



**Submission in response to
the Attorney-General's Department's
*Copying Photographs And Films In A
Different Format For Private Use*
Issues Paper**

29 February 2008



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We appreciate the opportunity to be able to comment on the Attorney-General's Department's Copying Photographs and Films in a Different Format for Private Use Issues Paper as part of the review of sections 47J and 110AA of the Copyright Act 1968.

Please note that while submission concentrates on section 110AA and the use of cinematograph film, the points raised should also be applied in the main to section 47J with the use of photograph and extending any expansion of section 110AA to include visual images embodied in a computer program.

Summary

CHOICE recommends that the current fair dealing provisions be expanded to include digital to digital format shifting for all media. We do not foresee that this will result in unreasonable harm to copyright holders and will instead be a positive move towards laws that are easier for consumers to understand. Further review of the law is necessary to ensure that consumers are adequately able to exercise these fair dealing exceptions for legitimate private uses.

The current fair dealing exceptions are too confusing for consumers to work effectively, largely as they are different for different media. The advent of section 109A allowing digital format shifting for private use did not result in measurable harm to the relevant industries; it is unlikely that expanding sections 47J or 110AA so that they are in line with section 109A will unreasonably prejudice industry interests either. Any expansion is limited to private use and thus does not affect the ability of copyright holders to legitimately exploit these works commercially.

Expansion of sections 47J and 110AA to include digital to digital format shifting is necessary to make legal legitimate private uses of these media. Failure to do so reduces consumer flexibility of use and may put consumers at the real risk of losing access to legally acquired media due to necessary technology upgrades. These disincentives can have the effect of stifling innovation and may cause harm to the very markets the provisions were intended to protect.

Compounding these issues is the prohibition of technological protection measure (TPM) circumvention regardless of the legitimacy of the intended use. The ability to restrict legitimate private use with TPMs will continue to be a problem that needs urgent addressing. However, it is unreasonable to restrict consumers' ability to digital format shifting of material that is not protected by TPMs simply because there is material that is protected by TPMs. Furthermore, licences are not easily understood by consumers and should not be relied upon to confer private use format shifting abilities or be allowed to take away such abilities. Fair dealing exceptions should safeguard the ability for consumers to format shifting of all media for private use.

Background

The Copyright Amendment Act 2006 brought some welcomed changes that, amongst other things, allowed the format shifting of sound recordings so that consumers could transfer legally acquired digital audio files as part of their private use. This made legal what were already commonly accepted consumer practices such as transferring audio CD files to an MP3 player or a computer hard drive.



The legislative changes were more restrictive with other forms of media. Format shifting of photographs and cinematograph film was limited to transferring a legitimately owned analogue film or hardcopy photograph to a digital version (and vice versa in the case of photographs) but, unlike sound recordings, format shifting of digital cinematograph film or photographs was not allowed.

These format shifting fair dealing exceptions for photographs and cinematograph film are contained in sections 47J and 110AA, respectively, of the Copyright Act 1968. When these sections were created, the amending legislation required the Attorney-General to review the operation of these two sections by the end of 31 March 2008. To comply with this requirement, the Attorney-General's department invited interested parties to provide submissions on "whether sections 47J and 110AA are operating satisfactorily or whether either provision should be modified in some way".

Consumer Representation

Copyright is an important issue for consumers and, in recent years, one that has had an increasingly significant impact on the ways that consumers are allowed to interact with information, entertainment and technology.

Regular reviews of such important laws are essential in this current time of rapid technological and cultural change; however, the consumer interest needs to be adequately represented in these reviews for equitable outcomes to be achieved.

It should be remembered when considering submissions for this review and in formulating copyright policy in general, that consumers – although numerous – are poorly resourced in this policy area in comparison with industry interests. It is critical that the decision making process attempt to correct for this imbalance in the review and any subsequent report.

Confusing Exceptions

CHOICE has previously voiced concern that these fair dealing exceptions are confusing for consumers. There is no general principle that can easily be understood; instead consumers are required to navigate and comprehend a maze of different rules for different media. The reality of the situation is that most consumers do not know what they can and cannot do with their legally acquired media and the complexities in the provisions for current fair dealing exceptions make understanding copyright even harder. This can either result in consumers putting themselves at risk of infringing copyright because they believe they have more rights than they do or, conversely, being overly cautious and missing out on the full enjoyment of their rights.

Technological Protection Methods

One argument given for excluding digital to digital transfers for cinematograph film is that the great majority of digitised cinematograph film is in the form of commercial DVDs and protected by technological protection methods (TPMs) that prevent copying (provisions prohibiting circumvention of TPMs were introduced as part of the 2006 amendments). Thus it would be harder for consumers to understand that they are allowed to format shift digital copies but are not allowed to circumvent TPMs, especially if software provided easy



facilitation of circumvention, than to understand that they just cannot format shift DVDs at all.

This argument isn't convincing because the current exceptions are already extremely confusing to consumers and are unlikely to be understood, largely because they apply differently to different media. It is not reasonable to expect consumers to remember and apply the table of different rules for different media. It would be much easier to understand that one can format shift copyrighted material for private use only but that circumvention of TPMs was prohibited. Furthermore, it is likely that the same person who is unaware that TPMs cannot be circumvented, would also be unaware that format shifting of DVDs was not allowed in the first place.

If the issue is consumers not understanding that TPMs cannot be circumvented, then there are more appropriate methods to make this clearer to consumers than restricting their ability to format shift audio-visual material that does not contain TPMs. Manufacturers should ensure that DVDs that have TPMs are prominently labelled as such and clearly explain the resulting limitations for consumer use.

While the operation of provisions that deal with TPM is not part of the current review, it is worth reviewing the recommendations of Labor Senators in the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America:

Recommendation 11: Labor Senators recommend that the Senate Select Committee on Intellectual Property investigate amendments to Copyright Act 1968 to provide that a contract that purports to exclude or modify exceptions to copyright infringement such as fair dealing is not enforceable.

Recommendation 12: Labor Senators recommend that the Commonwealth Government use the two year implementation period applying to effective technological protection measures to ensure 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 on components, equipment and hardware, regardless of the place of acquisition.¹

TPMs should not restrict consumers' ability to exercise their fair dealing rights and this area should be reviewed as a matter of urgency to see if exceptions are possible within the scope of the Free Trade Agreement with the USA.

Notwithstanding changes to the TPM provisions in the Copyright Act, the existence of such provisions should not be used to further restrict what consumers are able to do with copyrighted material that is not covered by a TPM. It is clear from these recommendations that the Labor Senators felt that there should not be hindrances on the ability of consumers on the legitimate private use of legally purchased or acquired audio, video, DVD and software items – either by contract or through TPMs, there is even less justification for hindrances in the absence of TPMs.

¹ <http://www.aph.gov.au/senate/freetrade/report/final/alp.htm> (accessed 29 February 2008).



Digital Risks

Another common argument is that digital to digital transfers are somehow riskier because full digital quality can be preserved – to allow format shifting of such material for private use would be facilitating commercial piracy and thus result in commercial harm.

This argument ignores the fact that those who engage in piracy for commercial gain are already flouting provisions that have far more serious consequences and are thus unlikely to have been deterred by current format shifting restrictions. Commercial piracy is already a serious crime with significant penalties. Full digital quality material is already being pirated commercially despite the existence of these rules.

Any expansion of the fair dealing exceptions would only apply to private, non-commercial use; it would not cover format shifting for commercial gain. Legitimate private use should not be prevented because of the potential of unsanctioned commercial gain that would occur with or without the expansion of the exceptions anyway.

It is more likely that the confusing nature of the exceptions are doing more to encourage infringement by making consumers unwitting infringers than any expansion of the exceptions that would simplify the law could.

Stifled Innovation

Returning to the issue of TPMs, there is the argument that because of the prevalence of TPMs, the expansion of fair dealing rights would apply to so few commercial works of cinematograph film that it would not be used enough to be warranted. This argument not only ignores the current and likely future changes to consumer use with the increasing uptake of broadband facilitating new and legitimate distribution channels but it stifles innovative uses of new technology like portable media players.

Broadband has facilitated alternative methods of legitimate distribution, consumers can receive audio-visual material with commercial value in ways other than TPM protected DVDs. There is an argument that if such digital goods did not come preinstalled with TPMs, they were unlikely to be very commercial so would be likely to have licences that allowed private use format shifting – thus an expansion of section 110AA would be unnecessary. However, as it is a developing market, if there was any such evidence that this was the case, it would be unreliable and subject to change. Furthermore, end user licence agreements, which are incomprehensible to the average consumer, should not be relied upon to confer the ability to format shift legally acquired copyrighted material in any media.

Putting aside the issue of TPMs with the realisation that there are other forms of copyrighted audio-visual material with commercial worth developing, the inability of consumers to legally format shift such material can stifle innovation of its uses and innovation of related product development. One needs only to look at the considerable industry around digital sound recordings and the equipment needed to play it to see the potential for digitised audio-visual material. Increasingly, we are seeing consumers wanting to use their legally acquired audio-visual material on portable equipment or to store it on and view it from DVD player/recorder or computer hard drives. What may preserve innovation is that consumers either do not understand the law enough or do not find the law reasonable enough to obey it and innovate nonetheless as was the case with sound



recordings before section 109A came into effect and allowed format shifting for sound recordings.

Real Consumer Risks

The issues paper explains the intended application of the current provision for format shifting cinematograph film as follows:

The primary application of this exception is to allow the owner of a VHS video cassette to make a digital copy of the film content, for example on a DVD or a computer hard drive. This exception allows consumers to continue to be able to view films purchased on video cassette without the need to maintain a video cassette player which are increasingly obsolescent.

The current provision allows transfer of video from analogue to digital on the basis that it lets consumers have access to their legitimately acquired films when the equipment to play the original format is no longer popular technology.

This principle should still hold in the upgrade to digital technology. It is unclear why consumers should have the ability to preserve their film collections when moving from analogue to DVD but not when moving from DVD to the high definition formats of DVD.

Not allowing digital to digital format shifting ignores the realities of technology obsolescence. Technology is rarely, if ever, built to last. DVDs do degrade and there is considerable variation in lifespan for DVDs subject to consumer use – consumers should not be left unable to preserve their film collections because of the inability to legally digitally transfer them. Likewise, if the transfer of analogue video was onto a computer or a DVD player/recorder hard drive, it would be unreasonable to not allow the transfer in a subsequent upgrade of equipment. This is also one significant example where TPMs would not apply if not on the original analogue video cassette.

The inability for consumers to legally format shift legally acquired material creates a real risk that audio-visual material purchased now will not be able to be legally transferred to updated equipment in the absence of a licence. Computers are becoming more popular as viewing and storage platforms for such media and are subject to continuous upgrades. Indeed, two to three years is often all it takes for a computer to be seen as redundant technology and unable to run the newest software. Consumers should retain the right to reasonable private use regardless of technology upgrades.

Market Harm

The risk that consumers may only have limited access to and use of purchased digital goods can create a disincentive to purchase the goods in the first place and may also affect the price that a consumer would be prepared to pay. It is a common but false assumption that more copyright protection and enforcement benefits the industries that are being protected. As copyright is a form of monopoly, imbalances that harm consumers can also have the effect of harming the market resulting in harm to the interests of copyright holders. An illustration of this was the failure of digital rights management (DRM) used on sound recordings: for a brief time this TPM was used on CDs but the resultant consumer



backlash forced its removal. The market for CDs was not improved by stronger technological copyright protection and was instead harmed.

Assumptions that stronger copyright law and enforcement are beneficial to the relevant markets may be a result of the rise of copyright protection and enforcement as its own industry. Whether it be dedicated lobbying organisations or individuals hired by industry groups – funding and salaries rely on copyright infringement being a problem. If infringement is less of a problem to the health of the market then such organisations are likely to lose their funding and people may lose their jobs. The result is that there is plenty of self-interest in fuelling stronger copyright law and enforcement and less genuine enquiry into the benefits of such regulation to the markets in question. A recent illustration of this occurred when independent research commissioned by the Canadian government found that people who shared music files online were more likely to buy CDs than those who weren't involved in file sharing.² Instead of analysing the results to better understand the consumer, Canadian music industry representatives were quick to commission a critique by two Australian based researchers to discredit it.

It is difficult to see how allowing private use format shifting would harm the creation and distribution of films or other audio-visual media. In order for the provision to apply, the film would have to be legally acquired and the exception ceases to apply once any commercial gain is sought. It is more likely that facilitating consumer use would increase consumer demand and stimulate the market which would benefit the industry.

Photographs and Visual images embodied in a computer program

Due to the limited time and resources available in the making of this submission, the focus has been on section 110A, in particular cinematograph film. However, the above points apply in the main to photographs and visual images embodied in a computer program.

Three-step Test

The issues paper states that any proposal to change sections 47J or 110AA must be consistent with the three-step test as follows:

Article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement set out a three-step test for exceptions to the exclusive rights of copyright owners. Under this test, exceptions and limitations to the rights of copyright owners must be confined: to certain special cases, which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right holder.

Expanding the current fair dealing exceptions to allow for digital to digital format shifting satisfies the three step test as the exceptions would still be limited to the special case of private use. This limited private use does not conflict with a normal exploitation of the work and would not unreasonably prejudice the legitimate interests of the right holder. It would only legalise non-commercial private uses which are already seen as legitimate by the community if not by the law.

² Birgitte Andersen and Marion Frenz (researchers from the University of London) The Impact of Music Downloads and P2P File-Sharing on the Purchase of Music: A Study for Industry Canada, http://strategis.ic.gc.ca/epic/site/ippd-dppi.nsf/en/h_ip01456e.html (accessed 18 February 2008).



CHOICE would be pleased to discuss these and other copyright issues with the Attorney-General's Department. Please contact Catherine Raffaele (Senior Policy Officer – IT and Communications) on (02) 9577 3290, 0403 013 012 or email at craffaele@choice.com.au for more information.