

*Law Council of Australia - Business Law Section*

*Intellectual Property Committee*

*By Email Only*

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**Reference - Copying Photographs and Films in a different format for private use.**

The Copyright Sub-committee of the Law Council of Australia's Intellectual Property Committee is pleased to make the following submission in response to the Issues Paper on Copying Photos and Films for Private Use.

The review asks the basic question: should the private use format-shifting exceptions for photographs in section 47J and film in section 110AA be broadened to reflect the scope of the format-shifting exception for sound recordings in section 109A?

In essence sections 43C, 47J, 109A and 110AA confer upon the private owners of certain non-infringing copies of relevant subject matter ('legitimate media') a free exception to make additional copies. Subject to differing criteria, their broad intention is to enable legitimate media to be copied so as to be rendered on future generations of devices. These are sometimes referred to as 'format-shifting' exceptions. Relevant to this review are the distinctions which exist between section 109A on the one hand, and sections 47J and section 110AA on the other. These provisions were introduced at the same time as reform to section 111 ensured an unremunerated exception for the private recording of broadcasts and subject matter contained therein 'solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made'.

The Copyright sub-committee makes the following two legal observations, but offers no opinion on the merits of any reform to sections 47J and 110AA.

Breadth

Section 109A is currently broader than sections 47J and 110AA insofar as:

1. Section 109A does not require that the later copy be in a form different from the form of the legitimate media and hence the description 'format-shifting' exception is a misnomer for section 109A.
2. Section 109A does not require that the owner must destroy, following the making of a later copy, any temporary reproduction of the sound recording that is incidental to the making of the later copy.
3. Section 109A permits the making of multiple copies.
4. Section 109A permits the owner to (non-commercially) dispose of the legitimate media.
5. Section 109A permits the owner of the legitimate media to engage in serial copying; because a later copy that is made pursuant to section 109A is not an infringing copy and may serve as legitimate media in an act of second generation copying, which may in turn be the source of subsequent generations of copying.

#### Circumvention liability

There appears a dichotomous treatment between copyright subject matter distributed in Australia with and without TPMs. Content to which TPMs have been applied might be theoretically subject to the private use exceptions, however no defence exists to allow an individual to circumvent the associated TPM for those exceptions. Nor does it appear to the Sub-committee that such a general defence could be drafted consistent with the FTA, since any general exception to circumvention would 'impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures'. Content distributed without TPMs (for example content included in terrestrial Australian free-to-air broadcasts) is subject to the full effect of the private use exceptions.

Yours sincerely