



JULY 1, 2005

AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT SUBMISSION TO THE AUSTRALIAN GOVERNMENT REGARDING FAIR USE AND OTHER COPYRIGHT EXCEPTIONS

The Australian Federation Against Copyright Theft Limited (AFACT) very much appreciates the opportunity to provide a submission in response to the Australian Government's Issues Paper *Fair Use and Other Copyright Exceptions* ["the Review"]. In particular we take this opportunity to commend the Government's ongoing work in continuing to address the need for changes in copyright law, in the current and fast changing digital environment in Australia.

The following submission will consider certain issues raised in the Review from the perspective of their potential impact on the business of production and distribution of cinematographic film ("film") in Australia in respect of copyright infringement of film products, and copyright enforcement action.

Information on AFACT, the film industry in Australia, movie piracy and copyright theft is attached in Annexure A.

AFACT view on

- **whether the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC; and**
 - **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.**
1. The insertion of non-exclusive factors open to judicial interpretation into the Copyright Act may assist the Act to be flexible in the face of rapid technological change however the cost of such flexibility is unacceptably high to both the copyright user and the copyright owner. Both interest groups would be required to rely on extensive litigation to determine the parameters of exceptions to infringing behaviour with no prior certainty of the outcome of the litigation. This is particularly the case if we introduce non-exclusive factors expecting them to deal with rapid technological change in the absence of an existing relevant Australian body of precedent case law. Copyright

users, especially consumer groups least familiar with the concepts and parameters of copyright law, would be required to 'infringe first – and seek a defence afterwards'.

2. In our observation of the use of copyright material by consumers, and even within copyright industries and copyright user businesses, what is most required at this time is clarity about the law and broad consumer education about how to comply with its terms. The wide ranging and hotly disputed views both in the US and in Australia about what copyright uses are or are not permitted under the US open ended fair use exception aptly illustrate the problems of the US approach.
3. Introduction into the law of general guidelines without the necessary case law and regard for the judicial system in which it operates as opposed to proscribed terms would not aid or encourage a clear understanding of the applicable laws, and would compound existing confusion about what uses are permitted in the face of new technological applications that facilitate copying. It is reasonable to assume that such an outcome would increase the already escalating levels of copyright infringement of film product in Australia.

AFACT view on whether the Copyright Act should 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.

4. AFACT does not express any view in respect of radio broadcasts. In respect of any introduction of a specific exemption for time shifting television broadcasts we note the following concerns:
5. VCR recording of analogue television broadcasts is a technological capacity that has been available to and widely used by consumers in Australia since the 1970's. The Copyright Act has in this respect, and for this long time been more honoured in the breach than the observance, although it was assumed to have little material consequence to copyright users and owners. During all or most of this period:
 - a. The possible recordings were on analogue tape of analogue free-to-air broadcasts and therefore not commercial quality;
 - b. The analogue recordings were known to degenerate over time and be relatively cumbersome to store;
 - c. Subsequent recordings of the program from the first off-air recording resulted in material loss of quality, and required a time commitment equal to the time of the program itself for each additional copy [outside professional duplication facilities];
 - d. Duplication facilities for multiple copying were cost and space prohibitive to the average consumer;
 - e. Consumer behaviour strongly supported the commercial availability, purchase and in particular the rental of video tape recordings of copyright film and television product from authorized sources;

- f. There was no technology available to the ordinary consumer to be able to remove the advertising during the time shifting process;
 - g. The unlawful copying and distribution of copyright film and television programs comprised up to 4% of the legitimate market in Australia;
 - h. As far as AFACT is aware, no actions for copyright infringement were brought by the film and television industry in respect of consumer copying from television for the purposes of time shifting.
6. The circumstances in Australia in 2005 are very different, and have changed dramatically over the last few years.
- a. Available technology now facilitates digital copying by various devices including optical disc and computer hard drive, of digital television signals - resulting in commercial quality copies of copyright film content;
 - b. Available technology now facilitates digital copying of copyright broadcasts while deleting the advertising content of those broadcasts;
 - c. Available technology now facilitates digital copying and time shifting by various devices including optical disc and computer hard drive of film and television programs from both authorized and unauthorized sources over the internet;
 - d. Computer file sharing systems over broadband connections are widely used¹ to download, upload and distribute unauthorized copies of film material;
 - e. Convergence of technology now makes it possible for internet content to be displayed on television sets, and for television programs and copyright film to be downloaded or streamed over the internet, cable and satellite to computers, television sets and other devices such as lap tops and mobile phones.
 - f. Commercial duplication equipment is heavily marketed to the consumer and facilitates perfect digital optical disc copies in less than fifteen minutes of recording time; e.g. Nine stack DVD burner priced from \$1950 burns 9 DVDs every 15 minutes, three stack burner available for \$950²;
 - g. The unlawful copying and distribution of copyright film and television programs doubled to 8% of the legitimate market in Australia between 2000 and 2003³;
 - h. The number of pirate discs seized in Australia by Police, Customs and industry went from 61,550 in 2003 to 148,937 in 2004, and reached 77,644 for the first quarter of 2005;⁴

¹ OTX research in 2004 and Envisional research in 2005 found 17% and 16% of Australian broadband users respectively to have downloaded from the internet unauthorised copies of copyright film including movies and TV programs. ACCC reports a 122% increase in broadband take up by Australians in the 12 months to March 2005.

² Sydney Morning Herald Icon Section April 16/17 2005

³ Australian Film and Video Security Office [AFVSO] Figures

⁴ AFACT figures

- i. Actions by copyright owners in respect of the unauthorized copying and distribution of copyright film by private users over the internet have commenced in the US;
 - j. Consumers are now provided with commercial services for time shifting such as 'video on demand', 'near video on demand' and Foxtel's 'IQ system'. These services have entered the market and are providing authorized digital time shifting capability to Australian consumers based on various price points, and based on these businesses negotiating commercial licenses with copyright owners of the copyright film content so supplied.
7. 2005 finds the film and television industry challenged by rapid change and meeting these challenges with emerging and in some cases [DVD movies and TV series] extremely successful new business models for delivering film to consumers. The industry is challenged by competing business models and technologies vying to build revenues by delivering film content to consumers, sometimes without due regard for the cost of production of that film content or the fees and royalties payable to the people and businesses that contributed to the creation of the film.
8. The industry is challenged by increasing piracy, but the combination of successful business models meeting consumer tastes and desires, improved and consistent law enforcement efforts, technological protection measures and clear consumer education – all of which factors were recognized in 2000 in the Andrews Report - can be expected to deliver increased compliance with determined effort and investment.
9. It is not easy to maintain the commercial viability, research, development and investment in much film product in the face of these challenges. Certain sectors of the film industry in Australia such as Australian film and television production, independent cinema, and film rental – especially in suburban and regional areas - are already at real risk of market failure. If changes to the law are introduced that dilute the right to raise revenue from the copying, exhibition, sale, rental and broadcast of film and television product, or mislead consumers into a perception of greater tolerance of unauthorized copying, then market failure in these sectors will materially increase. It is reasonably foreseeable that some sectors of the Australian industry would disappear altogether, or subsist exclusively on Government subsidy if available.
10. The sectors at greatest risk of market failure in Australia are also conversely, those sectors least likely to benefit from any statutory license that may otherwise be proposed in cases of absolute market failure. Statutory licenses do not benefit those industry sectors that do not comprise copyright owners, and while falling far short of adequate commercial compensation for lost sales, such licenses generally favour copyright owners who already possess the widest market penetration for their products as against those with significantly less market share.
11. In these circumstances there is a high risk that legalizing consumer copying of entire copyright films and television series, even if specifically and exclusively limited to time shifting free-to-air analogue television broadcasts, in the absence of stronger legislative protection measures and extraordinary increased enforcement and education efforts, will deliver the following additional outcomes:

- a. Displacement of existing and emerging commercial opportunities for copyright owners to provide consumers with authorized copies of the film to the home at varying price points and at times desired by the consumer;
- b. Undermining of the business model for commercial free-to-air television services as an outlet for copyright film where time shifting technology deletes the advertising content that is actually paying for both the broadcast and the copyright film content;
- c. Confusion by consumers about what copying is permissible, and especially in view of:
 - i. the distinction between copyright film content delivered to them over various media including free-to-air and Pay TV [as both can be delivered through a Pay TV service];
 - ii. analogue and digital signals [as both are simultaneously broadcast];
 - iii. television broadcasts as opposed to internet streaming, downloading or video on demand services to TV sets and other devices;
- d. A material increase in the number of copies of films circulating amongst consumers for which:
 - i. the copyright owner has received no payment;
 - ii. no technological protection against unauthorized further copying or secondary dealing is present;
- e. A material increase in the difficulty and complexity of law enforcers and copyright owners efforts to enforce the law especially in cases of criminal breaches of copyright, and criminal breaches facilitated by computer equipment and the internet [as I understand will be outlined in detail in the AVSDA submission to the Review] and
- f. An increase in the cultural shift by some consumers towards illegal copying of films.

AFACT view on:

- **whether the Copyright Act should be amended to include a specific exemption for format shifting – and if so under what conditions; and**
- **whether the Copyright Act should be amended to include a specific exemption for back up copies of copyrighted material other than computer programs – and if so under what conditions.**

12. Copyright film is a product generated by the creativity and investment of people who hope to secure a consumer market and derive revenue for their efforts. The Australian film and television industry is successful and diverse - it delivers films to consumers in a wide and increasing range of formats and price points. The copyright film must by necessity be embodied in some format, and the copyright owner must retain the exclusive right to copy the film to the format in order to reach that consumer market and derive a return on the money invested in creation of the film. There is no more justification to permit format shifting or back up copies of copyright film than to permit or indeed mandate a free upgrade from your VCR to a DVD player, or a free new DVD player when your child 'accidentally' posts the toast in the old player.

13. The expectation by consumers that copying the image on the screen or disc should be treated differently from stealing the screen or disc itself, together with ready access to technology that facilitates copying, is a principal contributor to the current rising levels of copyright theft in Australia and must be met by a concerted campaign of education and awareness.
14. Permitting format shifting or back up copies of copyright film will exacerbate those factors already outlined above in respect to time shifting, especially if characterised under the guise of 'fairness', without delivering to the consumer any demonstrable need other than a desire to obtain for free what in the circumstances of physical as opposed to intellectual property would obviously and without contention incur payment for a replacement.

Adrienne Pecotic
Executive Director

ANNEXURE A

The Australian Federation Against Copyright Theft

The Australian Federation Against Copyright Theft [AFACT] was established in January 2004 by the Motion Picture Association (MPA), to protect the film industry in Australia from the adverse effects of audio visual copyright theft. AFACT states as its principal objective to work closely with industry, government, law enforcement and educational institutions in Australia to address copyright theft and protect the interests of the film and television industry and Australian movie fans.

AFACT is affiliated with MPA offices around the world also charged with the monitoring, investigation and reporting of incidents of movie counterfeiting and unauthorized copying of copyright and trademark films, often referred to by the generic term 'movie piracy'. The MPA members include the major film studios Disney/Buena Vista, MGM, Paramount, Sony/Columbia, Twentieth Century Fox, Universal and Warner Bros.

AFACT is also associated with Australian based film producers, distributors, and exhibitors as well as the video and optical disc replicators and distributors. Village Roadshow and Roadshow Films Pty Ltd joined the Federation in February, 2004.

AFACT collates information on the incidence of movie counterfeiting and unauthorized copying of copyright and trademark films in Australia and operates an 1800 free call number to receive reports of alleged infringing activity from members of the public. AFACT investigates alleged illegal activities and initiates deterrent warnings, civil actions and referral of matters to police as necessary.

The Film Industry in Australia

Three main industry sectors in Australia rely on the trade in cinematographic films and television programs [films] produced in Australia and overseas [principally the U.S. and U.K.] to sustain their economic activity, and employ approximately 50,000 Australians. This trade is made possible through the legal framework and protection of intellectual property in the films comprised in the Copyright and Trade Mark legislation. The Australian Bureau of Statistics describes these sectors as Film and Video Production Services, Film and Video Distribution Services, and Television Services.

Film and Video Production consists of people in businesses/organizations mainly engaged in the production of films on film or digital media [including tape and disc] for theatre or television projection. This class also includes such services as casting, film editing and titling. Film and video production is a collaborative exercise requiring a large capital investment employing many people in development and production of the original film. The investors in the film and the principal creative personnel such as Producer, Director, Script Writers, Actors and Composers obtain income from the distribution, sale, exhibition and televising of each authorized copy of the film in Australia and around the World.

Film and Video Distribution consists of people in businesses/organizations mainly engaged in leasing or wholesaling films on film or digital media to organizations for

exhibition, broadcast and sale. This class also includes agents mainly engaged in leasing and wholesaling films to organizations, retailers and exhibitors. This sector obtains income by retaining a portion of the sale price of the cinema ticket, video or DVD, or by charging the consumer a fee for rental or viewing of authorized copies of the film.

Information collated by the Australian Video Software Distributors Association, Australian Video Rental Retailers Association and collated by the Australian Film Commission indicate there are approximately 2,500 video/DVD rental stores in Australia, 90% of which are operated by small businesses and franchisees. In 2000 Australian Bureau of Statistics (ABS) noted this sector comprised 11,615 Australians 75% of whom were casual or part time employees.

Information from the ABS and the Motion Picture Distributors Association of Australia [MPDAA] indicate that in 2000 there were 1,540 cinema screens operated in Australia with 35% operated by independent exhibitors. The cinema exhibition sector employed 9,282 Australians 81% of whom were casual employees.

Movie Piracy and Copyright Theft

Following is an outline of the current status of movie piracy and copyright theft of cinematographic film in Australia. Changes to Copyright law that facilitate private copying of film can be expected to aggravate the losses already being suffered by the industry due to piracy, and both complicate and compromise the enforcement efforts of State and Federal Police in this area.

Value of the Illegal Trade in DVDs in Australia & Loss to Legitimate Industry

The industry estimates⁵ the trade in illegal DVD's in Australia to be valued at over \$83 million based on a rate of 8% of the legitimate home entertainment sector of the film industry for 2003 [see below]. In addition there is loss to the cinema and television industry sectors, loss of concession sales [chips, drinks etc.] and tax revenue together estimated in 2003 to be over \$200 million. Finally there is loss from unauthorized copies of films copied, distributed and downloaded by the internet without manifesting in optical disc or video tape copies of the films.⁶

Global Growth In Illegal DVD Manufacture & Trade

The Motion Picture Association [MPA] operates anti-piracy offices in 13 countries in the Asia/Pacific region and the member companies estimated their loss in excess of US\$896 million in potential revenue regionally in 2004. MPA reports that in 2004 their operations investigated more than 25,500 cases of movie piracy and assisted law enforcement officials in conducting nearly 12,000 raids. These activities resulted in the seizure of approximately 49 million illegal optical discs, and the initiation of more than 8,000 legal actions.

⁵ Australian Film Industry Coalition figures 2003

⁶ See note 1 above

Statistics maintained by AFACT and previously by the AFVSO indicate that unauthorized copies of films seized throughout Australia increased from 5,650 in the year 2000 to 61,550 in 2003. The seizure figure more than doubled in 2004 to 148,937 with first quarter figures for 2005 already amounting to 77,644. This is a physical count undertaken by investigators and staff authorized by and under the control of AFACT during or shortly after each police or industry operation, together with seizure figures provided by Australian Customs Services.

Further statistics maintained by AFACT building on those previously maintained by AFVSO since 1982 calculate a percentage rate of counterfeit and unauthorized material in the market place. This historically has been evaluated from volume of product seized by Police, together with voluntary surrenders and observations, compared to genuine product distributed to retailers. Of more recent times, the number of substantiated complaints from consumers has been part of the evaluation.

It is accepted that this is not an exact science, however the figure of 4% and less, was fairly consistent from 1990 to 2001. Taking into account the increase of product seized in 2003 and 2004, together with an unknown, but apparent adverse impact upon cinema attendances, AFVSO estimated an 8% piracy rate as at end 2003. AFACT anticipates this percentage loss will rise when calculated as part of an independent research survey due for completion in late 2005.

The increasing prevalence of copyright crimes correlates with the increasing popularity of the DVD format with the Australian consumer, and the increasing tendency for the Australian consumer to seek to buy DVD copies of films to own at home, as well as continuing to rent films on DVD format from video stores. The increasing prevalence also correlates with a large increase in the number of unauthorized films on DVD format being produced in the Asian region and exported around the world including Australia.

Manifestation of Illegal DVD Manufacture & Trade

A sharp increase in the prevalence of movie piracy offences followed the introduction of optical disc technology, in particular the Digital Versatile Disc [DVD] and the Recordable Digital Versatile Disc [DVDR]. Statistics maintained by AFACT and the AFVSO confirm this increase.

AFACT records indicate there is an increasing trend since 2002 for unauthorized copies to be imported from Asia in the DVD format [as observed by Australian Customs Services] or illegally downloaded from the internet. In many instances this involves Films that have not yet reached the cinemas in Australia and are several months prior to legitimate video or DVD release. These are then copied onto DVDR format for illegal distribution in Australia.

During 2004, MPA Regional Office in Singapore concluded that Melbourne was host to the largest concentration of market stalls selling counterfeit copies of Films under one roof in the Asia Pacific Region. The number of market stalls trading in counterfeit DVD Films at the relevant location rose from a low of 15 to over 135 prior to being addressed by joint AFP and Victoria Police enforcement action in November 2004.

In areas where Police and industry representatives have had success in reducing the overt prevalence of the crime at local markets, manufacturers and distributors of illegal discs have moved to covert operations frequently distributing lists of film titles through closed networks of customers by email or workplace, and selling illegal copies of films burned to order on DVD recordable discs.

Organized Crime

Despite the recent increases in this crime in Australia, the MPA reports that Australia maintains one of the lowest piracy rates in the Asian region. However due to the high profit on unauthorized copies of DVD films sold in Australia, the legitimate industry suffers one of the highest revenue losses in the region and Australia is observed to be a prime export target for unauthorized copies of films from Malaysia, China, Indonesia and Taiwan.

Due to the large profit margins, organized crime groups have moved into the film piracy racket with the distribution and sale of counterfeit DVD's become increasingly better organized. The move into the counterfeit industry by such organized crime groups has seen them use threats of physical violence, damage industry investigators property, issue death threats against industry investigators as well as attempt to bribe industry investigators to stay away from certain markets and sales areas.

Effect of Illegal DVD Manufacture and Trade on the Legitimate Industry

AFACT is contacted by video store owners, cinema owners, producers and other persons involved in the film industry on a weekly basis concerned that film piracy is seriously affecting their business and they are suffering losses they cannot sustain. Those most seriously affected are operating small businesses, especially in regional and suburban areas where film piracy, especially in local markets, has become entrenched.

The damage to the industry is particularly acute when legitimate traders rely on the sale or exhibition of high volumes of 'blockbuster' new release movies to sustain their cash flow and revenues – exactly the film titles most targeted for illegal manufacture and trade. The ready availability of unauthorized copies of these titles both from criminal hard copy sources and over the internet to consumer homes, often prior to legitimate first release, is of material impact on the revenue stream in Australia to small and large businesses alike, within the film industry and the retail sector.

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