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## Feature: Private Copying: Illegal or Impossible?

*[Speech given by Simon Lake, "The Future of Copyright Exceptions" Seminar- 15 June 2005]*

With the Government's recent release of an issues paper to examine the fair use exceptions to copyright infringement, a conference on the future of copyright exceptions was held in Sydney on June 15. Screenrights Chief Executive, Simon Lake, spoke on private copying. Following is an edited version of his talk.

### INTRODUCTION

I have been asked to "consider the implications of introducing flexible exceptions into Australian copyright law and the issues posed by private copying."

I have 15 minutes, so I won't be able to explore the topic in the depth that it requires, but I will try to share some thoughts about why the issue of private copying is such a lightning rod.

Recently, I had a conversation with a friend who works for a large telco. They said: "Surely a copyright owner would want the ability to copy to either be illegal or impossible."

This observation reflects what Professor Andrew Christie described in his paper, "Private Copy Licence and Levy Schemes: Resolving the Paradox of Civilian and Common Law Approaches".

I did try to do a cut and paste of the quote but the IPRIA's papers are password protected for copying - an interesting aside to a point I want to explore later with regards to digital rights management systems.

To return to Professor Christie's paper, Professor Christie makes the observation, and I quote, "private copying is an economic problem and a statutory licence and a levy scheme is a solution to this problem".

Professor Christie then goes on to explore what he describes as the paradox of common law countries not embracing levies as the solution, while civil law countries, who have traditionally been the strongest advocates for authors, have embraced private copy levies. Why?

One answer might be that it is simply not possible, as my friend from the telco suggested, to make private copying both "illegal and impossible".

The Europeans have taken a pragmatic approach - there is a culture of copying that cannot be easily changed and the challenge is not to necessarily stop the copying for private purposes, but to create a fairer market place in which this copying occurs. Or, in other words, to recognize that there is a market failure and to try to remedy this failure.

From Screenrights perspective, we do not favour having open slather wide ranging exceptions that allow for unlimited time shifting, format shifting and the building of private libraries.

We believe that private copying unequivocally affects copyright owners' economic rights.

I recently visited the local blockbuster store and there were boxed sets of TV programmes such as Friends, The Sopranos, Little Britain and Walking with Beasts. The economic life of these programs is being affected by the ability of consumers to copy or to even use the latest PVR technology, which allows and encourages consumers to select a series, and make their own library of this series.



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On the consumer side, the evidence of the benefits of private copying is overwhelming. Consumers are being encouraged to embrace the myriad of new copying technologies. DVD recorders are below the \$300 mark, broadcast signal capture cards are below \$50 and the sale of blank DVDs and CDs has exploded.

## Making copying illegal

In answer to the question "should copying be made illegal?", the pure position from a copyright owner's perspective is that they should be able to control the use of their works. Making copying illegal is one way to do this.

But the living rooms of Australia suggest that this is not an effective answer from a consumer's perspective. The millions of VHS recorders and the rapid growth in DVD recordable devices and other hard drives suggests that this approach has not worked.

Moreover, the lack of any mechanism to get remuneration means it has not worked for the copyright owner. Further, the consumer, who is technically breaching copyright, is in an uncertain position. This is very different to the position of educational institutions which have the certainty of the statutory licence to conduct their copying and communication for their educational purposes.

In short, technology and the culture of copying have meant that copyright owners are not able to prevent copying in the home.

This difficulty of preventing copying is not the end of the story and copyright owners will not give up on trying to protect their rights.

Hence, making uncompensated private copying legal is, in our view, not the answer. We see no cogent reason as to why copyright owners should renounce their copyright just because technology puts consumers in a position to copy without their permission.

Imagine if such a principle was extended to other rights.

We do not believe that private copying falls into the too hard basket. Issues such as devices being used for other purposes, the scope of a potential licence, constitutional questions and the interaction with digital rights management systems can be dealt with in a positive and consultative way which will be of ultimate long term benefit for both copyright owners and consumers.

The debates around fair use have been characterized by assertion and very little fact based analysis. I do not believe the government is in possession of the necessary market based information at this point in order to make a fully informed decision about introducing a wide ranging fair use provision.

Unfortunately, the Government's Issues Paper does not make much reference to market data in its analysis. The copyright industries of Australia are a powerful generator of economic growth and employment. There is a wide range of estimates as to its value to the economy, but 5% of GDP is not out of the ballpark. Copyright industries are full of not only large, but also small and medium sized companies. There are also many individual creators such as writers, composers and producers whose livelihood is dependent on getting a return for the use of their works. Given the potential impact of the options, it is very dangerous in our view to proceed without this economic analysis.

In particular, we would like to know more about the attitude of consumers and their willingness to pay. If consumers have the opportunity to do the right thing and pay a small levy on their copying, surely they would be willing to do this for the benefit of making legal copies and creating a revenue stream back for copyright owners?

In the countries with a private copying levy, there does not appear to be resentment about the creation of levies so long as they are reasonable in their price, clearly explained and easy to administer.

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## Making Copying Impossible

The other approach for copyright owners is for legislation to make copying impossible via technological mechanisms, which could include some digital rights management systems or broadcast flags. Some copyright owners believe this is the path that should be followed.

There is no perfect copy protection system and it seems the moment that a new system is announced, it has been hacked and the information is shared around the net.

Copyright owners of course have the right to try and protect their property and the incentive to do so only increases if they are not receiving any remuneration. It may be that a perfect and uncrackable system is developed.

The interaction of digital rights management systems and private copying has received some attention in the European Commission. Our understanding is that the general conclusion of these deliberations is that Digital Rights Management systems and private copy levies can exist side by side. They can be complementary rather than competitive approaches.

There has been concern that the simultaneous operation of DRM licensing and private copying levies on media may lead to so called "double dipping": consumers paying twice for the same licence.

In Europe, where the levies have been in place prior to the introduction of the DRM systems, this is not a great concern because the pricing of the licence through the DRM takes the private copy licence into account. Such an approach could be adopted here.

## What system of private copying would actually work in Australia?

Screenrights, the Australasian Performing Association, AMCOS, the Screen Producers Association of Australia, the Australian Writers Guild, the Australian Directors Guild and the Australian Guild of Screen Composers, Viscopy and the Independent Record Association wrote to the government in January 2003 seeking to open this debate.

We provided a fully drafted legislative scheme from the former Solicitor General Dennis Rose QC and Dr David Brennan to establish a levy approach for removable media. This submission is on our website at [www.screen.org](http://www.screen.org).

So we are encouraged in 2005 that the government is now looking at this issue. We are concerned, however, that the lack of market information and research and the tight timetable might result in a hurried decision.

There is a real opportunity to create a private copy system, which is appropriate for Australia and which achieves the goals of access and fairness without throwing copyright owners' rights aside.

Screenrights would itself like the time to reconsider and review our 2003 proposal in light of our further consultations with a wide range of stakeholders, including government, our members, consumer groups and retailers. We have been involved in debates in the media and on talk back. The principle that there has to be some mechanism for remuneration does not appear to be disputed. It is intuitively fair, particularly when consumers consider the investment they are making in copying equipment..

The questions we have received and have always wanted to jointly explore are implementation ones.

The major issues we have identified are: 1. the changing technologies of copying onto hard drives 2. The fair treatment of the copying of non-copyright material, and 3. the interaction with digital rights management systems.

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## The changing technologies of copying onto hard drives

The issue as to what devices should have levies applied to them has been raised. To just have a levy on removable media such as blank CDs and DVDs will not fulfill the goals of creating a fair system for copyright owners and consumers. It seems in Europe that the specific devices that have a principal purpose of being used for home copying are levied, eg., PVRs, iPods, etc. This creates a good starting point, but clearly this should be debated and explored in a structured fashion.

## The fair treatment of the copying of non-copyright material

We would also like to consider the issue of the best way to handle concerns that some blank media are being used for non copyright purposes. This might be home videos or copying of photos onto hard disks.

As we understand it, there are two options: either to include exemptions from the levy with a reimbursement scheme for non-copyright uses or to take account of the non-copyright uses in the determination of the rate.

In France and Europe generally the second approach has been taken.

This is preferable because the administrative costs of managing the rebated exemption have the risk of being high but not clearly defined. France for example does have some very limited exemption which seem to apply to copyright creators who are using blank devices, and they administer a rebate scheme (but this is apparently insignificant).

The experience in Europe is that this approach is generally considered fair. This is particularly so because professional uses of blank media tend to use different formats to the home uses.

Even in relation to blank CDs, the evidence Screenrights has seen is that more than 66% of use is for private copying.

## Digital Rights Management Systems

As mentioned previously, we believe that there is sufficient experience to suggest that digital rights management systems and a private copy levy can co-exist.

## LEGISLATION

Finally, the mechanism for introducing the legislation has to be carefully considered.

There are three broad options.

Option 1 is the current industry option presented to the government which is a levy with a rebate system, but which does not cover hard drives in its present form.

Option 2 is a hypothecated tax- where the government or an independent pricing authority sets the levy and this is administered by an appropriate collecting society or societies.

Option 3 may be some form of voluntary scheme where consumers can in effect opt in to buy a private copying licence. Screenrights and its members are working through these options and we will be discussing them with our membership before presenting them to the government.

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## CONCLUSION

I opened with a quote from Professor Christie that "private copying is an economic problem and a statutory licence and a levy scheme is a solution to this problem"

The manufacturers, the retailers and consumers are benefiting, all at the cost of the copyright owner - and copyright owners should not have to subsidise or forgo the right to benefit from the use of their works.

A solution has to be found to create a fairer market place for copyright owners and consumers. 40 other countries have managed to introduce a levy scheme. We believe that the basis for the introduction of such a scheme can be clearly and cogently justified.

These countries with a private copy scheme have not gone down the "illegal and impossible" path. A levy system removes the barrier of illegality and impossibility for consumers, while ensuring that copyright owners receive payment. It is a matter of balance.

We do not believe it is appropriate to carve out copyright owners' rights because the issue of private copying is complex. There is a wealth of international experience and local know-how to help Australia develop a fair private copying scheme – one that facilitates use and create certainty for consumers.

What could be a fairer use than that?

*"The Future of Copyright Exceptions"* Seminar was organized by the Centre for Media and Communications Law and the Intellectual Property Research Institute of Australia, 15 June 2005

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## Royalty distribution surpasses targets

Screenrights Member Services team has surpassed its distribution targets with the distribution of almost 97% of royalties collected in the 1999 distribution period, prior to the 30 June deadline for paying out this money.

Under Screenrights' Articles of Association, Screenrights must distribute educational copying royalties within six years of the money being collected. The Corporate Plan requires the team to distribute at least 96% of the royalties from any given distribution period within this time frame.

Screenrights has surpassed this target, having distributed 96.8% of royalties from the 1999 distribution period.

Member Services will continue to contact members and distribute royalties until the deadline falls at the close of business on Thursday 30 June 2005.

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## Screenrights sponsors session from Blair Witch publicist

Harry Clein, best known for the extraordinarily successful internet marketing campaign for The Blair Witch Project, will speak at a session at the upcoming SPAA conference sponsored by Screenrights.

Clein's public relations firm is one of the top US outfits and has handled marketing and publicity for films such as Sophie's Choice, Dirty Dancing, Heathers, Kiss of the Spider Woman, Sex, Lies and Videotape and Steel Magnolias. However, Clein's marketing of The Blair Witch Project has earned him the most accolades – including Premier Magazine naming the campaign as one of the top achievements of recent film history.

Clein is speaking on the morning of 16 August at the upcoming SPAA conference. Screenrights is delighted to sponsor the session.

More information can be found at <http://www.spaa.org.au/conference>

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## First online copying survey in New Zealand

Screenrights regularly surveys Australian and New Zealand schools and universities to assess what is being copied from television and radio so that copyright owners can be paid for the use of their work. Our first online survey in a New Zealand university has now taken place, greatly reducing survey management for the educators involved.

Screenrights Licensing Executive James Dickinson said Screenrights had worked with independent survey authority AC Nielsen and the university sector to develop the online survey.

“Rather than university staff having to complete paper based records, they can log in to a site and let us know whether they have copied material, and what that material was, by electronic means,” Dickinson said. “The process worked well – and should make the administration and management of the survey easier for the university staff involved.”

Screenrights will continue to use the online surveys in all sampled New Zealand universities.

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## Full Federal Court decision finalises Panel Case

In the April issue of Off the Air we included a brief update on the "Panel Case" – a significant case that deals with when the use of a program excerpt constitutes an infringement. Since then, the Full Federal Court has handed down its decision. Screenrights lawyer Gail Fulton summarises this judgment.

In the Panel Case, Channel Nine brought copyright infringement proceedings against Channel Ten in relation to the use of excerpts from their programs in Ten's satirical program "The Panel".

This is one of the few cases in which the High Court has given guidance on determining what constitutes a substantial part of a broadcast for the purposes of copyright infringement. The High Court held (by majority) that the interest to be protected by this form of copyright is the cost and skill in assembling or preparing and transmitting the program to the public. If an extract is held to be a substantial part, copyright infringement will be established unless the person using the extract is able to show that a defence applied. In the Panel Case, Ten successfully established fair dealing defences in relation to 9 of the 20 extracts in question.

It is noteworthy that the High Court emphasis was on a qualitative assessment of the importance of the extract to the program from which it was taken. This approach and analysis is directly analogous to the approach we would expect of the courts in assessing whether the use of an extract from a film infringed copyright in the source film.

Following the High Court's decision last year the task of applying these principles to the excerpts in dispute in the Panel Case was remitted to the Full Federal Court. On 26 May this year the Full Federal Court handed down its decision. The table below summarises the Court's findings on the 11 extracts in question. In several cases there was a dissenting judgement from one of the three judges on the question of substantiality of individual segments.

Nine Program	Duration of Nine Program	Panel Segments – duration and percentage of Nine Program	Was it a substantial part? – Did Ten infringe Nine's copyright?
'A Current Affair' Expose of questionable business practices of brothel masquerading as an introduction agency	22 mins & 51 secs (Relevant segment 6 mins & 39 secs)	9 secs 0.66%	<b>No</b> - Extract was insignificant (or de minimus) in the context of Nine's program and caused no injury to Nine's interests
'The Inaugural Allan Border Medal Dinner' - the program centered upon the dinner and the presentation of the medal	2 hrs 11 mins & 44 secs (Relevant segment 42 mins & 17 secs (or at best 5 mins & 50 secs))	10 secs 0.13%	<b>Yes</b> –The extract was of Glen McGrath's reaction to the announcement that he was the winner and his movement to the stage to collect the medal "The excerpt was plainly a material and important part of the programme"

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			<b>However</b> Hely J dissented on this point regarding it as “trivial, inconsequential or insignificant in terms of the source broadcast”
<b>'The Today Show'</b> Footage of successive Russian Prime Ministers who have been dismissed by President Boris Yeltsin	90 mins & 2 secs  (Relevant segment 1 min & 24 secs)	13 secs 0.24%	<b>No</b> - Extract was insignificant (or de minimus) in the context of Nine's program and caused no injury to Nine's interests
<b>'Midday'</b> (Prime Minister singing Happy Birthday to Sir Donald Bradman )	67 mins & 34 secs (Relevant segment 15 mins & 5 secs)	17 secs 0.42%	<b>Yes</b> – footage of prime minister singing Happy Birthday to Sir Donald Bradman was “a key and memorable feature” of the program
<b>'Wide World of Sports'</b> (Grand Final celebrations – last game of Glen Lazarus)	4 hrs 57 mins & 30 secs (Relevant segment 8 mins & 16 secs)	8 secs 0.04%	<b>Yes</b> – “the footage of the Glen Lazarus cartwheel was, on any view, a highlight”  <b>However</b> Hely J dissented on this point regarding it as “trivial, inconsequential or insignificant”
<b>'Australia's Most Wanted'</b> (Re-enactment of gang of youths who gate crashed a party and a resulting stabbing)	43 mins & 2 secs (Relevant segment 8 mins & 55 secs)	26 seconds <sup>1</sup> 0.77%	<b>Yes</b> – the “intimidation and break-in sequence coupled with the climatic stabbing scene is very dramatic and clearly central to the programme in which it appeared.”
<b>'Pick Your Face'</b> Children's game show in which contestants must identify faces – in this case Kerri-Anne Kennerley	22 mins & 32 secs (Relevant segment 5 mins & 25 secs)	20 secs 1.48%	<b>Yes</b> – the identification of the faces they have assembled by the children is “an important part of the show” – One of the panel members described the incorrect identification as a “little highlight”

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<p><b>'Crocodile Hunter'</b> Show featuring Steve Irwin filmed in various marine environments</p>	<p>42 mins &amp; 50 secs (Relevant segment 7 mins &amp; 23 secs)</p>	<p>28 secs 1.09%</p>	<p><b>No</b> - Extract was insignificant (or de minimus) in the context of Nine's program and caused no injury to Nine's interests Hely J noted that "the Panel segment is humorous, but there was nothing funny about the original broadcast" and that it is used in an entirely different context.</p>
<p><b>'The Today Show'</b> Interview with the manager of a hostel for homeless people</p>	<p>1 hr 29 mins &amp; 56 secs (Relevant segment 5 mins &amp; 9 secs)</p>	<p>42 secs 0.78%</p>	<p><b>No</b> - Extract was insignificant (or de minimus) in the context of Nine's program and caused no injury to Nine's interests Hely J notes that "the Panel's focus is on matters which are no more than background in the source broadcast, and barely noticeable"</p>
<p><b>'The Today Show'</b> Interview with child celebrity and his mother</p>	<p>1 hr 30 mins &amp; 30 secs</p>	<p>9 secs 0.17%</p>	<p><b>Yes</b> – the extract showed child yawning whilst being interviewed "It is a memorable part of the interview"  <b>However</b> Hely J dissented on this point regarding it as "trivial, inconsequential or insignificant"</p>
<p><b>'Nightline'</b> Interview with Kevin Gosper expressing relief at being cleared of corruption allegations.</p>	<p>25 mins &amp; 50 secs</p>	<p>10 secs 0.65%</p>	<p><b>No</b> - Extract was insignificant (or de minimus) in the context of Nine's program and caused no injury to Nine's interests Hely J notes that the part taken is fleeting in nature, and so taken out of context that it does not give the impression of a reproduction of a material part of the original story"</p>

<sup>1</sup> Hely J agreed with the majority judges Sundberg and Finkelstein JJ on this point although in Hely's judgement he lists this segment as being 20 seconds long.

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The issues are by no means simple and the decisions in this case have shown that even after extensive consideration different conclusions on the same factual material are possible. The Full Federal Court has reached a unanimous conclusion that three of the extracts were a substantial part of the programs from which they were taken. In each instance the Court looked at the footage in question as being, in some sense, a highlight of the program from which it was taken.

In three instances there was 2:1 majority decision that the extracts were a substantial part of the programs from which they were taken. In these cases the majority and minority judges differed in their perceptions of the significance of the extracts - what one judge regarded as trivial and fleeting the others saw as more central to the programs from which the extracts were taken.

In five instances the Court unanimously held that the extracts were not substantial. In these cases the Court stressed both the minimal nature of the amount taken, the lack of economic impact on the original broadcaster and the nature of the use made being very different from that made in the original program.

So what does all this mean for Screenrights members?

For anyone who was hoping for a simple and clear-cut rule to establish what is and what is not a substantial part of a television broadcast there could be some disappointment. There is simply no fixed rule or percentage that can be applied to this question. In grappling with the issue of whether the part taken amounts to "essentially the heart" of the copyright work, the following considerations are likely to be relevant:

- The general rule is that substantiality depends on quality not quantity;
- Where the amount taken is small the courts will look carefully at the aesthetic significance of the part taken
- The economic significance of the part taken will be important – here the court will look at the financial harm to the copyright owner or the gain to the user;
- The use that is made of the copied portion – the court here may consider differences in the way in which the material is used.