

A V S D A

Australian Visual Software Distributors Association Ltd

**Submission by the Australian Visual Software Distributors
Association into the Review of sections 47J and 110AA of
the *Copyright Act 1968***

29, February 2008

Attention:

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Executive Summary

AVSDA's position on format shifting of copyrighted audio-visual materials is as follows.

1) There is no need for the government to create a format shifting exception for films due to the growing number of applications allowing managed copies which are both meeting consumer demand and driving consumer choice.

The industry is investing in and developing technologies on DVDs that allow the making of 'managed copies'. 'Managed copies' are copies made from legitimate originals, in a different format where the copies have technological protection measures applied to them.

This new technology allows consumers to create format shift copies, whilst preserving the film copyright owners' ability to protect and manage their core copyright rights by preventing further copying. The industry is well on the way to deploying this new technology, which would benefit consumers and also meet the needs of industry.

The counter argument is that if the film industry is moving towards allowing private format shifting then why not legislative for it? The answer is simple and four-fold:

- i) Why legislate when the market is providing choice;
- ii) it would undermine industry efforts to bring these new models to market;
- iii) it would increase levels of piracy; and
- iv) it would unwittingly create a new level of criminal behaviour.

2) There is no need for format shifting due to continuous evolution of new and exciting delivery systems (beyond DVDs and managed copies) which are supported by TPMs and offer greater price responsiveness and consumer choice.

Unlike certain other categories of works, commercial entertainment DVDs distributed by AVSDA members are almost always protected by access control technological protection and their circumvention is not permitted under the Copyright Act. Therefore any format shifting exception would be unworkable for our industry - it would have no legitimate value to the public and would increase the likelihood that people will circumvent access control technological protection measures, whether intentionally or due to confusion.

Unlike the music industry, the film industry is actively pursuing digital offerings and the *Copyright Act* supports these business models and technologies being developed.

3) The dangers of unprotected format shifted copies getting distributed via the internet rise if a format shifting exception is allowed.

If a format shifting exception were introduced at the present time, it would lead to the rise of the creation of unprotected format shifted copies. Unprotected copies could then be uploaded to the internet and shared across peer to peer networks and copied limitlessly, impacting negatively upon the continued development of new business models for the delivery of filmed entertainment to consumers and return on investment. The film copyright owners would then have no further ability to protect or manage their core copyright rights, nor any incentive to expand consumer choices by offering different services at different price points.

4) Allowing format shifting of DVDs without TPMs could create unintended consequences which adversely affect consumers.

Those DVDs without TPMs are generally low margin low volume titles so distributors would have to consider placing a TPM on these discs or risk unmanaged copying and piracy. This will impact consumers either in terms of price increases or reduced availability of content both of which would impact the industry in terms of reduced revenues.

In summary, any changes to allow format shifted copies of films would be high risk in terms of the impact on piracy levels, the impact on emerging business models, negative returns to the industry, and of no benefit to the consumer in terms of pricing or availability of content. Allowing format shifting of films would be a lose-lose proposition for the consumer and industry.

The argument that format shifting is allowed for music and should be applied to films as a matter of principal is fallacious and without merit which this submission demonstrates.

AVSDA believes that should the industry fail to meet consumer expectations around format shifting at a point of time in the future and if new models don't meet legitimate consumer behaviour, then a review into this matter may be warranted. This current format shifting review, and consideration of any changes, therefore is many years premature.

About AVSDA

The Australian Visual Software Distributors Association (AVSDA) was formed in 1983 to represent the interests of owners of copyright in, and distributors of, videos in Australia. The video market is now 99% using the DVD format. In 2007, AVSDA members moved over 95 million titles worth \$1.347 billion in wholesale sales. According to ABS data, the entire film and television production and distribution industry in Australia employs directly or indirectly over 50,000 people.

The Association speaks and acts on behalf of its members on issues that affect the industry as a whole such as censorship, film piracy, technology challenges, free trade, copyright and enforcement.

AVSDA lobbies government stakeholders, responds to government enquiries by submissions, seeks amendments to legislation, and when appropriate works with other copyright industries to affect change. AVSDA also commissions industry research from time to time to gauge Australian consumer attitudes to our industry - an industry which is currently going through a period of constant change led by changes in technology.

AVSDA currently has 16 members who range from all the major international film distribution companies through to wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Starz Home Entertainment.

AVSDA liaises closely with the Office of Film and Literature Classification to ensure a smooth working relationship between it and our members and to help resolve any issues that arise. AVSDA looks forward to the outcome of the Government's reviews into the self-assessment of additional materials on DVDs and removing the restrictions on advertising for our industry. Both of these reviews AVSDA has been lobbying for over the past two years.

AVSDA is also proud to support the Starlight Children's Foundation.

More information can be found at www.avsda.com.au

Situation Analysis

AVSDA welcomes the opportunity to respond to the Attorney-General Department's published Issue Paper titled: *Copying photographs and films in a different format for private use*.

The film distribution economic model

The video, film and television industries operate on an economic model that maximise the returns to producers and investors of films in order to off-set their enormous investment through a number of distinct but related channels, including:

- theatrical release;
- DVD release for rental and retail;
- Pay TV broadcast; and
- free-to-air television broadcast.

Each of these channels represents a commercial opportunity to derive income critical to keeping the industry growing and attracting investment in production.

Importantly, DVD revenues for films now make up over 50% of the total revenue return on investment (compared to theatrical box office receipts). Another important source of revenue for Australian producers and investors in TV shows is the DVD 'after-market' is demonstrated by the fact that AVSDA members now receive approximately 65% of revenues from TV DVD series. This includes many Australian TV shows such as: *Kath and Kim*, *McLeod's Daughters*, *The Chaser's War on Everything*, and *Thank God You're Here*.

The DVD revenue is critical to investment decisions to make a program and any erosion of this revenue or perceived potential erosion of revenue by changes in the laws pertaining to private copying will affect business decisions to invest capital in films.

Secondary overseas markets are important for many Australian productions, particularly TV series and the low cost global nature of film piracy and distribution available via the internet will affect the value of these overseas markets. Arguably allowing private copying of Australian produced shows on DVDs and uploaded on the internet prior to being sold to these overseas markets could affect their value.

AVSDA in its 2005 submission on the Fair Use Review said that it was too early for the Government to create additional exceptions for private copying of films as digital business models were in its infancy. Since that time we have seen a number of business models emerge both in Australia and in other countries with a trend and consumer tastes still a long way from being clear. However, what is clear is that digital business models are evolving and still seeking a financial ROI.

AVSDA estimates that over the past five years studios have invested around \$1 billion annually in film and television production in Australia helping support the estimated 50,000 Australians who make a living from the industry. It is also worth noting that on average a studio will not be able to get a return on their investment for 60% of the films they make.

Therefore, given the risks of the movie-making business, it is important that studios be able to maximize revenue streams in order to recoup investment. The "after-market" of DVD, television and new media sales is critically important in this respect and it is in this context that this format shifting review is significant to AVSDA.

Film and TV Piracy and IP enforcement

AVSDA member content is predominantly provided on payment of a fee. Where that same content *is* available for free, it is generally made available in breach of copyright.

Piracy of AVSDA member content is a significant concern for industry and for the Government. Independent research conducted by LEK in 2005 found that piracy is estimated to be costing Australia's local industry over \$230 million each year. In addition, it also found that Australians are per capita the largest users of (illegal) peer to peer (P2P) networks in the world.

The illegal distribution of unauthorized copies of movies rose from 4% in 2000 to around 11% of the legitimate market in 2005. Discs seized by police comprise mostly DVD-R copies made in Australia as DVD-R technology has increased its share of the pirate optical disc market. In addition, Australian Customs seized more than 40,000 pirate DVDs imported into Australia in 2004, a 185% increase compared to the 14,000 seized by Customs in 2003.

The Australian Federation Against Copyright Theft (AFACT) in a media release on 11th February said that:

"We have seen a considerable increase in burner operations year to year. The number of DVDR burners seized in 2007 has increased 300% compared to 2006; and pirated disc seizures in 2007 increased 561% compared to 2006. "Movie pirates in Australia are getting bolder by the day. Such criminal activity, if allowed to continue, will jeopardise the livelihood of the 50,000 Australians who work in the movie industry in our country... The fact that the seizures in Australia are not far behind China, is a clear indication of the extent of the problem here."

Police jurisdictions recognize organized crime involvement in film piracy. Organized crime links to movie piracy in Australia were first uncovered following a raid on Malaysia-linked movie pirates in 2002.

AVSDA supports and applauds the Minister for Trade, the Hon Simon Crean's comments on 1 February 2008 when he announced in a media release that Australia will begin negotiations with a number of trading partners on a new Anti-Counterfeiting Trade Agreement (ACTA):

"The Australian Government takes intellectual property protection seriously. Enforcement of IPR internationally is important to Australian trade interests, which suffer losses through counterfeiting and piracy.

A recent OECD report observed that international trade in counterfeit and pirated goods was growing rapidly, with an estimated value of approximately US\$200 billion annually. The negative impacts of this trade are wide-ranging, creating significant costs for governments, consumers and businesses."

This commitment from the Rudd Labor Government comes on top of the \$12.4 million allocated by the 2006/07 Federal Budget for IP enforcement, specifically for the Australian Federal Police and the Commonwealth Department of Public Prosecutions. The AFP referrals by industry and results to date of this allocation are showing that this money is well spent and is needed to fight piracy including that of film.

The *Copyright Act 1968*: a driver of innovation

The Australian copyright law regime currently provides one of the more effective environments for copyright protection in the world. The government is to be congratulated

for ensuring its laws remain up-to-date and effective in the digital environment and maintaining the standard for copyright protection.

It is this strong copyright regime that has allowed the market to develop world first digital distribution business models safe in the knowledge that laws protect their IP. The balance between consumer and intellectual property owner is a constant effort but in the case of digital models for film and TV products, the current law supports their development and expansion arguably prior to the consumer demand. In other words, industry is attempting to pull consumers into digital models rather than consumers pushing models onto an unwilling sector. This stands in stark contrast to the music industry in which common consumer practice and behaviour led to the government introducing legislation.

Economic Impact

Since the business of AVSDA members and copyright owners relies on the supply of the copyright material, before there was any consideration is given to a change there should be an analysis of the economic impact of any change.

Absent economic analysis, common sense would suggest that providing consumers with the right to access material that would otherwise only be available to them on commercial terms would have the effect of depriving copyright owners of sales or potential sales.

Emerging business models: the market giving consumer's choice

Please note - this section is confidential and not for publication

Response to Issues Paper

AVSDA now responds to the specific issues raised in the discussion paper.

Issue 4: Current operation of section 110AA

(a) Does section 110AA provide an appropriate balance between the rights of copyright owners and other interests?

The Copyright Act 1968 including section 110AA does manage to get the delicate balance right between the interests of copyright owners and that of other interests such as consumers. This section allows the copying of analogue content (VHS) to digital (DVD) for private or domestic use. This recognises that people may have a VHS video library that they wish to watch on a DVD player as VHS players have become obsolete.

The 2005 Fair Use Review and the subsequent limited time shifting and format shifting exceptions reflected long-entrenched consumer behaviour and thus the rationale for changes along with those of section 110AA. That is, time shifting of TV free-to-air television to watch at a later date with the safeguards against creating libraries and format shifting of legitimately purchased music were appropriate amendments which AVSDA supported. Likewise, section 110AA is narrow in scope and seeks to allow private copying from analogue to digital of legitimately acquired content.

Likewise, with the format shifting exception created to allow consumers who have legitimately purchased music on compact disc to format shift the legitimate content to their MP3 or other digital music devices. This is sometimes referred to as the Ipod law.

The rationale behind these changes and the reason why they were so broadly accepted and without controversy was because they responded to existing consumer demand and did not result in negative revenue consequences for the copyright owner (making the important assumption that the consumer did not make multiple digital copies or forward files to others be it via the internet or in person).

AVSDA asserts and believes that no such demand exists in relation to film and that this review of section 110AA with a view to expansion is unwarranted. Further, if additional exceptions were to be made to allow private copying and format shifting of film and TV content by the consumer (with or without the TPM proviso) then it would effect:

- Revenue per title;
- Investment in Australian content;
- Content availability in the Australian market and thus reduced consumer choice;
- Potential for price increases to seek return on investment from the DVD channel; and
- New business models being risked in the Australian market.

The Government created section 110AA to meet a specific and narrow need. Nothing has changed to warrant further amendments.

(b) If section 110AA is not appropriate, what are the options for achieving a better policy outcome?

AVSDA does not seek any changes to section 110AA. Any comparison to section 109A should be viewed with extreme caution as this applies to music only and reflected common consumer behaviour. The impact if applied to film has the potential to undermine the entire industry and revenue models as well as lead to a further rise in piracy should digital to digital copying be allowed.

(c) What are the benefits and costs of these options?

AVSDA does not support any changes to section 110AA.

Issue 5: Should section 110AA be changed to permit additional copyright

(a) Under what additional circumstances should section 110AA permit a copy to be made of a cinematograph film for private and domestic use?

AVSDA is strongly of the view that section 110AA should not be amended to include any additional circumstances. The industry is providing consumers with various new business models and digital channels to view film and TV content as has been indicated in the background to this submission. The current copyright laws support the roll-out of these new business models and any changes would in fact result in less choice and flexibility for the consumer as business confidence and piracy issues would become major factors.

(b) What are the kinds and sources of films that are likely to be reproduced under any proposed changes?

AVSDA does not support any changes.

(c) To what extent are films likely to be reproduced under proposed changes subject to TPMs (such as anti-copy measures) to block unlicensed copying?

The issue of technological protection devices (TPMs) is a core issue in relation to any proposed expansion of circumstances under section 110AA. *The issues paper specifically states that any considered expansion of section 110AA would only apply to films and TV shows on DVDs which don't use any TPMs.*

Whilst AVSDA supports this starting position it also shows the dangerous nature of this review. Data provided by leading Australian manufacturer of DVDs – Technicolor - shows that in 2007 based on all units, copy protection TPMs were used in the following amounts:

- Macrovision - 60%
- CSS - 90%
- Ripguard - 5%

Therefore, a minimum of 90% of all DVDs manufactured at a leading replicator factory in Australia had some form of TPM included. Should the Rudd Government support any proposed expansion to section 110AA to include certain rights for films as per section 109A then it should be clear that this new law would only cover an extremely small number of units whilst having the potential to dramatically affect the industry and working against both the interests of consumers and industry.

For the less than 10 per cent of units in the Australian market that do not have some form of TPM, these are in large on marginal low cost titles where the additional cost of including a TPM and the low margin for profit prohibits a TPM being included.

Should private copying of DVDs be allowed, there would be an impact on low cost, low volume and low margin DVDs. These impacts would have the following effects:

- Distributor needing to add TPMs to the DVD and thereby raising the cost of the DVD; and
- By including a TPM and thereby raising the cost of the DVD per unit, the title viability is eroded then the distributor will not offer that title for sale to the Australian consumer.

AVSDA submits that it would be an unprecedented and brave decision to enact a change in the Copyright Act which negatively impacts both consumers and industry.

AVSDA also is of the view that should the Rudd Government change the law to allow limited private copyright of DVDs to be played on another device² absent of a TPM, it would dramatically increase the levels of piracy. The consumer will justifiably be confused by the government message of it is now ok to make copies of DVDs, BUT only if a TPM or DRM is not present.

The other concern with such a dramatic policy shift is that the shift in consumer behaviour around making private copies of DVDs with TPMs (which is the vast majority), the Government would in fact be creating a new class of criminal to which the industry would have to decide how to respond.

It is in neither the Government, nor industry's interests for a new class of criminal activity to be created as a result of changes to section 110AA.

(d) How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?

AVSDA estimates that over the past five years studios have invested around \$1 billion annually in film and television production in Australia helping support the estimated 50,000 Australians who make a living from the industry.

Given the risks of the movie-making business highlighted by the fact that 6 out of 10 movies studios make fail to make a profit, it is very important that studios be able to maximize revenue streams in order to recoup investment. The "after-market" of DVD, television and new media sales is critically important in this respect and it is in this context that the current format-shifting review is very significant.

(e) How would any proposed changes improve achievement of the Government's policy objectives, including economic incentives for the creation and distribution of films?

As per the response to (d) above, AVSDA believes it would have a negative effect in terms of economic incentive. Attached to this submission is a letter from Village Roadshow regarding the potential impact on its business.

Most Australian films are:

- a) made for the domestic audience; and
- b) part-funded by State/Commonwealth film funding bodies.

Therefore piracy growth would affect either the ability to fund the film for the same amount based on returns or the need for greater government funding will increase.

Issue 6: Should section 110AA be changed to limit permitted copying

(a) What changes should be made to section 110AA to limit making copies of cinematograph films?

AVSDA seeks no change to section 110AA.

² Noting that the consumer is not in fact doing this and has no need. Filmed content on DVDs has TPMs attached but even if they did not, the is not a scenario in which a consumer would want or expect to format shift the DVD to a MP4 format for playing in the car for example.

(b) How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?

N/A

(c) How would any proposed changes affect the government's policy objectives, including fair and balanced copyright law?

As mentioned previously in this submission, any proposed changes would adversely affect the balance of copyright law for both consumer and industry. Whilst not wanting to be Chicken Little and proclaim the sky would fall, AVSDA really cannot see any benefits flowing from an expansion of the section 110AA and can foresee numerous and cumulative negative consequences should changes be contemplated.

The argument that format shifting is allowed for music and should be applied to films as a matter of principle is fallacious and without merit.

Attachment A: Underbelly piracy article



Underbelly mob of bootleggers

By Larissa Cummings, February 15, 2008

TENS of thousands of Australians have risked a prison term and hefty fines to download the first two episodes of the mobster drama *Underbelly* on the internet.

Illegal copies of the controversial series premiere were available to download from the web just 20 minutes after the episode finished screening in NSW.

It is believed the show, which portrays Melbourne's gangland war, was streamed live onto the internet and distributed using file-sharing software.

A Victorian Supreme Court judge banned Channel 9 from airing the \$13 million series in Victoria, citing concerns that it could prejudice a potential jury in an ongoing case.

The judge also ordered promotional trailers for the program to be pulled from the internet.

But the ban has only intensified interest in the drama - particularly among Victorians.

On web forums yesterday, requests for pirated copies of *Underbelly* were rife, with many Victorians complaining about the court ruling.

Dozens of websites were reported as listing the program for free download. One of them, Mininova, boasted 38,000 downloads of the show since it was posted on Wednesday night.

Another, EZTV, reported about 10,000 downloads.

Downloading TV show and movies from the internet is illegal under Australian copyright law and anyone caught with copies risks up to five years jail and fines of up to \$60,500.

Anyone caught distributing or selling copyrighted footage of *Underbelly* could be charged with contempt of court.

A spokeswoman for Channel 9 said the network would take legal action against anyone caught downloading or distributing its prized program.

File sharing, or Peer 2 Peer (P2P), software like LimeWire, Kazaa and Bit Torrent are free to download and install. They draw content from a users' "shared" folder.

Other users on the same P2P software are able to access and upload files from any of these shared folders from anywhere in the world.