

COPYING OF PHOTOGRAPHS AND FILMS IN DIFFERENT FORMAT FOR PRIVATE USE

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

The key issues for consideration in this review are:

- whether the new exceptions for reproducing a photograph or making a copy of a film in a different format are achieving their objectives.
- whether it is possible that the provisions could be widened to include digital-to-digital copying as found in s 109A.

Background:

Both ss 47J and 110AA are exceptions for private use and were introduced to restore credibility to the *Copyright Act 1968* (Cth) (“the Act”) by better reflecting public opinion and current practices. As the Attorney-General, Philip Ruddock, stated at the time of the introduction of the amending Act, the changes were made to ensure “*Everyday consumers shouldn’t be treated like copyright pirates. Copyright pirates should not be treated like everyday consumers.*”ⁱ The exceptions were considered somewhat controversial and innovative. Sections 47J allows for the reproduction of a photograph from hardcopy to electronic form or electronic to hardcopy, and s 110A allows for the copy of a film from analogue form to electronic. Section 109A which allows digital-to-digital copying was introduced to allow a music album in CD format to be copied to play on a personal computer, portable MP3 player or car sound system.

The changes were opposed by the Media Entertainment & Arts Alliance which noted that Australia would be the only country introducing such an exception without also introducing a system of “equitable remuneration to the copyright owners.”ⁱⁱⁱ Other objections were put forward by the Australian Society of Authors^{iv}, the Screen Producers Association of Australia^v and Viscopy^{vi} on the basis that the justification for such changes was not clear and may interfere with emerging markets in the digital environment. The Internet Industry Association (IIA)^{vii} however expressed concern at the “narrowly confined exceptions” which failed to take into account the method used to format shift, particularly in relation to the making of more than one copy in any given format. This means that if an MP3 copy is made for an iPod, the MP3 copy on the individual’s computer cannot be retained. While the government may have been concerned that it would otherwise be providing an open-ended licence to allow individuals to make unlimited copies, the requirement that the copy should not be retained was considered by the IIA to be neither practical nor realistic and could lead to contempt for the law.

There was also an argument put forward by the Australasian Performing Right Association Limited (APRA) and Australasian Mechanical Copyright Owners’ Society Limited (AMCOS) that the exception for format shifting would be contrary to Australia’s international treaty obligations and would lead to adverse international

reaction. They argued that format shifting should not be allowed as an exception to copyright unless a private copying levy on blank recording media is introduced to ensure that copyright owners are compensated.”^{viii}

Reasons for extension of exceptions to Copyright law:

(a) Respect for law

If the intent of the 2006 amendments was to achieve respect for the law, the limitations of s 47J and 110AA do not achieve their objectives. The UK report, May 2007^{ix}, refers to an application of the Becker’s model^x of crime to copyright infringement and indicates that people will break the law if the expected benefit is higher than the risk of detection and scale of punishment. In relation to format shifting it would mean that people would see minimal chance of detection of infringement in their own homes and would understand the difficulty of enforcement of the condition to remove the second copy. The report found that the current law was difficult to enforce because the restrictions were seen as unreasonable. Consumers are unable to understand why, when they own a DVD, that the act of transferring the film to their own iPod is illegal.

(b) Limited quantitative assessment of the impact of format shifting

There has been limited quantitative assessment of the impact of format shifting. The recent UK Intellectual Property Office report summarising the proposed changes to copyright law in the UK examined the evidence presented to the Gower’s Review.^{xi} The Indicare, Olswang and Jupiter surveys found that transferability between different devices and the rise of portable digital music players were key factors and the new technological opportunities were driving a demand for private format shifting. It was noted that there were not studies available that focussed on format shifting, so that it was difficult to attribute market movements to format shifting alone. The Indicare and Olswang Surveys found that consumers would pay more for flexibility in terms of copying, sharing and format shifting, so that format shifting is of additional value.

(c) Simplicity – Copyright law has been recognised by leading academics such as Prof Lawrence Lessig^{xii} and Prof Pam Samuelson as too complex, “largely incomprehensible, especially as to non-professionals” and lacking “a clear vision about what its normative purposes are.”^{xiii} It is apparent that the format shifting exceptions introduced do not provide a simple answer for consumers. The simplification by the extension of digital-to-digital copying would allow the emphasis to be made on “private” use only, without commercial exploitation. The criminal penalties introduced with the 2006 amendments would then clearly be used to prevent illegal commercial copying.

(d) no further need to update the legislation as new technology introduced

The importance of allowing flexibility into format shifting for personal use can be seen in the complexities of providing archival storage for photographic materials. In discussions on www.photographyblog.com participants highlight the problems of obsolescence in physical media and digital recording formats, the latter forcing migration to new digital formats as well as to new physical media, despite the use of the proposed standards such as Universal Preservation Format (UPF). Restricting format shifting and excluding digital-to-digital would not keep pace with technological change and would not provide practical solutions for private use archiving.

(e) Compliance with international obligations

There has been concern that the exceptions introduced would not comply with the relevant provisions of TRIPS, Berne and Rome treaties,^{xiv} which limit the exceptions to those that comply with the “three step test” – the exception can only apply in certain cases; they may not conflict with the normal exploitation of the work and may not “unreasonably prejudice the legitimate interests of the right holder”. The case law on the application of this test is limited, although there has been a considerable amount of academic comment. It appears that the test is wide enough to allow a general exception for private use, as long as there is no commercial exploitation. It was noted in comments at the time of the implementation of the current changes, “that the three-step test is not an obligation; you only have to go as far as you can go under the treaty obligations.”. It is not necessary “that the government should go as far as the three-step test allows.”^{xv}

(f) International laws moving towards exceptions for private use

Changes in Canada, the UK and New Zealand indicate that there is a movement towards the introduction of private use exceptions, particularly relating to format shifting. The complexities of the submissions and proposals indicate the difficulty in finding consumer-friendly legislation that will also protect the interests of copyright owners.

Canada

The National Post, 14 January 2008 called on the government to establish a format shifting exception to allow Canadians to legally copy music from CDs to iPods and explicitly recognise “the reality that once you’ve bought a song, you should be able to take it with you to new platforms”.^{xvi} The use of a levy on technology to offset any exceptions has found resistance. In *Apple Canada Inc v Canadian Private Copying Collective* Federal Court of Appeal of Canada held that the Copyright Board erred in law when it concluded it had legal authority to certify the tariff proposed by the CPCC for 2008 and 2009 on digital audio recorders.

UK

The Gowers Review of Intellectual Property (“the Gowers Review”)^{xvii} recommended changes relating to formatting. It is proposed that a new exception, only applying to personal or private use, will allow consumers to copy a work they legally own so that it is accessible in another format to play on another device, such as an iPod or MP3 player. Lord Triesman^{xviii} the UK Minister for Intellectual Property, stated that “we can start by making the law sensible” because the “average consumer is concerned the current law is a nonsense”. He expressed his desire to ensure that there is a clear distinction between legal and illegal activity and to make sure that consumers know what they are buying and what they can do with what they buy.

New Zealand

There has been considerable debate in New Zealand regarding the introduction of the *Copyright (new Technologies and Performers’ Rights) Amendment Bill*. The Second Reading speech indicated that the select committee had removed the two year sunset clause from the fair-use provisions, which limited the right to copy music from a CD to an MP3 player. The Bill however requires the owner of a recording to keep the original and excludes video because it was thought “...*format-shifting of music for private and domestic use is widespread, while format-shifting of other types of copyrighted works is not.*”^{xix} It was considered that the limited format-shifting provided for in the Bill will be ignored by consumers because it is unrealistic to expect that they will understand it is legal to copy CDs but not films. The changes could make everyday use of digital technology “impossible or against the law.” Evidence was not presented to show that there would be a significant economic loss to copyright owners.

Conclusion:

Sections 47J and 110AA should be widened to include digital-to-digital copying, as found in s 109A of the Copyright Act. The criminal sanctions provided in the 2006 amendments for illegal copying should prove effective to deter commercial exploitation. This would establish more general provisions providing for digital-to-digital copying in any form when necessary for private use only.

Copyright owners would still be able to rely on Digital Rights Management (“DRM”) or a technological protection measure to limit what consumers can do with digital music^{xx}, photos and film. DRMs are rights that users are aware of on purchase, so they can, at that time, choose to buy the product or pay more for products that do not have DRM. The current anti-circumvention provisions^{xxi} of the Copyright Act providing protection for the DRMs applied.

ⁱ Media Release, 14 May 2006, Attorney-General: *Major Copyright Reforms Strike Balance*

ⁱⁱ Submission 60 at page 1 on proposed amendments

ⁱⁱⁱ Explanatory Memorandum, Copyright Amendment Bill 2006 at page 9

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- ^{iv} Submission 4 at page 2
- ^v Submission 19 at page 2
- ^{vi} Submission 39 at page 2
- ^{vii} Submission 66 at page 3
- ^{viii} Submission 45
- ^{ix} House of Commons Committee Report, *New Media and the Creative Industries*, 16 May 2007 commended that the current law was difficult to enforce and to justify because the restrictions were seen as unreasonable. The report recognised the danger of such a law which could damage the public's perception of copyright and lead to a general lack of understanding and respect for the law. The Report recommended that a new exception should be introduced which allowed copying for domestic use
- ^x Prof Gary S Becker (University of Chicago) – Nobel Prize in Economics for 1992
- ^{xi} This evidence included: The European Consumer Survey 2006 into Digital Music Usage and Digital Rights Management by Indicare, commissioned by the European Commission (“the Indicare Study”); the Digital Music Survey conducted by Entertainment Media Research between 2005 to 2007 (“the Olswang Survey”); The Music Consumer Survey 2005 conducted by Jupiter Research, commissioned by IFPI (“the Jupiter Survey”); the European Consumer Survey into Digital Video Usage and Digital Rights Management in 2006, commissioned by the European Commission (“the Indicare Film Survey”); the OECD report on digital film and video 2007 and the Ofcom Communications Report 2007
- ^{xii} Professor of Law at Stanford University
- ^{xiii} P. Samuelson: *Preliminary Thoughts on Copyright Reform* www.blogs.law.harvard.edu Prof. Samuelson is Professor of Law at the University of California at Berkeley with a joint appointment in the School of Information Management and Systems.
- ^{xiv} The World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) – Article 13; The Berne Convention for the Protection of Literary and Artistic Works (“Berne – Article 9(2), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisation (“Rome”).
- ^{xv} Senate Committee Hansard, 7 November 2006 at page 42.
- ^{xvi} www.michaelgeist.co
- ^{xvii} December 2006
- ^{xviii} UK Minister for Intellectual Property –speech for the launch of the First Consultation on the Amendments to Copyright Exceptions recommended by Gowers.
- ^{xix} www.parliament.nz Second Reading, 23 October 2007, Copyright (New Technologies and Performer' Rights) Amendment Bill
- ^{xx} More than 1.5 million licensed tracts that Apple makes available on the iTunes Music Store are in Apple's proprietary DRM format only. Submission to the Australian Attorney-General, June 2005, Apple Computer Inc at page 15
- ^{xxi} Copyright Act 1968 (Cth) ss 116AN, 116A0, 116AP, 116AQ