

***Issues Paper:
Copying Photographs and Films in a
Different Format for Private Use***

**Submission of the
Australian Digital Alliance**

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Submitted by email: copyrightlawbranch@ag.gov.au

1. The Australian Digital Alliance

This submission is made on behalf of the Australian Digital Alliance (ADA). The ADA thanks the Attorney-General's Department for the opportunity to comment on the Issues Paper "Copying Photographs and Films in a Different Format for Private Use" (the **Issues Paper**).

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united by the common theme that intellectual property laws must strike a balance between providing appropriate incentives for creativity against reasonable and equitable access to knowledge.

2. Consumer behaviour

The ADA recognises the importance of the format-shifting provisions introduced under the *Copyright Amendment Act 2006*. Until December 2006 there was a significant disconnect between the law and everyday user behaviour, when a range of everyday including video-taping television programmes to watch later on, consumer copying of music from CDs onto mp3 player, and indeed, copying from record to cassette tape, were generally copyright infringements.

The ADA believes that the introduction of these format-shifting provisions has been very important to users, however the highly prescriptive nature of the provisions under review (ss 47J and 110AA *Copyright Act 1968*) means that users are still prevented from engaging in a great deal of reasonable, everyday uses of copyright material.

The broader, less prescriptive language in the 'iPod provision' (s109A *Copyright Act 1968*) seeks to ensure that users are no longer infringing copyright simply by "ordinary use by consumers of digital music players"¹. The ADA believes that this reasoning should also be applied to the provisions under review.

In the Second Reading of the Copyright Amendment Bill, Nicola Roxon (Shadow Attorney-General at the time) speaking about the private copying provisions, noted that "a number of the provisions do not seem to reflect the reality of how people access and use legitimately purchased copyright materials"² The ADA agrees with this statement and sets out recommendations relating to the provisions under review.

¹ Supplementary Explanatory Memorandum, Copyright Amendment Bill 2006, (Cth) 8.

² Commonwealth, Parliamentary Debates, Senate, 1 November 2006, 33 (Nicola Roxon, Shadow Attorney-General).

Photo format-shifting provision (s47J Copyright Act 1968)

We note that the current form of this provision allows users to shift photos from hardcopy to digital or vice versa, but does not allow users to make a digital copy of their digital photos (or hardcopy-hardcopy). In contrast, the ‘iPod’ provision (s109A *Copyright Act 1968*) is not format specific, and so allows users to make digital to digital copies. In practical terms, this allows users to take music they own in a digital form and copy it onto their computer or iPod so they can listen to it on these devices.

The ADA notes that many digital devices, including mobile phones and mp3 players have features allowing users to synchronise not just their music, but other media such as photos.³ The ADA believes s47J should be amended to allow users to store their portable devices with photos as well as music. Consumers purchasing music generally believe they should be able to enjoy the music on their portable devices as well as in original CD format, or digital format on their computers. In the same way, consumers would also generally expect to be able to view photos they own on different devices they own. This consumer behaviour is a fairly ordinary use of digital devices, given that most mobile telephones, mp3 players and other mobile devices now have this capability.

Film format-shifting provision (s110AA Copyright Act 1968)

This provision is more prescriptive than s47J, in that it only allows users to take a video that they own, and shift it into a digital format. We make similar comments here as we have (above) for section 47J. This provision does not allow users to shift a DVD into a digital format that allows them to watch the film on a mobile device (for example the “iPod Video” or some mobile telephones). Inevitably, users wish to make use of these types of features on their digital devices, and, having purchased a film for themselves, will often feel entitled to view this film on digital devices they own. Once again, we believe this is a “reasonable use” of digital devices, and will become more and more common in portable devices as technology develops.

Why should the law be influenced by consumer behaviour?

The ADA’s position with regard to these private copying provisions is that often current consumer behaviour needs to be taken into account. As noted in the Explanatory Memorandum in relation to the private copying provisions; “failure to recognise such common practices diminishes respect for copyright and undermines the credibility of the Act”⁴. The ADA submits that users will more and more come to expect to be able to view and use a range of purchased media on their portable devices (including photos and films), and we therefore recommend that the provisions under review be amended to allow this type of consumer behaviour, with the appropriate controls in place, as are already seen in these provisions (for example, by only allowing non-commercial use).

³ For example on the “iPod Photo”.

⁴ Explanatory Memorandum, Copyright Amendment Bill 2006, (Cth) 6.

3. Flexibility & technological neutrality

The ADA is strongly in favour of private copying provisions that are flexible and as technologically neutral as possible. Some advantages in this type of provision are:

1. A reduction in the complexity of the *Copyright Act* 1968;
2. The provisions are less likely to ‘date’ and need amendment as technology changes; and
3. Flexible provisions allow room for innovation and development by industry in Australia as new technologies can more easily fit within broad exceptions.

We believe that s110AA is destined to date quickly, and will become a section in constant need of amendment in order to keep up with technological developments. As videos become less common, the s110AA exception will lose its value and it is likely that users will begin to want to shift their DVDs into new formats, however this provision will not allow that. It will be necessary to amend the exception as new media forms become prevalent.

A further problem can be anticipated with sections 47J and 110AA preventing digital to digital copies. A user may purchase a film or photo in a digital format. Over time, this format may become obsolete, as new digital formats are developed. The lack of flexibility in the provision means that users could be left with digital format films or photos that they are now unable to open and/or use.

The ADA recommends private copying provisions (and in particular s110AA under review) should be drafted in a flexible and technologically neutral form, rather than the current form which is prescriptive and technologically specific. During the debate of the Copyright Amendment Bill 2006, Nicola Roxon stated, of the private copying provisions, “we do not want to be back here when the next era of DVDs, or whatever the next thing that comes out, is produced to say that it is okay to copy from DVD to the next format.”⁵ The ADA agrees.

The ADA believes the best way to avoid technological specificity, and to ensure the *Copyright Act* 1968 does not need constant updating would be to introduce a broad exemption for format-shifting, with appropriate controls and limiting factors, such as a requirement for only non-commercial use.

During the Negotiation of the Australia-US Free Trade Agreement the Federal Labor Party raised a number of concerns with the content of the Intellectual Property chapter in the Agreement. Labor Senators made a number of recommendations relating to Australia’s Copyright law, as part of the final report of the Senate Select Committee on the Australia-US Free Trade Agreement⁶. In particular, Recommendation 8 included investigation of:

⁵ Commonwealth, Parliamentary Debates, Senate, 1 November 2006, 33 (Nicola Roxon, Shadow Attorney-General).

⁶ Commonwealth, *Final Report: Select Committee on the Free Trade Agreement Between Australia and the United States of America* (2004) 225 - 240.

Options for possible amendments to the *Copyright Act 1968* to expand the fair dealing exceptions to more closely reflect the ‘fair use’ doctrine...and to address the anomalies of ‘time shifting’ and ‘space shifting’ in Australia.⁷

The Australian Digital Alliance strongly agrees with this recommendation and believes a broad exemption for format-shifting is far preferable to the miscellaneous, technology-specific private copyright provisions that are currently in place.

4. Technological Protection Measures (TPMs)

The Recommendations of the Labor Senators also included a recommendation relating to TPM, that the Commonwealth Government “ensure [TPM] exceptions will be available to provide for fair dealing including temporary copies, research and study and the legitimate private use and application of all legally purchased or acquired audio, video, DVD and software items”.⁸ The ADA commends this recommendation, but notes that this is not the case with regard to a number of exceptions, including the private copying provisions under review.

Under the *Copyright Act 1968* it is an offence in most cases to break technological protections measures, or digital locks. This has strong implications on the usefulness of the format-shifting provisions. If a user owns a digital format photograph or film containing some kind of copy-protection on it, they will be unable to utilise the format shifting provisions, since it would be illegal for them to override or break the copy-protection. Under the current s47J, a consumer may legally purchase a photograph in digital format, and print it out in hardcopy. However, if the photograph is locked up with technology that prevents printing, the consumer will be unable to format-shift it. Alternatively, the photograph may, when printed out, be overlaid with a company watermark. In both of these cases, the TPM provision make it illegal for the consumer to break these copy control measures.

The ADA strongly recommends the introduction of a provision that allows TPMs to be broken when it is for a purpose that is legally allowed by an exception under the *Copyright Act 1968*.⁹

5. Copyright v. Contract

Although not specifically mentioned in the Issues Paper, the ADA wishes to note the difficulty that can be caused by contractual terms and conditions. Even though these private copying provisions give users the right to change the format of copyright material they own, these rights can be excluded by contract. Therefore, whenever a consumer purchases a photograph or video, the copyright holder can include a term that excludes or modifies the user’s ability to utilise the format-shifting provisions. This significantly decreases the effect of the provisions under review, as well as the

⁷ Ibid 230.

⁸ Ibid 231.

⁹ Another example of difficulties arising with exceptions that are subject to TPM offences is, for example, that institutions cannot format-shift a DVD under the new flexible dealing provision (s 200AB) if it is protected by a TPM.

other private copyright provisions, and indeed any of the exceptions under the *Copyright Act 1968*. In order to preserve these provisions, we believe the *Copyright Act 1968* should provide that these rights cannot be modified or excluded by contract, as recommended in the Copyright Law Review Committee's *Copyright and Contract* inquiry.

6. Format-shifting for institutions

Another issue not strictly within the scope of the Issues Paper, but which the ADA's members have raised as one of concern, is the limitation of the format-shifting provisions to private consumer copying.

The 2006 copyright amendments included the introduction of a flexible dealing provision for libraries, archives and educational institutions (section 200AB) which will, in a number of cases, allow institutions to format-shift materials they hold in their collection (for example, for preservation, or in response to technological obsolescence). However institutions wishing to format shift will be required to consider each of the (many) elements in section 200AB, each and every time they wish to format-shift materials. This requires a significant devotion of resources on the part of the institution. Institutions who have legitimately acquired copyright materials should be able to utilise format shifting provisions in the same way as individuals now can.

We refer once again to a recommendation of the Labor Senators in relation to the Australia-US Free Trade Agreement:

That the Commonwealth Government enshrine in the *Copyright Act 1968* the rights of universities, libraries, educational and research institutions to readily and cost effectively access material for academic, research and related purposes.¹⁰

Providing institutions with format-shifting provisions would certainly assist them in carrying out their socially beneficial activities.

7. Conclusion

The ADA thanks the Attorney-General's Department for the opportunity comment. Please contact us should you have any further queries or would like further information.

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¹⁰ Commonwealth, *Final Report: Select Committee on the Free Trade Agreement Between Australia and the United States of America* (2004) 230.