

AFACT

AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT

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29 February 2008

Ms Helen Daniels
Assistant Secretary
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Robert Garran Offices
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Dear Ms Daniels

Copying photographs and films in a different format for private use: Review of sections 47J and 110AA of the *Copyright Act 1968*

The Australian Federation Against Copyright Theft (AFACT)¹ is grateful for the opportunity to provide this submission in response to the Issues Paper on 'Copying photographs and films in a different format for private use: Review of sections 47J and 110AA of the *Copyright Act 1968*' (**Issues Paper**).

As noted in the Issues Paper, the policy considerations for this review include:

- ensuring copyright continues to provide adequate economic incentives for the creation and distribution of films to the public;
- ensuring copyright law reflects developments in technology;
- recognising reasonable consumer use of technology to enjoy copyright material;

¹ AFACT was established in 2004 by the Motion Picture Association (MPA), to protect the film industry in Australia from the adverse effects of copyright theft in all forms. The founding member of AFACT, the MPA, is a trade association representing the interests of the major film studios that produce and distribute theatrical films, home video entertainment and television programming in Australia and throughout the world. AFACT members include: the MPA; Village Roadshow Limited; Buena Vista International, Inc.; Paramount Pictures Corporation; Sony Pictures Releasing International Corporation; Twentieth Century Fox International Corporation; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

AFACT notes that recently, the MPA and Singapore's Media Development Authority launched the Centre for Content Protection – Asia Pacific (**the Centre**). The Mission Statement of the Centre is expressed as 'promoting the research, development, implementation and awareness of technological solutions for the protection and exploitation of digital and analogue media content'. The launch of the Centre demonstrates that 'movie studios... are highly motivated to meet the dynamic demands of the entertainment consuming public.' (Centre for Content Protection homepage www.contentprotection.net)

- ensuring any changes do not unreasonably harm or discourage the development of new digital markets; and
- minimising the risk of promoting copyright piracy.²

AFACT notes that 'a particular concern of this review is whether the extent of copying permitted by section 110AA might be extended, such as to permit digital-to-digital copying, without causing significant harm to copyright owners'.³ AFACT notes that the Government does not endorse a particular view or course of action.

As producers, distributors and owners of copyright works, AFACT members have a significant interest in any proposed amendments to Australian copyright law. In light of the interests of the members of AFACT, this submission is limited to the format shifting exception for the copying of films - section 110AA of the *Copyright Act 1968* (Cth) (**Act**). This submission primarily uses DVD technology to illustrate its points; however the same principles are applicable to other digital forms of film copyright owners' content.

In this submission, AFACT outlines why an expanded format shifting exception for films would detrimentally impact the film industry and the continued development and implementation of new business models for the delivery of filmed entertainment to consumers.

AFACT's views in summary are that:

1. There is no need for an expanded format shifting exception for film as the industry is developing and deploying 'managed copy' technology that allows consumers to make format shifted copies of films in a way that protects copyright owners' core rights.
2. Any expanded format shifting exception for film would be contrary to the Government's stated policy considerations and contrary to the requirements of the 'three step test' as set out in the *Berne Convention for the Protection of Literary and Artistic Works* (**Berne Convention**) and the Agreement on *Trade-Related Aspects of Intellectual Property Rights* (**TRIPS**).
3. An expanded format shifting exception would be unworkable in practice and have no legitimate value to the public as using any expanded format shifting exception would require consumers to circumvent access technological protection measures (**ATPMs**), in breach of copyright law. Further, any consideration given to introducing an exception to allow ATPMs to be circumvented for the purpose of using any expanded format shifting exception would quickly reveal that such an exception would be contrary to the requirements of the *Australia – United States Free Trade Agreement* (**FTA**).
4. An expanded format shifting exception would defeat the ATPMs and technological protection measures (**TPMs**) film copyright owners apply to their copyright products, creating unprotected copies of films. Unprotected copies could then be uploaded to the Internet and shared across peer to peer networks and copied limitlessly. This would impact negatively on the continued development of new business models for the delivery of filmed entertainment to consumers. Film copyright owners would have no ability to protect or manage their core copyright rights, nor any incentive to expand consumer choices by offering different services at different price points.

² Pages 8-9 of the Issues Paper

³ Page 15 of the Issues Paper

AFACT is pleased to provide further comments below in respect of these points.

Developments regarding 'managed copies'

AFACT believes that there is no need for an expanded format shifting exception. The film industry is developing technology that will meet the Government's policy objective of recognising 'reasonable consumer behaviour without causing harm to copyright owners'.⁴

AFACT members recognise that 'the mantra of the modern consumer is "what I want, where I want it, when I want it and on whichever device I happen to be using".'⁵ Consumers want to be able to view films they have purchased on a variety of media, including their television, computer and portable devices.

The industry is developing and increasingly using technology that allows the making of 'managed copies'. Managed copies are copies made from legitimate originals, in a different format, where the *copies* have technological protection measures (**ATPMs and TPMs**) applied to them.

This new technology allows consumers to create format shifted copies, whilst preserving the film copyright owners' ability to protect and manage their core copyright rights, by preventing further copying, and communication.

The industry is well on the way to deploying this new technology, which would benefit consumers and also meet the needs of industry.

The development and licensing of Content Scramble System (**CSS**), the copy protection technology applied to DVDs (see further below), is overseen by the DVD Copy Control Association (**DVD CCA**).⁶ The DVD CCA has recently approved an amendment to the CSS Agreement to allow commercial vendors to make managed recordings of DVDs by 'burning' movies purchased online to a DVD. Further this amendment allows consumers, in the convenience of their own homes, to burn copies of DVDs downloaded through a variety of on-line delivery services.

There are multiple approaches to enabling purchased DVD movies to be format shifted onto other devices owned by that same consumer, for example:

- providing consumers who buy a DVD with an additional physical copy that can be moved onto a variety of consumer devices in multiple formats, where all copies are protected; and
- providing consumers who buy a DVD with a coupon to allow a free digital download, so that the film is held in multiple formats on multiple devices, again where all copies are protected.

With regard to next generation media, the Advanced Access Content System (**AACS**) Licence Agreement permits, in certain circumstances, managed copies of high definition optical discs.⁷

⁴ Page 5 of the Issues Paper

⁵ Centre for Content Protection homepage www.contentprotection.net

⁶ DVD CCA is a not-for-profit corporation administered by a 12 member Board of Directors representing the three industries – consumer electronics, information technology/computer and the motion picture/content provider industries – that use CSS technology.

⁷ See www.dvdcca.org and www.aacsla.com for further details regarding managed copies.

Industry is already adapting to consumers' expectations for managed copies. For AFACT members, the introduction of an expanded format shifting exception for films would represent an unnecessary intrusion on the evolving commercial market.

An expanded format shifting exception would be unworkable for the film industry

Since December 2006, the Act has permitted format shifting for private use in relation to sound recordings to and from any format. The present format shifting exception for films relates only to converting VHS to electronic format. This approach recognises that the nature and requirements of the music and film industries are very different.

The film industry is dependant upon the use of ATPMs such as CSS for the commercialisation and development of today's technology. The level of investment in a film demands adequate copyright protection to allow investors to recoup their investment and minimise the risk of a low rate of return. Delivery methods for film reflect these facts. As stated in the MPA's publication, *Asia Pacific Technology Initiatives*, 'making movies is an expensive business, and it is a risky business because of the potential low rate of return on investment. When large numbers of people "consume" movies without paying, these so-called "free-riders" undermine the financial base of movie making. While free riders are even more harmful to developing movie companies seeking a sound financial footing in the marketplace, they threaten major movie studios as well. If millions of people continue to steal movies, the result will be that the movie companies, both large and small, will be unable to produce quality content.'

The music industry has a significantly different economic structure to the film industry. Motion pictures are expensive to produce. A typical major motion picture, whether produced in Australia or elsewhere, employs from 100 to 1000 workers, exclusive of actors, ancillary workers and those involved in distribution (including theatre operators, retail store owners and their employees).⁸ Nevertheless, motion pictures are made available at a price almost all can afford. Motion pictures are able to do this because they recoup their costs from multiple markets and territories. If any ancillary market is lost due to piracy or other reasons, it affects not only that market but all 'downstream' markets (ie those markets in which the picture is distributed subsequent to the affected market), negatively impacting the ability to produce feature films.

The film industry is distinctly different to the music industry. The music industry's use of copyright protection technologies is declining with companies increasingly electing to make unprotected copies of their content available to the public.

The music industry's delivery mechanisms differ to those of film and reflect the music industry's openness to consumer format shifting. For example, the compact disc format developed jointly by the music and electronics industries was introduced without copy protection technology from the outset, whereas DVDs have historically used copy protection technology as part of the negotiated industry agreement that permitted the development of the format. Different consumer habits and expectations have evolved as a result.

Contrary to the three step test and the policy considerations of the review

AFACT is of the view that, in light of managed copy technology, an expanded format shifting exception for films is not necessary. In any case, AFACT strongly believes that the introduction of an expanded format shifting exception for films would be contrary to the policy considerations of the review and contrary to the requirements of the 'three step test'.

⁸ There are at present approximately 50,000 Australians involved in the film and television industry, including through independent cinemas, video stores and films and television producers across the country.

The policy considerations for this review are set out above.

The Issues Paper recognises that any extended format shifting exception must comply with Australia's international treaty obligations and in particular the requirements of the 'three step test'. As noted in the Issues Paper, those requirements are that any exception must be confined:

- to certain special cases;
- which do not conflict with a normal exploitation of the relevant copyright material; and
- do not unreasonably prejudice the legitimate interests of the copyright owner.

It is apparent that there is considerable overlap between the policy considerations and the requirements of the three step test.

The introduction of an expanded format shifting exception would not meet the requirements of the three step test and would be contrary to the policy considerations because an expanded format shifting exception would:

- greatly increase the risk that everyday consumers will circumvent ATPMs, in breach of copyright law; and
- defeat the ATPMs and TPMs film copyright owners apply to their copyright products, causing an increase in piracy and a severe disincentive to copyright owners to develop new markets.

These impacts would result in:

- conflict with the normal exploitation of films by copyright owners. AFACT also notes that film copyright owners are increasingly making films available with managed copy technology (see above); and
- unreasonable harm to film copyright owners, including through the enormous economic impacts of piracy and the prejudice to film copyright owners' development of new technologies and new business models.

Film copyright owners' core rights

The Act grants film copyright owners the right to exclusively control copying, communication and public performance of their films. These are copyright owners' 'core' rights. As recognised in the Issues Paper, 'the copyright rights provide an incentive to encourage the generation and flow of new material to the public.' They also provide 'some security for the skill, time and resources necessary to produce new works'.⁹

A key strategy copyright owners use to protect these rights is to implement technological protection measures to protect copyright and prevent and inhibit piracy.

The film industry places great importance on its ability to use technological controls to minimise and eventually prevent the piracy of its intellectual property. The need to protect copyright owners from harm caused by the wide availability of circumvention devices and services to circumvent the legitimate technological protection measures used by copyright owners is recognised as an integral part of the FTA.

The use of technological protection measures is an important element of the broader strategy employed by film copyright owners to protect their products, enforce their licensing and distribution rights and identify and take action against pirate products which in turn enables

⁹ Page 3 of the Issues Paper

expansion into new markets and media. Technological protection measures serve two important roles in protection. They assist in the prevention of copyright infringement in the first place, which has a secondary benefit of reduced enforcement costs for industry and Government, with less impact on public resources such as police and customs services and the courts.

Technological protection measures also play a critical role in regulating consumers' usage rights in a way that reflects the consumer's choice. Film copyright owners offer consumers various options for access to content at different price points, so that consumers are not paying for a service or product that they do not want, whilst those consumers who do want additional services or products can gain access to those upon payment of the associated costs.

The ability to protect products in digital formats is fundamental to copyright owners' commercial decision to make these products available. In order for digital delivery models to be utilised it is vitally important that the copyright owner has the necessary control over access to their works.

Through the use of access controls, copyright owners have been able to make more products available to consumers than ever before. Unless copyright owners can continue to protect these fundamental access technologies, the significant benefits of digital technology, which enhances the consumer's ability to access material, will cease to be available and new forms of digital distribution will not be developed and promoted.

Increasing the risk that everyday consumers will unlawfully circumvent ATPMs

AFACT notes that the Act now recognises two categories of copyright protection technologies, ATPMs and TPMs. The distinction between the definitions of an ATPM and a TPM is crucial as the FTA requires that circumvention of an ATPM be prohibited, whereas this requirement does not apply to a TPM. This is reflected in the Act.¹⁰

Film copyright owners use CSS as the predominant means to protect content in almost all commercially released DVDs.¹¹ CSS has the characteristics of both an ATPM and TPM.¹²

¹⁰ Section 116AN of the Act. Circumvention of an ATPM can amount to a criminal offence where the person engages in conduct with the intention of obtaining a commercial advantage or profit (section 132APC of the Act).

¹¹ CSS is a 40-bit encryption computer algorithm used on DVDs to encrypt the data so that only licensed DVD players can decode it. CSS involves the use of 'keys' which are a sequence of symbols used with a computer algorithm for encrypting or decrypting data. Essentially, a key is a 'formula' which when applied to encrypted information or another key, decodes it and makes sense of it. CSS is designed to have two core functions:

- restricting the playback of films to authorised playback devices only; and
- storing film content in an encrypted form to prevent the unauthorised copying of films.

A DVD disc contains encrypted data and a hidden area. The contents of the hidden area can only be delivered to an authenticated DVD player device. The hidden area contains a set of keys including a title key, a disc key, a table of encrypted disk keys and a region code. A DVD player is equipped with a CSS Decryption module which includes an authentication key and a small number of licensed player keys which can be used to decrypt the disk key on a particular DVD.

When a DVD is played, a series of decryption steps occur to read data from the DVD. Firstly, a process of authentication occurs, where a DVD disc and the CSS Decryption module on a DVD player recognise or authenticate each other using authentication keys. Player keys are then used to decrypt disc keys on DVD discs. Only licensed playback devices have access (via contractual arrangements) to a player key to enable access to the film content stored in the DVD disc. Disc keys in turn are used to decode title keys which descramble the data on DVD discs (called 'titles'), allowing the DVD to be played. A title may be a complete motion picture, a trailer or segments of a movie.

¹² When copying a DVD, decrypting software must firstly be used to decode the CSS algorithm to enable access to the encrypted DVD content which is then decrypted. It is likely that this process falls within the definition of an ATPM which involves the application of information or a process (ie, the CSS decrypting software inside the player) to gain access to the encrypted movie and associated features on the DVD. Additionally, CSS software would also qualify as a TPM as it acts to prevent, inhibit or restrict the copying of the DVD content.

If an expanded format shifting exception were introduced, using that exception (e.g., to format shift a DVD) would cause a person to circumvent an ATPM (the CSS) and therefore breach the Act. This means that a person relying on any format shifting exception for films would be in breach of the Act. It follows that an expanded format shifting exception for films would be unworkable in practice. It would have no legitimate value to the public.

Any consideration by Government of the introduction of an exception allowing circumvention of ATPMs for the purpose of making a format shifted copy of a film under any expanded format shifting exception (**TPM Exception**), would quickly reveal that a TPM Exception would be in breach of Australia's obligations under the FTA.

Article 17.4.7(e) (viii) of the FTA requires that an exception allowing circumvention of an ATPM must 'not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention' of ATPMs. An exception designed to allow the use of an expanded format shifting exception would not meet this requirement. This is discussed in detail in Annexure A.

ATPMs and TPMs film copyright owners apply to their copyright products

In the absence of managed copy technology, the creation of a format shifted copy from a legitimate original would cause the CSS (ATPM) applied to the DVD to be circumvented and irreparably broken, meaning that the DVD would be unprotected. Further, the resulting format shifted copy would not have any ATPM or TPM applied to it. Unlimited infringing copying and communication could then ensue.

Unprotected copies of films could be:

- burnt to an unlimited number of DVDs, potentially for sale and distribution;
- made available across the Internet through a peer to peer file sharing website; and/or
- made available online for download.

The defeat of copy protection technologies would mean that film copyright owners would have no ability to protect and manage their core copyright rights. A drastic increase in piracy could be expected to follow.¹³

This would impact negatively upon the continued development of new business models for the delivery of filmed entertainment to consumers. There would be no incentive to film copyright owners to expand consumer choice by offering different services at different price points.

Conclusion

AFACT submits that any argument for expanding the format shifting exception for film is quickly and decisively countered by:

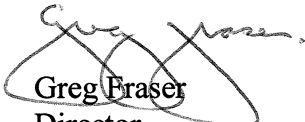
- the fact that the industry has already developed and is continuing to refine technology that could supersede the need for an expanded format shifting exception for films;
- the fact that a person relying on any expanded format shifting exception would circumvent an ATPM and therefore breach the prohibition on the circumvention of ATPMs contained in the Act;

¹³ Further information in relation to piracy and its impact on the industry is available upon request.

- the fact that, were an expanded format shifting exception to be introduced, piracy would increase dramatically and industry would be strongly discouraged from investing in the development of new business models; and
- the fact that any expanded format shifting exception would be contrary to the requirements of the three step test.

We would be pleased to provide any further information that might assist the Government in its deliberation of this matter and look forward to AFACT's continued participation in the legislative process.

Sincerely,



Greg Fraser
Director

Annexure A

Consideration of an exception allowing circumvention of ATPMs for the purpose of making a format shifted copy of a film under any new format shifting exception

Any consideration by Government of the introduction of an exception allowing circumvention of ATPMs for the purpose of making a format shifted copy of a film under any new format shifting exception (TPM Exception), would quickly reveal that such a TPM Exception would be in breach of Australia's obligations under the FTA.

The FTA requires Australia to prohibit the circumvention of ATPMs (article 17.4.7(a)). Article 17.4.7(e) provides that Australia may introduce certain exceptions to this prohibition.

Article 17.4.7(e) (i)-(vii) provides that these exceptions may relate to specified activities, such as reverse engineering security testing and protecting minors.

Article 17.4.7(e) (viii) provides a more general ability for Australia to introduce exceptions to the prohibition. This subarticle allows a TPM Exception to be introduced in relation to non-infringing uses where an actual or likely adverse impact on those uses is credibly demonstrated. However, as is recognised in the Issues Paper,¹⁴ this ability to introduce exceptions is limited by article 17.4.7(f). Any TPM Exception introduced in accordance with article 17.4.7(e) (viii) must 'not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention' of ATPMs.

There are two questions that must be answered.

First: would a TPM Exception to permit use of any format shifting exception, allow non-infringing uses where an actual or likely adverse impact on those uses can be credibly demonstrated?

If the Government were to introduce an expanded exception to allow format shifting of films, it is clear that ATPMs employed by film copyright owners would inhibit the ability of people to use that exception (eg make format shifted copies of DVDs). The existence of the ATPMs would make any format shifting exception of no value, and would introduce confusion and contradictions. Therefore the answer to the first question is yes.

The second question that must be answered is: would the introduction of a TPM Exception to allow use of any format shifting exception 'impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention' of the ATPMs applied to films (eg CSS)?

The Issues Paper states that it 'seems questionable whether section 249(4) would allow regulations to be made permitting the circumvention of TPMs for broad private copying purposes.'¹⁵ In AFACT's view the position is clear.

For the copyright owner, allowing the circumvention of ATPMs applied to films would be the equivalent of removing the legal protections for ATPMs and TPMs. Once the ATPM is lawfully circumvented for the purpose of making one format shifted copy, there is no way for the copyright owner to regain control over the making of further copies. Once the technology is 'broken' it cannot be 'fixed' – a person would then be uninhibited from making further copies and distributing those copies at will, where those further copies and distribution would be

¹⁴ Page 11 of the Issues Paper

¹⁵ Page 11 of the Issues Paper

infringements of copyright. The legal protection for copyright owners that ATPMs offers would be rendered inadequate.

Film copyright owners' ability to enforce their ATPM rights would be seriously impaired, as would their ability to take action against the circumvention of ATPMS. Any action for circumvention of ATPMs would be met with the response that the ATPM was lawfully circumvented in order to make a format shifted copy. Enabling private citizens to lawfully circumvent ATPMs would make the technological protection measure provisions of the Act inoperable.

It follows that the second question would be answered in the affirmative. Therefore the introduction of a TPM Exception to allow use of any format shifting exception would be contrary to Australia's obligations under the FTA.