. For example, it is unclear from the operation of Section 40(2) whether time-shifting of works contained in television broadcasts would be a permitted use. Indeed, if the film or television series being recorded is available to purchase or rent on video cassette or DVD, Section 40(2)(c) would appear to operate against a right to record that program. If, however, that program is not readily available on DVD or video, then such a recording may be permitted. The effect of adopting the CLRC's recommendations could mean that the burden would be on the copyright user to consider

whether they were permitted to record a program each time they sought to do so. This contrasts with the US position, where, by reason of the so-called ‘Betamax’ case⁴, a right to time-shift programming recorded via a VCR (or other home video recording device) was determined to be a fair use. This was because the matters for consideration in the US copyright legislation were less specific than those contained in Section 40(2) and, in particular, did not include a counterpart to Section 40(2)(c).

ASTRA’s view is that if the Attorney-General’s Department sought to include a broader fair use doctrine in the Act, then it would be preferable to adopt the US position than that recommended by the CLRC. However, it is ASTRA’s opinion that neither approach is suitable for the Australian copyright environment.

3.3 Should the Copyright Act be amended to replace the present fair dealing exceptions with a model that resembles the open ended fair use exception in US copyright law.

ASTRA submits that it is not appropriate for the Act to be amended to include an open ended fair use exception based on US copyright law. Instead, ASTRA supports more specific amendments including amendments to the Act that provide for an extension of the fair dealing provisions to allow for ‘time-shifting’ (see 3.4 below).

However, ASTRA believes that the fair use rights would be better spelt out in the Act itself rather than be left to judicial interpretation, which could make it a potential moveable feast over time, resulting in perpetual uncertainty for both owners and users.

Further, it is by no means certain that Australian courts would follow in the footsteps of their American counterparts, as the common law that applies in Australia differs greatly from that in the US, and the reasoning of the US courts is applied far less frequently in Australia than judicial reasoning from the UK or New Zealand courts.

A primary argument in favour of adopting the open ended approach used in the US is that such a law would deliver greater flexibility and be more adaptable to new technologies. Whilst this certainly is an attractive prospect in theory, as a practical matter the broader fair use doctrine in the digital age has posed significant problems for copyright owners, such that their interests needed to be addressed in new legislation that, in effect, limited the application of fair use rights.

As stated in Section 10.4 of the Issues Paper, the Digital Millennium Copyright Act 1998 (the DMCA) was introduced in part to clarify the rights of copyright owners to incorporate technological protection devices in their works to protect those works from unauthorised copying and commercial distribution. The DMCA makes it a crime to produce or offer for sale software programs or devices that allow for circumvention of technological protection measures built into software by copyright owners or licensees. Although the DMCA does state that it is not intended to affect the fair use right granted under the Act, the US Supreme Court upheld a claim by copyright owners to prohibit the manufacture and sale of a program that enabled copyright users to circumvent Macrovision contained on DVDs.⁵

⁴ *Sony Corporation v Universal City Studios* 464 USC 417, 1984

⁵ *321 Studios v Metro Goldwyn Mayer Studios et al*, US District Court, 19 February 2004.

If an open-ended fair use right was to be introduced into the Act, then ASTRA submits that this should be made subject to the restrictions against circumventing a technical protection device introduced to the Act in 2000.

It is ASTRA's view that an open ended fair use provision would not offer any greater ability to adequately deal with or adapt itself to technologies yet to be created, without further amendments being required to protect the rights of copyright owners.

3.4 Should the Copyright Act be amended to include a specific exemption for time-shifting television and radio broadcasts - including underlying works, films, sound recordings and live performances - and, if so, under what conditions?

ASTRA supports an amendment to the Act that would permit copyright users to record a television or radio broadcast for the purpose of time-shifting, including a right to record any and all underlying copyrighted works contained in that broadcast. Such an amendment would bring the Act into line with legislation in comparable common law jurisdictions.⁶

ASTRA considers that the right to time-shift should be constrained to the specific purpose of viewing or listening to the broadcast at a later and more convenient time to the user. ASTRA believes that such an amendment addresses the key deficiency of the Act as it commonly applies to the daily use of VCRs, DVD recorders, audio cassette recorders and PDRs by the general public. Namely, copyright users have been routinely copying television broadcasts (and, ASTRA believes to a considerably lesser extent, radio broadcasts) for the purposes of viewing and/or listening to those broadcasts *other than* at a time scheduled by the broadcaster.

Obviously, these devices can, and undoubtedly have been used to record broadcasts of programs with the intention of the copyright user to keep such programs indefinitely. However, the mere fact that a certain technology exists does not in and of itself demand a legitimisation of any and all of its uses. Rather, the technology should, in a logically sustainable manner, set limits on how a copyright user can use the recording device, but at the same time permit them to use all the primary features of that device.

It is to be noted that even under the fair use doctrine employed in the US, it is unclear from the *Betamax* case that there exists a right of a user to copy a television program for the purposes of keeping that copy indefinitely. Rather, the *Betamax* case considered and approved the use of a VCR for time-shifting purposes as falling within the US fair use exception as contained in s107 of the Act. The Court also held that the fact that a VCR may also be put to an infringing use did not of itself constitute a basis for determining that a VCR should not be available for sale to consumers.

The recent decision of the US Supreme Court in the *Grokster* case⁷ has qualified the *Betamax* decision, particularly with regard to the manner and intent by which recording devices that are capable of being used for time-shifting and other lawful means (but are also capable of being used for unlawful means) are marketed and promoted by the manufacturer of the device. However, the principle of time shifting as a fair use right under the US

⁶ The Annexure to this Submission provides a brief summary of the legislative position in other jurisdictions.

⁷ *Metro-Goldwyn-Mayer Studios Inc, et al v Grokster, Ltd*, Supreme Court of the United States, No. 04-480, 27 June 2005.

Copyright Act remains sound law under the circumstances so far considered in decisions to date. ASTRA does not believe that retaining the status quo under the Act benefits either copyright owners or users. Users will continue to use their recording devices to record programs illegally, with little or no regard to or in many cases, knowledge of the actual provisions of the Act.

Proposed amendment to the Copyright Act

As to the wording of an amendment to the Act, ASTRA is of the view that the current s111 of the Act should be amended to include a new Section 111(2A) on the following terms:

(2A) The making for private and domestic purposes of a recording of a television broadcast or a sound broadcast solely for the purpose of enabling it to be viewed or listened to at a later and more convenient time does not constitute an infringement of the copyright in the television broadcast or sound broadcast or the copyright in any work included in such television broadcast or sound broadcast.

The proposed wording of Section 111(2A) closely follows Section 70 of the Copyright Designs and Patents Act in the UK. Section 111(2A) would be in addition to the other provisions of Section 111, and ASTRA does not propose the repeal or amendment of Section 111(1) or s111(2). The proposed s112(2A) imposes the following conditions on any recording of a program:

- the recording is for private and domestic purposes only. This is consistent with the other provisions of s111 and the same determination on what constitutes ‘private and domestic purposes’ as set out in s111(3) would apply to the proposed new s111(2A); and
- the recording would be *solely* for the purposes of enabling the program to be *viewed at a later and more convenient time*. This makes it clear that any recording is made for a specific purpose.

Technological protection measures and time-shifting

ASTRA also submits that the exercise of a copyright user’s right to time-shift a television or radio broadcast in the manner proposed in s111(2A) should be subject to a broadcaster's right to implement a technological protection measure on their broadcasts. This is consistent with the objective of the Copyright Amendment (Digital Agenda) Act 2000.

Copyright owners may require broadcasters to implement technological protection measures on certain programs included in their transmission to prevent or restrict copying, even for the purposes of a copyright user exercising their fair use rights. The implementation of such technological protection measures is consistent with broadcasting practice internationally, including in the US.

Macrovision, the most prominent provider of technological protection measures to broadcasters in the world, estimates that its copy protection system has been embedded in

over 145 million digital set top units and PDRs throughout the world and that its technology has been activated by pay per view operators in Western Europe, Japan, the US and Canada⁸. FOXTEL and AUSTAR have also activated Macrovision technology in their digital set top units to protect pay per view movies available on their FOXTEL Box Office and Box Office services respectively.

If a time-shifting right was not made subject to technological protection measures incorporated into broadcast streams, then it is likely that broadcasters may find themselves at risk of civil action from copyright owners to whom they have contractually agreed to implement such measures and, further, agreements for the broadcast of works protected by technological protection measures could be lawfully terminated by copyright owners, thereby denying broadcasters the ability to broadcast such works.

Statutory licence for time-shifting

ASTRA does not believe that any statutory licence fee should be associated with the rights granted to copyright users for time-shifting. ASTRA's submission on this issue is dealt with under part 3.7 of this Submission.

3.5 Should the Copyright Act be amended to include a specific exemption for format-shifting and, if so, under what conditions?

ASTRA does not support amendments to the Act which include a specific exemption for the format-shifting of television or radio broadcasts. On the assumption that amendments to the Act take substantially the form proposed by ASTRA, or as adopted by the legislatures of the UK and New Zealand, ASTRA does not believe that a specific exemption for format-shifting is required.

ASTRA acknowledges that a vast majority of time-shifting of television broadcasts will involve format-shifting to VCRs and DVD recorders, whilst radio broadcasts will by necessity be format-shifted to cassette tapes, CDs or other portable listening devices. However, the amendment proposed to the Act as set out above in part 3.4, does not specify the manner in which the right to time-shift a broadcast may be exercised or on what format the recording can be made. This is consistent with the international position. Indeed, as the amendment proposed by ASTRA would only permit recording, viewing and then deletion or disposal of the recording, it is ASTRA's view that the media utilised in the recording is not, of itself, of primary importance to the making of the recording.

A right to engage in format-shifting is more relevant to the copying of musical works from one format (usually a CD) to another format (at present, an MP3 player via recording the musical work to a computer hard drive from a CD in the first instance). However, in the digital environment, it is only a matter of time before format-shifting will also become an issue in respect of the copying of television broadcasts from one format to another (for example, recording a program using a PDR, copying that program to a personal computer hard drive and then copying that recording to a portable video player such as a next generation MP3 player or iPod). As ASTRA is not directly involved in the exploitation of musical works other than as embodied in programs in its subscription television and radio

⁸ Macrovision Annual Report, 2004, p4.

broadcasts, and as currently the effective format-shifting of television broadcasts is less relevant as available bandwidth is yet to catch up with file sizes, ASTRA does not at this stage make any material submissions in relation to the format-shifting of works. However, ASTRA would like the opportunity to revisit this issue in the future.

3.6 Should the Copyright Act be amended to include a specific exemption for making back-up copies of copyright material other than computer programs and, if so, under what conditions?

As stated in the Issues Paper, the primary purpose of back-up copying is to make copies of works that are purchased (but not rented) by copyright users in case the original copy is lost or damaged. As this use does not apply to the activities of ASTRA or its members, ASTRA does not intend to make any substantive submissions on this point. However, ASTRA again reiterates that the need for any right to create back-up copies should be subject to the right of copyright owners to implement copy protection technology on the media containing the purchased work. This is in line with current provisions applying to fair dealing under the Act.

3.7 Should the Copyright Act be amended to include a statutory licence for private copying and, if so, for what materials and under what conditions?

ASTRA does not support the introduction of a statutory licence for time-shifting of television or radio broadcasts.

ASTRA believes that copyright users who time-shift broadcasts should not be placed at a disadvantage to their counterparts in other comparable jurisdictions. Equally, broadcasters should also not be placed in a more onerous position. No levy is applied to copyright users or broadcasters in the US, the UK, Ireland or New Zealand⁹. The *Information Society Directive* formulated by the European Union, whilst providing for the ability of Member States to introduce “fair compensation” for the use of protected works, also notes that in “certain situations where the prejudice to the rights holder would be minimal, no obligation for payment may arise.”¹⁰ The UK, a Member State of the European Union, did not implement a provision for compensating copyright owners for time-shifted recordings when considering changes to the Designs Patents and Copyright Act 1988 to comply with the Directive¹¹.

There are sound philosophical and practical reasons why a statutory licence for the time-shifting of broadcasts is not implemented in these jurisdictions and why Australia should follow their lead and similarly reject a levy for time-shifted viewing. Primary among them is that there is no material economic prejudice to the copyright owner arising from the act of time-shifting by a copyright user, by reason of the fact that time shifting does not involve any commercial exploitation of the program and does not grant a right to archive the program by the copyright user.

⁹ The position in Canada seems unclear, although no levy applies to time-shifting; a blank audio media levy has been legislated for the making of back up copies of musical works.

¹⁰ Directive 2001/29/EC of the European Parliament, Article 5.2(b) and Recital 35.

¹¹ See: Notice issued by the Patents Office, “Implementation of the Copyright Directive (2001/29/EC) and related matters”, located at: http://www.patent.gov.uk/copy/notices/2003/copy_direct3.htm

If the Department does seek to impose a statutory licence for time-shifting, then ASTRA requests the right to make further, more detailed submissions on this issue on behalf of its members.

Further Submissions

ASTRA does not make any submissions on the issues raised in Points 8, 9 or 10 of the list of "Issues for consideration in submissions".

4. Conclusions

There is increasing divergence between the rights granted to copyright users in the Act to use copyrighted works and the manner in which they are using those works.

ASTRA does not support a broader fair use doctrine. It considers that it is important that legislation dictates the rights of copyright users as specifically as possible, thus reducing the need for litigation to determine the scope of fair dealing rights and retaining certainty for program producers and copyright owners.

The current fair dealing provisions for professional and educational uses are for the most part satisfactorily dealt with under the Act. An expansion of these rights would not offer sufficient benefit to justify the uncertainties such additional rights could create.

We have also noted that the approach recommended by the CLRC is not supported on the basis that it will result in greater uncertainty for both copyright owners and users and would not be suitable for the Australian copyright market.

It is ASTRA's submission that the Act should be amended to allow specific additional exceptions to copying prohibitions as outlined below:

- Exceptions contained in Sections 41 and 103A of the Act should be extended to include caricature, satire, parody and pastiche.
- Copyright users should be permitted to record a television or radio broadcast for the purpose of time-shifting. This should include the right to record any and all underlying copyrighted works contained in that broadcast. However the right should only be for viewing or listening to the broadcast at a later or more convenient time for private and domestic purposes only. This will bring Australian law into line with legislation in comparable common law jurisdictions.
- The right to time-shift should be subject to the exercise of a broadcaster's right to implement a technological protection measure on their broadcasts.
- Time-shifting should not be extended to allowing copyright users to make back-up copies to be kept permanently.
- A statutory licence for time-shifting should not be introduced.

In addition to the above, ASTRA seeks the opportunity to properly analyse and comment upon any amendments that may be proposed from this current policy review as and when they are determined so that we may accurately inform the Government of the likely impact of legislative change and be involved in an appropriate level of consultation at that stage.

Annexure

Summary of Time-Shifting Rights in Major Common Law Jurisdictions

<i>Jurisdiction</i>	<i>Time shifting of works contained in television and radio programs permitted</i>	<i>Permanent copying of works contained in television or radio programs permitted</i>	<i>Statutory licence payable to copyright owners and/or collecting societies for time shifting right</i>
United States	Yes: Section 107 of the US Copyright Act as interpreted by the US Supreme Court in <i>Sony Corporation v Universal City Studios</i> 464 USC 417 (the <i>Betamax Case</i>)	No. The <i>Betamax</i> case only extended the fair use exception to a right to time shift television programs via a VCR.	No.
United Kingdom	Yes: Section 70, <u>Copyright, Designs and Patents Act 1988 (UK)</u>	No.	No.
New Zealand	Yes: Section 84, <u>Copyright Act 1994</u>	No.	No.
Ireland	Yes: Section 101(1), <u>Copyright and Related Acts 2000</u>	No.	No.
Australia	No. Section 111 of the <u>Copyright Act 1968 (Cth)</u> only permits recording of live broadcasts, but not copyrighted works contained within those broadcasts	No.	Not applicable