
The case for a private copying levy

Australian Mechanical Copyright Owners Society (AMCOS) & Screenrights

October 2001

1: Background

Most private copying of recorded music and television programs infringes copyright, but copyright owners are unable, in practice, to prevent it or license it, partly because of concerns about privacy. Much private copying of other material – including text and images – also infringes copyright and is similarly unenforceable.

A solution – adopted in many other countries – is to allow private copying as an exception to infringement, but at the same time remunerate copyright owners from levies payable on blank recording media and recording devices.

Such a scheme was introduced in Australia in 1989, but declared unconstitutional by the High Court in 1992. A similar scheme – but which would have avoided the constitutional difficulties of the 1989 scheme – was proposed by the Government in 1993 but never introduced.

2: Why now?

There is a renewed urgency to introduce a private copying levy, for the following reasons:

2.1 Digital Agenda amendments now in force

Until earlier this year, the major concern of copyright owners has been the passage and implementation of the Digital Agenda Act. While this was in progress, there was little opportunity for consideration of other reform issues such as private copying.

2.2 Increasing opportunities for private copying

Technological developments are providing increasing opportunities for private copying – including new types of copying media, new types of copying devices, and new sources of access to copyright material. In addition, sales of digital recording media and devices in Australia rapidly increasing.

2.3 International developments

International experience has shown that there is a continued role for private copying schemes, and that private copying has not been controlled by technological means. This position is reflected in the recently adopted EU Information Society Directive. Countries with private copying levies have recently begun extending their schemes to digital media and devices. As a result, private copying levies – which were declining due to decreasing use of analogue media and devices – are now increasing.

3: Arguments in favour of a private copying levy

- Failure to respond to widespread infringement encourages disrespect for, and misunderstanding of, copyright law. It is also inconsistent with government policies of increasing awareness and acceptance of copyright;
- Copyright owners are adversely affected by private copying because of lost sales and licensing opportunities;
- Providing an exemption for private copying without remuneration would be inconsistent with international treaty obligations and the practice in other countries;
- Private copying remuneration schemes have been introduced in more than 40 countries, including the United States, Canada, Japan and many European countries;
- Overseas schemes have adapted to technological developments such as digital recording media and devices;
- Overseas surveys have indicated consumer acceptance of a private copying levy as a fair method of remunerating copyright owners;¹
- The introduction of a scheme in Australia would entitle Australian rights holders to a share of income from private copying schemes in countries which only distribute to rights holders from countries which have a similar scheme.

4: Arguments against a private copying levy

4.1 Time-shift

Many people record television programs to view at a more convenient time – referred to as “time-shifting”. It is sometimes argued that copying to time-shift should not be subject to remuneration.

In response:

- The consumer benefits from the opportunity to watch the program at a more convenient time. This is similar to the benefit from hiring or purchasing a video for more convenient watching, both of which may result in payment to copyright owners.
- Although there is always some benefit to a person who tapes a program, the degree of benefit may vary depending on the period of time the person has access to it. Where there is a levy on blank recording media, the consumer only pays one levy for each tape, irrespective of the number of programs or films which are copied onto it. If, for example, the levy is \$1, a person who copies only one program onto the tape pays \$1 in respect of that program. On the other hand, a person who does not retain taped programs but uses the same tape to tape a series of programs, erasing the previously taped program each time, pays a much smaller amount per program. If, for example, the tape is used to record 25 programs successively, the consumer pays a levy of 4 cents per program.
- A substantial proportion of recorded programs are retained as part of a collection.²

¹ Gillian Davies and Michele Hung *Music and Video Private Copying* (Sweet & Maxwell London 1993) at p64

4.2 LACA Committee: “Cracking Down on Copycats”

As part of its inquiry into enforcement of copyright, the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee) briefly considered private copying. In its report “Cracking down on copycats: enforcement of copyright in Australia” (but not as part of its formal recommendations) the Committee recommended against the introduction of a blank media levy scheme, for the following reasons::

- In the Committee’s view, many people are not aware that home taping is an infringement of copyright, or regard its effect as trivial. The change in public attitudes intended to result from the Committee’s recommendations relating to public education “should lead to a decrease in the amount of private copying”.³
 - *Response:* It may be the case that many people are not aware that home taping is an infringement of copyright, or regard its effect as trivial. However, even if more people become aware that their home-taping infringes copyright, and accept their copying harms copyright owners, it is unlikely that they will stop copying if they believe they will not be penalised.
- In the Committee’s view, private copying would in the future predominantly take place in the electronic environment, where the use of “traditional media” such as blank video and audio cassettes would be minor in comparison.
 - *Response:* In the future, copyright owners may be able to prevent or inhibit unauthorised private copying by use of technological protection measures. However, there is, and will continue to be for some time, vast amounts of copyright material available without such protection measures, including the reportedly millions of digital music files copied using services such as Napster.
 - In addition, countries with private copying schemes are already adapting their schemes to the digital environment – for example, by imposing levies on CD burners and blank CDs.
- The Committee referred to the submission of the Australian Consumer Association that “the digital economy not be used for increasing pursuit of consumers”.
 - *Response:* It is unclear whether the ACA’s comments were intended to apply to a possible remuneration scheme for private copying of audio and audiovisual material. In any event, the ACA’s proposed solution to unauthorised private copying – better business models and better customer relationships – do not address the fact that the copyright owner may have no customer relationship with the person making private copies.
- The Committee referred to the submission of the Australian Digital Alliance that “there is in any case a public policy debate over whether private copying constitutes infringement”.⁴
 - *Response:* As with the ACA submission, it is unclear whether the ADA’s comments were intended to apply to remuneration for private copying.
 - There have been debates about private copying in the European Union (particularly in the lead up to the adoption of the Information Society Directive),⁵ and in the United States (particularly in connection with the Napster litigation). The issue has Information

² Survey Report: Private Copying on Videotape, prepared for Audio-visual Copyright Society (now trading as Screenrights), October 1995. The survey found that more than half of the videotape holdings surveyed were to be kept, and that less than 20% of households had tapes used exclusively to time-shift.

³ para 2.43

⁴ para 2.44

⁵ Directive on harmonisation of certain aspects of copyright and related rights in the information society

Society Copyright Harmonisation Directive, and in the United States with the Supreme Court decision in the Napster case that users of Napster software were not covered by the fair use exception.⁶

- There is less room for debate in Australia, as there is no exception for private copying (as there is in some European countries), and the Australian fair dealing exceptions only apply to certain specific uses (unlike the fair use defence in the US Copyright Act). As noted above, most private copying of audio and audiovisual recordings does infringe copyright. Whilst copying for research or study does not infringe if the copying is a fair dealing, private copying to time-shift, archive, store in a more convenient medium, “place-shift”, or to give to a friend is not copying for research or study.

5: Proposed model for private copying remuneration scheme

5.1 Exception to infringement for private copying

A new exception to infringement would allow the copying:

- for the private and domestic use of the person who made it;
- on private premises;
- of a sound recording or cinematograph film;
- from an article embodying the recording or film or from a non-infringing broadcast of the recording or film;
- onto a medium ordinarily used to copy or record sound recordings or films for private and domestic use on which the levy has been paid;
- provided:
 - the record of the sound recording or the copy of the cinematograph film from which the private copy is made, and any reproductions of works or performances embodied in the recording or film, are non-infringing;
 - the record of the sound recording, and/or the copy of the cinematograph film has been made in a country which is a member of the World Trade Organization;
 - the material has been published;
 - the source copy has not been made accessible by circumvention of a technological protection measure, by the copier or anyone else;
 - the copier has not given a contractual obligation not to copy the recording or film for his or her private and domestic use; and
 - the private copy is not subsequently used for any other purpose.

⁶ *A&M Records v Napster* (2001) 50 IPR 232

5.2 Means of remuneration

Having regard to the decision of the High Court in relation the 1989 scheme, and the subsequent 1993 Blank Audio Recording Media Levy (BARML) proposal, there are two options:

1. a royalty initially payable to an “umbrella” copyright collecting society such as the Private Audio Copyright Collecting Society (PACCS) established to collect royalties under the 1989 scheme, or
2. a new tax payable to the Government.

In either case, the levy would be payable by importers and manufacturers of:

- blank audio recording media ordinarily used by individual customers for copying recorded audio and/or audiovisual material, and
- any machine or device that is sold to individuals, the recording function (or part of which) is designed and marketed for the purpose of making copies of audio and/or audiovisual copyright material

For a royalty – the Copyright Act would set the rate for the first two years and provide for review by the Copyright Tribunal thereafter. For a tax – the rate would be set by legislation

There would be provision for exemptions from payment of the levy for certain non-infringing uses of blank media and devices.

5.3 Distribution of remuneration

Remuneration would be distributed according to the following principles:

- existing collecting societies would distribute to the classes of rights owners they represent;
- the umbrella collecting society (if the levy is a royalty) or the Government (if the levy is a tax) would allocate a percentage of the total remuneration to each collecting society for distribution to the class of rights owners it represents;
- it is anticipated that the societies will be able to agree on the allocation (and some agreement has already been reached) – but in the event of a disagreement, alternative dispute resolution would be used;
- distribution by each of the collecting societies to its members would be determined, as it is for other distributions, according to its distribution policies, constitution and Code of Conduct
- entitlement to distribution could be determined according to existing data (such as broadcasting schedules and sales data) and/or new data (such as from a sample).