



27 February 2008



Ms Helen Daniels  
Assistant Secretary  
Copyright Law Branch  
Attorney-General's Department  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600

Dear Ms Daniels

**Apple Inc. - Submission on the review of sections 47J and 110AA of the Copyright Act 1968**

Apple previously made submissions to the Attorney-General's Department in March 2007 concerning section 110AA of the *Copyright Act 1968* ("Act"). In that submission, Apple expressed its concern that the legitimate expectations of consumers were not reflected in the drafting of the section. Apple welcomes the review of this section and of section 47J.

It is Apple's view that, due to the rapid expansion of the capabilities of consumer electronic devices and the subsequent changes in consumer behaviour, it makes little sense for section 110AA to relate solely to an already antiquated technology, that of "videotapes", and that the very minor and particular activity of converting old videotapes to DVD hardly merits a specific provision in the Act. This activity should be caught up by a provision guided by more fundamental principles and using defined terms that are relevant to today's technology.

**Legitimate consumer expectations**

The technology of consumer electronic devices is developing rapidly. Entertainment that was previously delivered to consumers through a fixed device in the home with a single capability, such as a television or a stereo, is becoming increasingly integrated across numerous devices in the household and in mobile devices. As these devices develop, so too do consumer expectations. Consumers acquire the content in order to use it on more than one device at home and on devices that accompany them outside the home. The increased capability of portable consumer electronic devices applies equally to cinematograph films, television programs, music videos and films.

It is our intention that we hope to persuade consumers of digital content to acquire it legitimately.

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For example, the iTunes software, the iPod nano, iPod classic and iPod touch as well as the Apple TV, play both music and video content. As a result, and as consumers already expect with digital audio recordings, consumers expect that they can copy and re-use properly obtained digital video in order to view this material on a number of different devices, on a number of occasions and in any number of places (not just the home).

Apple considers that there are two relatively new activities that are undertaken by consumers in respect of cinematograph films that should be reflected in the drafting of section 110AA:

- copying of a recording of a broadcast for replaying at a more convenient time; and
- copying of properly obtained (but not rented) DVDs.

### Copying of DVDs

At the most basic level, it is to be regarded as a reasonable consumer expectation, and not one which will cause any harm to copyright owners, that when, for example, a family purchases a genuine copy of video material such as a DVD purchased from Kmart, any member of the family should be able to make a copy or shift the format of the film to use on a portable device or computer.

Of course, some of this material may be copy-protected but that is not really a relevant issue. The proposed s. 110AA provides a defence only, not a substantive right, as may be the concern in other jurisdictions. In Apple's view, the use of copy-protection of one kind or another is a decision to be made solely by the copyright owner, as it is an attribute inherent to the product supplied and to its value. Copyright owners of many types of material take the view that an absence of copy-protection enables them to charge a premium, due to the evident additional utility to the consumer of the ability to make additional copies.

Apple strongly believes that copyright owners will enjoy the benefit of an increase in the demand for their products, both physical and on-line, and in licensing to distribution channels (such as broadcasters) if they enable the reasonable dissemination of these products, and increase the useful value to consumers of copies properly obtained.

In this regard, it is noted, that Apple respects the concerns of the copyright owners of films in particular to protect the rental distribution channel. For so long as the rental distribution channel remains relevant, Apple believes that an exception to the right to make a copy for personal and domestic use should not apply to rented copies of films.

### Interconnection between sections 110AA and 111 of the Act

In discussing the technological developments of consumer electronic devices, it is clear that there is an interconnection between section 111, which allows for the recording of broadcasts for replaying at a more convenient time and section 110AA which allows for the copying of cinematograph films in limited circumstances. It appears to Apple that a recording made under section 111 should be regarded as a legitimate copy of a film that belongs to a person for the purposes of section 110AA of the Act. This is to allow a



person who records a broadcast to be able to make a copy onto his or her Macintosh, personal computer or iPod touch, for example, for viewing by him or her or his or her family members or household at a more convenient time.

Apple submits that, consistent with the capability of the devices with which consumers interact, consumer behaviour in changing the form of a broadcast into the most convenient and appropriate should be acceptable under copyright law. Apple takes this view in respect of all forms of broadcasts and considers that no different position should be adopted with respect to third party copyright material included in a broadcast.

### What difference does it make?

The comment may be made that, since consumers will make these copies anyway, what is the point of providing for this defence, and fine distinctions made within it such as those that exist between rented and owned copies. This is happening now, these copies are being made illegally, and the copyright owners can do nothing to stop the tide coming in. Furthermore, for the same reason, it is somewhat illogical for any of the copyright owners to argue that any change to the Act will cause any loss to them. So long as the law is seen as an irrelevant relic of a bygone era, consumers, and especially young people, will ignore it. That is the real price we will pay for maintaining irrelevant provisions in the Act.

On the other hand, it is Apple's experience that there is a genuine desire in the great majority to adhere to what are seen as sensible and balanced legal rules. Apple has found that a genuine attempt to educate consumers regarding such rules meets with a good response – maintaining archaic rules and adopting a threatening approach to consumers meets with ridicule and disregard. For this reason, Apple believes that amendments which reflect a reasonable consumer position, which is supported by education as well as positive marketing efforts which add value to the consumer experience of legitimately obtained copyright material, presents a real opportunity to copyright owners to increase their revenues as a consequence of the higher value placed by consumers upon the legitimately obtained products.

Apple submits that changes such as those proposed below are strongly in the interests of copyright owner and represent a fair balancing of the legitimate interests and concerns of consumers.

### Suggested amendments

To reflect these changes, Apple believes that section 110AA could be drafted in comparable terms to section 109A of the Act.

However, simply repeating section 109A of the Act but in respect of cinematograph films is inadequate. The obvious deficiencies, from a practical perspective, of section 109A are:

1. it only allows the owner of a sound recording to make a single copy of a sound recording, whereas the ordinary use of the relevant technology is to make more than one copy for household and private use;



2. it restricts the device on which the copy is to be made to a device belonging to the person who 'owns' the sound recording (rather than allowing a copy to be made on a device belonging to a member of the owner's family or within the owner's household) ;
3. the wording contained in section 109A concerning downloads "*the earlier copy was not made by downloading over the Internet a digital recording of a radio broadcast of similar program*", presumably intended to address podcasts and other digital recordings which are licensed, but could equally be read to refer to the listening to a radio broadcast on a computer by means of streaming or other technologies, which should not be distinguished from any other form of broadcast;

Apple proposes the following redrafting to section 110AA, modelled on section 109A:

#### 110AA Copying cinematograph films for private and domestic use

- (1) This section applies if:
  - (a) the owner of a copy (the *earlier copy*) of a cinematograph film makes a copy (the *later copy*) of the film from the earlier copy; and
  - (b) the sole purpose of making the later copy was for private and domestic use of the later copy with a device that enables films to be seen and heard that belongs to the owner's household; and
  - (c) the earlier copy itself is not an infringing copy of the film or of a broadcast, sound recording, or a literary, dramatic or musical work embodied in the film.; and
  - (d) the earlier copy was not made by downloading over the Internet of a copy of a film other than in the case of a copy of a broadcast made in accordance with section 111.

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

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

*Dealing with earlier or later copy may make the later copy an infringing copy*

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

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



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

Apple submits that the changes to section 110AA that are suggested above would not harm the copyright owner's exclusive rights provided under the legislation because the exceptions would still be restricted to the private and domestic use of cinematograph films.

#### Section 47J

Apple does not wish to make extensive submissions on section 47J, other than to say that it is far from self-evident why this exception is limited to photographs and does not extend to artistic works, such as cartoons, catalogues, advertising material or any of the plethora of other forms of artistic works properly stored by people on their computers and other devices. There does not appear to be any policy justification for photographs receiving different treatment from artistic works generally.

Please do not hesitate to contact us if there is any further information or information we may provide regarding this submission.

Yours faithfully

A handwritten signature in cursive script that reads "Naomi Law".

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