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29th February 2008

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600
By email: copyrightlawbranch@ag.gov.au.

Dear Ms Daniels,

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

Electronic Frontiers Australia (**EFA**) welcomes the opportunity to make a submission on the operation of ss47J and 110AA of the *Copyright Act 1968* (Cth).

Our submission is attached. Any comments or questions may be directed to the undersigned.

Yours faithfully,

Nic Suzor
Vice-Chair
Electronic Frontiers Australia
on behalf of the Board
Email: email@efa.org.au

Submission by Electronic Frontiers Australia

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

EFA believes that the balance of interests in copyright favours allowing unlicensed private copying for the purposes of time shifting and format shifting.

EFA believes that private copying satisfies the Berne Convention 'three step test' in that:

- format shifting and time shifting can be considered to be 'special cases';
- the normal exploitation of copyright material does not extend to selling consumers a separate copy of the same material for each medium or time in which the customer wishes to enjoy the material; and
- allowing consumers to format-shift, time-shift, and space-shift copyright material for private purposes cannot unreasonably prejudice the legitimate interests of the copyright holder, because it is not reasonable to expect consumers to purchase multiple copies of the same copyright material in order to enjoy it on different devices or at different times.

EFA submits that Australia should introduce a general exception for private time-shifting, format-shifting, and space-shifting of copyright material. Such an exception would simplify and clarify the existing rules, which are more complicated than necessary. These rules, designed to give effect to the reasonable expectations of consumers, should be made as simple as possible in order to be clearly understood. Failing to simplify the exceptions is likely to encourage non-compliance on the part of everyday consumers.

EFA notes that the enforcement costs of preventing private copying and the concomitant costs to consumer privacy greatly outweigh the costs to the copyright owner of legitimising this behaviour. EFA strongly discourages the continued enactment of prohibitions on copying which are likely to be regarded as unreasonable and unlikely to be followed by the average consumer.

EFA suggests that private copying exceptions in no way encourage or increase the incidence of piracy. Allowing consumers to make personal copies of their digital content will only broaden the opportunities available to law-abiding consumers. Large scale commercial infringers of copyrights are unlikely to be either encouraged or deterred by restrictions on private copying, and ordinary consumers are extremely unlikely to be turned into large scale infringers simply because they are given the legal right to enjoy their lawfully acquired content on the device or at the time of their choice.

Failing the introduction of a general provision, EFA believes that sections 47J and 110AA be simplified and brought into line with section 109A.

Issues 1-3: Review of operation of section 47J – Photographs

EFA believes that s 47J is overly limited in that it:

a. does not allow digital-to-digital reproduction; and

b. does not allow reproduction in case the original is lost or destroyed.

Digital-to-digital reproduction of photographs

Increasingly, photographs are being licensed in digital form. A wedding album, for example, may be delivered in the form of both a small number of hardcopy prints and a larger number of digital images. This is increasingly common as the quality and availability of digital still cameras increases. Accordingly, limiting the exception in s 47J to hardcopy-to-digital or digital-to-hardcopy is no longer appropriate. Many consumers now want to be able to store their digital photos in one location, and view them on their televisions, digital photo frames, or portable players. A restriction on private space-shifting provides little to no additional benefit to professional photographers – consumers are unlikely to pay multiple times for the ability to view their photos on multiple digital displays. Rather, such an unreasonable restriction is unlikely to be followed, and encourages a disrespect for copyright law among consumers.

The lack of a digital-to-digital exception also means that if a hardcopy photograph is permitted to be digitised for viewing on an electronic device, it must be digitised from the hardcopy for each device, rather than the much simpler process of creating a digital copy of an existing digital copy.

EFA submits that s 47J should be modified to allow digital-to-digital reproduction for private purposes.

Serial reproduction and a backup right

Section 47J does not permit serial reproduction. This means that if a digital copy is made from the hardcopy original in order to permit viewing on a computer, for example, and the original is lost or destroyed, consumers will no longer have the right to enjoy the photo in hardcopy form without purchasing another licence from the copyright owner.

EFA believes that allowing digital-to-digital reproduction for private purposes should extend to creating backups of digital and digitised photographs. All digital storage is, to some extent, volatile. There is no justification for requiring a consumer to purchase a new copy of a digital photograph if their hard drive fails or their optical or magnetic media deteriorates.

In most cases, the transaction costs of tracking down and negotiating with the copyright owner will be prohibitive. A restriction on the ability of consumers to make backups of their photos is unreasonable, and provides no legitimate benefit to the copyright owner. Providing an exclusive right to control backups does not increase the incentives to create the original material, and merely creates a monopoly on backups which is not socially beneficial.

EFA submits that s 47J should be amended to allow serial reproduction for private purposes.

Issues 4-6: Review of operation of section 110AA – Films

EFA believes that the current wording of 110AA is no longer appropriate. It specifically addresses the single case where the owner of a movie on videotape wishes to make a copy to a digital medium. However, the vast majority of movies are now distributed in digital format already, on DVDs, Blu-Ray discs, or by download. They are consumed on a variety of devices. The law needs to be changed to acknowledge this new reality.

EFA believes that unlicensed private digital-to-digital reproduction should be made permissible under Australian copyright law. Australian consumers should have the ability to backup the copyright material they have legitimately purchased, and should be allowed to enjoy their digital media on any device they see fit. Increasingly, Australian consumers want to enjoy their audiovisual material on Home Theatre Personal Computers, on their laptops, on portable players, and any number of other devices. It is unreasonable to expect Australian consumers to purchase a different copy of each film for every device they wish to use to view it.

A restriction on digital-to-digital copying provides no extra incentive for copyright owners to produce any more audiovisual content. The copying of material from one digital device to another digital device imposes no cost on the copyright owner and does not interfere with their legitimate market. Requiring a consumer to pay for a new copy for each different device is an economic rent deriving from a government granted monopoly – it is pure profit to a copyright owner without any expenditure on their behalf.

EFA submits that s 110AA should be amended to allow digital-to-digital personal copying.

The scope of the exceptions in face of the limits imposed by TPMs

While it is true that with current TPM restrictions there are few sources of audio-visual content which can legally be copied for personal use, this fact should not limit the scope of personal copying exceptions. Recent experience has shown that copyright owners are beginning to recognise that consumers are overly hindered by TPM restrictions on digital content. TPM restrictions greatly limit the ability for consumers to transport their digital media to the devices of their choice, limiting both consumer sovereignty and competition in high technology markets. Recognising that the desires of consumers outweighs the benefit provided by TPMs, most of the major record labels have begun selling unrestricted digital downloads. It is likely that the availability of unrestricted audiovisual content will similarly increase in the future.

EFA submits that the scope of the private use exceptions should not be limited on the basis that digital media unencumbered by TPMs are currently less available than their encumbered equivalents.

Issue 7: Visual images embodied in a computer program

Under the current legislation, while a backup copy may be made of a computer program, there is no explicit right for consumers to make a backup copy of a game or other program which embodies a cinematograph film.

EFA strongly supports the argument that Australian consumers should legitimately be able to make backup copies of their digital media. Similarly, EFA supports the extension of the rights to make interoperable products, correct errors, and engage in security testing to computer programs which embody cinematograph films.

EFA submits that the exception in 110AA should extend to cinematograph films embodied in computer games and other programs, and that the exceptions in ss 47C-47F be extended to include cinematograph films embodied in computer games and other programs.

EFA believes that a concomitant exception to liability for TPM circumvention should be introduced to allow circumvention for the purposes of making backups, making interoperable products, correcting errors, and engaging in security testing. EFA is aware, however, that this review does not address, or invite submissions on, the circumvention of TPMs.

EFA submits that because submissions on the circumvention of TPMs are out of the scope of this review, the scope of the exemptions contemplated by this review should not be limited on the basis that computer programs are often distributed in a TPM-encumbered format.

Further recommendation – avoid limitation by agreement

EFA believes that consumer exceptions to copyright infringement should be supported by inalienability. Individual consumers have little bargaining power in digital media agreements, which are characterised by shrink-wrap, click-wrap, and browse-wrap licences, with no opportunity for the negotiation of terms. EFA

suggests that it would be unreasonable to introduce exceptions designed to benefit consumers if they may be excluded by agreement, on the basis that commercial distributors of digital media are likely to simply bypass the exceptions by imposing onerous terms on consumers in non-negotiable licences. Indeed, many suppliers of digital media include 'copyright notices' with their products that purport to forbid the consumer from engaging in any copying of the product, whether or not it would infringe copyright. Permitting the contracting out of exceptions would greatly undermine the intentions of the Government in introducing reasonable private copying rights for consumers.

This problem exists in relation to *all* exceptions within the *Copyright Act 1968*. The Copyright Law Review Committee in its 2002 report *Copyright and Contract* found that contractual limitations on statutory copyright exceptions were distorting the balance of copyright, and recommended that exceptions be protected from contractual limitation, yet this recommendation has not yet been implemented.

This problem is especially acute when considering exceptions to the anti-circumvention provisions of the *Copyright Act*. EFA notes that Labor moved amendments to the *Copyright Amendment Bill 2006* in the Senate on 30 November 2006 which would have addressed this problem, at least in relation to anti-circumvention exceptions, but those amendments were defeated by the Coalition.

EFA submits that all exceptions within the *Copyright Act 1968*, including ss 47J, 109A, and 110AA be protected from exclusion or limitation by agreement.