

Ms Helen Daniels
Assistant Secretary
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Dear Ms Daniels

Review of sections 47J and 110AA of the *Copyright Act 1968*

We, the below signed, are writing in response to the Copying Photographs and Films in a Different Format for Private Use discussion paper. We represent Legal and Regulatory Impasses and Innovations program of the ARC Centre of Excellence for Creative Industries and Innovation, Australia's premier centre for research into the convergence of cultural and economic values.

The introduction of new exceptions to the *Copyright Act 1968* to provide a better balance between the legitimate interests of copyright owners and consumers as part of the *Copyright Amendment Act 2006* was necessary and long overdue. For too many years Australian copyright law has been out of step with technological developments and the reasonable expectations of ordinary Australians. The failure to legally permit everyday uses of copyright material, such as recording broadcast television, transferring music to an iPod or printing out a digital photograph, had resulted in an unacceptable imbalance in Australian copyright law and public disdain for the *Copyright Act*.

Unfortunately, the extremely restrictive exceptions introduced by the *Copyright Amendment Act* did little to address this imbalance. The new provisions are so limited and complex in their drafting that they fail to provide effective or accessible rights to consumers. As the Hon Nicola Roxon MP, currently the Minister for Health and Aging, noted at the time:

Instead of moving towards making the laws technology neutral, in fact a number of the provisions in this bill have gone into more detail and more specifics about what is permissible and what is not permissible in different formats of material, some with current technology in mind but much of it in restrictive terms and I think potentially restrictive for dealing with future changes to technology.¹

By introducing these exceptions, the *Copyright Amendment Act* merely served to perpetuate the gap between ordinary consumer behaviour and Australian copyright law. As the Labor Party's supplementary report as part of the Senator Committee for Legal and Constitutional Affairs' (LACA) *Inquiry on Provisions of the Copyright Amendment Bill 2006* noted, the Liberal Government's decision to pursue specific exceptions rather than introducing a more general fair dealing or fair use right that would encompass all reasonable private activities, "creates

¹ *Hansard*. House of Representatives, 1 November 2006, p. 29

difficulties from the perspectives of both copyright holders and consumers. . . [and] does not solve the fundamental and ongoing problem of Australian copyright law's inability to recognise rapid changes in technology and the use of new technology by consumers."²

Not only do the provisions fail to provide sufficient flexibility to deal with future technological developments, they also fail to provide the rights needed to make use of common products such as video iPods. Furthermore, reasonable 'non-format shifting' uses of copyright material that take place in the private sphere and have no adverse affect on the copyright owner's market – such as making a Bananas in Pyjamas birthday cake or painting a mural on a bedroom wall featuring Disney characters – remain infringements.

This puts Australian citizens at a significant disadvantage to their peers in the United States in which such ordinary uses are permitted. It also promotes copyright infringement by fostering public disregard for copyright law. To again quote the Hon Ms Roxon, "if the laws are out of touch with personal practice then they do end up being treated with contempt and they do not encourage the purchase of legitimate materials and their lawful use".³

While we recognise that the specific review of ss47J and 110AA is dictated by a legislative commitment, if the new Government seriously wants to sponsor innovation it should take this opportunity to conduct a broader review of the Australian *Copyright Act*, to redress some of the problems it itself has noted. As we live, learn and make money in the modern era of digital technologies, linear models of knowledge and cultural production are rapidly being supplanted by more distributed, collaborative, user-generated, diverse and open networking models. In this context the ability to create, access, reuse and, importantly, communicate digital content has become paramount. If copyright law is to sponsor innovation rather than chill it, it must learn to understand what it can do better.

Four fundamental reforms that would go a long way to making Australia a leader in copyright and innovation policy would be the introduction of clear rights to:

- reuse copyright material for non-commercial purposes in circumstances where there is no financial detriment to the copyright owner;
- engage in transformative and fair uses, including the right to communicate derivative works;
- reuse Crown copyright material for non-commercial purposes; and
- undertake format shifting in consistent circumstances for all copyright materials.

Furthermore, we urge the Rudd government, through the current review or its *Review of the National Innovation System*, to consider how copyright law and policy should be developed and implemented across the many Federal Government departments and offices to which it is fundamental – such as A-Gs, DBCDE, DEEWR, DIISR and AGIMO. A co-ordinated approach as to what copyright law and policy should look like and how it should be implemented within the public and private sectors is key to any innovation strategy in 2008.

With regard to ss47J and 110AA specifically, we strongly urge the new Government to take this opportunity to rectify the inequities and inefficiencies introduced by past legislative amendments to ensure that Australian consumers have the rights they require to make reasonable and ordinary use of legitimately purchased products. This could be done by introducing the following amendments to the *Copyright Act*:

1. as a first preference, the Labor Government should follow its own comments as part of

² 'Supplementary Report by the Labor Party', *Inquiry into Provisions of the Copyright Amendment Bill 2006* (Senate Committee on Legal and Constitutions Affairs, 2006)

³ *Hansard*. House of Representatives, 1 November 2006, p. 29

the LACA inquiry by repealing the format shifting exceptions, including ss43C, 47J, 109A and 110AA, and replacing them with a fair dealing right for private and domestic use. This would ensure that Australian consumers are granted the rights they need to make all 'fair' uses of copyright material both in relation to current and emerging technologies, without hindering the development of new markets for copyright material;

2. at a minimum, ss47J and 110AA should be amended to implement the Labor Party's recommendations to the LACA inquiry by:

- removing technologically specific language (such as the current references to 'videotape' in ss110AA) to ensure that the provisions apply to films and photographs in all digital and analogue formats;
- permitting consumers to shift material on a digital-to-digital and analogue-to-analogue basis;
- ensuring consumers have the necessary rights to make ordinary use of legitimately purchased products with respect to all current and emerging technologies, not just iPods.

By aligning ss47J and 110AA with s109A, these amendments will eliminate the *Copyright Act's* current discrimination between different copyright owners, which privileges creators of films and photographs over creators of sound recordings and musical works. It will also promote public observance of copyright law, by providing a consistent and reasonable approach across all categories of copyright material.

As the Rudd government maps out a broadband future for Australia we urge it to include in such a strategy a sensible approach to copyright law that will allow Australians to realise their full potential in the digital environment.

Yours sincerely



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