

## **Screenrights' Response to the Attorney-General's *Fair Use and Other Copyright Exceptions Issues Paper* July 2005**

### **INTRODUCTION**

1. Screenrights is a non-profit copyright collecting society for rightsholders in film, script, music, sound recordings of music and artistic works in film, television and radio programs. Screenrights administers copyright royalties collected under provisions in the Australian and New Zealand Copyright Acts. As at the date of this submission Screenrights has 2,259 rightsholder members from 47 different countries.
2. Screenrights has been declared by the Attorney-General to collect educational royalties under Part VA and VB of the Copyright Act 1968. Screenrights is also the declared society for the purposes of administering Part VC retransmission statutory licence. Screenrights has been declared by the Copyright Tribunal to collect royalties for government copying under s183. As a declared society, Screenrights operations are overseen by the Attorney-General who tables our Annual Report. Screenrights also adheres to the voluntary code of conduct for collecting societies
3. Screenrights understands that the Issues Paper – notwithstanding its more expansive title – is concerned primarily with private use. Indeed the nub of the underlying issue which seems to inform much of the Issues Paper seems to be found in the following paragraph in the Attorney-General's Foreword:

The Government is aware some common personal uses of copyright material infringe copyright. Examples include transferring music from a CD onto an MP3 or iPod player or copying a television broadcast to view later. Those engaged in such uses do not believe they are or should be considered copyright pirates.

4. This submission will be organised by reference to the first seven of the ten specific issues on which the Issues Paper has invited comment.
5. It is useful to point out in this Introduction which reform option Screenrights favours in terms of the five options set out in the Issues Paper. Essentially Screenrights favours Option 4 (retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material) considered in these terms:
  - Retention of fair dealing broadly in its current form;
  - The creation of defined specific exceptions for certain acts of private use; and
  - The making of those exceptions remunerated exceptions (rather than free exceptions) through the mechanism of a statutory licence and associated levy.
6. In relation to a statutory licence and levy mechanism, in 2002 Screenrights worked with other peak industry bodies to produce a draft private use statutory licence scheme. Screenrights remains committed to pursuing such a scheme for the reasons outlined in this submission.
7. There appear to be two limitations to the scope of the Issues Paper. These limitations are perhaps best illustrated by the title of a research paper produced by the Berkman Center for Internet & Society at Harvard Law School: *iTunes: How Copyright, Contract, and Technology Shape the Business of Digital Media – A Case Study*.<sup>1</sup> The paper outlines the mode of lawful distribution of music adopted by Apple's iTunes Online Music Store (iTMS) as deploying copyright in content, contractual obligations adhering through the iTMS Terms of Service, and the technological protection measure (TPM) FairPlay embedded within the music files. The contractual obligations and the FairPlay TPM restrictions mirror and reinforce each other in their regulation of the use of the copies of the copyright property sold. These permit limited multiple private copying of files purchased from the iTMS. Any consideration of copyright exceptions must take account of the

---

<sup>1</sup> Fisher et al, June 15, 2004. available at: <http://cyber.law.harvard.edu/media/itunes>

iTMS-type of business model. This requires a consideration of the interfaces between copyright exceptions and contract, and between copyright exceptions and legal protection of TPMs. However, the Issues Paper invites consideration of exceptions divorced from contract and TPM protection.<sup>2</sup> This is unfortunate. The Berkman paper observes: 'Internationally, the trend seems to be toward fair use laws that encourage business models like the iTMS'. Screenrights in its submission relating to its proposed statutory licence will consider how the suggested remunerated private use exception would interact with emerging online business models such as the iTMS.

## **ISSUE ONE: OPERATION OF EXISTING EXCEPTIONS**

8. Screenrights is unaware of any major areas of concern with the existing fair dealing exceptions in the Copyright Act 1968.
9. While confined to an exhaustive set of purposes, those fair dealing purposes (research or study, criticism or review, reporting of news, and giving legal advice) are able to be applied flexibly. Both the concept of a 'dealing' is broad (covering all the exclusive economic rights attached to copyright) and the purpose-based approach to definition is necessarily technology non-specific.
10. The many specific exceptions in the Copyright Act 1968, both free (such as those affecting libraries and archives) and remunerated (such as those affecting educational institutions), exist in conjunction with the broader fair dealing exceptions. Operating together, the broad and specific exceptions provide a logical and clear demarcation which is well-understood in Australia.
11. The litigation involving the NSW Director-General of Education and Copyright Agency Limited in the early 1980s provided extremely useful guidance for all who rely on the exceptions. In that dispute, the NSW Director-General had asserted in a memo to schools:

*It should be noted before making a determination about whether or not to use [remunerated teaching exception under the then Division*

---

<sup>2</sup> Under the heading 'Other Related Issues' these two matters are discussed and consigned to future review pursuant to FTA processes in the case of TPMs and future Government consideration of a CLRC report in relation to Copyright and Contract.

*5A – Copying of works in educational institutions], that s 40 [fair dealing for research or study] allows for virtually the same amount and type of copying WITHOUT IMPOSING any need to keep records [or] make payments. A teacher could use s 40 for example, in preparing his/her own materials ...*

12. In establishing authorisation liability both the trial judge and appeal court reasoned that the sphere of operation of the broad unremunerated fair dealing exception was confined by the specific remunerated exception created in Division 5A.<sup>3</sup> A unanimous Full Federal Court stated:

An answer [to what is fair dealing] must take into account the existence and effect of [the remunerated exception]. Moreover, it is important to the proper working of the sections that a distinction be recognized between an institution making copies for teaching purposes and the activities of individuals concerned with research or study.<sup>4</sup>and <sup>5</sup>

The distinction spoken of by the Full Federal Court here is but one of many like distinctions that exist under the Australian Copyright Act 1968 which reflects a balancing of interests between the various stake holders.

13. It is Screenrights' submission that the primary structures within the Copyright Act 1968 are sound and coherent. They provide reasonable levels of protection to copyright interests and reasonable use entitlements.

14. In particular the Part VA statutory licence which is administered by Screenrights is fulfilling its role of facilitating access to audio visual material for the teaching purposes of Australian schools, universities and TAFES, while ensuring a revenue stream for copyright owners for that use.

---

<sup>3</sup> *Copyright Agency Ltd v Haines* (1982) 40 ALR 264 (NSW Supreme Court, McClelland J) and *Haines v Copyright Agency Ltd* (1982) 42 ALR 549 (Full Federal Court).

<sup>4</sup> *Haines v Copyright Agency Ltd* (1982) 42 ALR 549 at 556.

<sup>5</sup> *Simplification of the Copyright Act 1968, Part 1, Exceptions to the Exclusive Rights of Copyright Owners* (1998), [6.35].

## ISSUE TWO: CONSOLIDATION OF FAIR DEALING AS RECOMMENDED BY THE CLRC

15. The most critical recommendation of the CLRC's 1998-9 Simplification Report concerned reform to the fair dealing provisions. The Report recommended the abolition of the exhaustive nature of the four purposes for which the fair dealing exception currently applies. This was recommended to be replaced with a more generalised fair dealing exception which may be supported by any purpose, including the existing four, where that dealing meets five criteria, the first two of which were 'the purpose and character of the dealing' and 'nature of the copyright material'.<sup>6</sup>
16. The fair dealing recommendation was justified by the CLRC on the 'real limitations of the current provisions' being 'inflexibly linked to specific purposes and ... difficult to apply to new technologies'.<sup>7</sup> Later in the report these 'real limitations' of the current provisions were described as a criticism of the current fair dealing provisions.<sup>8</sup> At both points in the CLRC Report the sole reference given is to a 1997 journal article published in the *European Intellectual Property Review*.<sup>9</sup> The relevant portion of that article, authored by an Australian commentator, reads:
- There has been some criticism of the fair dealing provisions being inflexibly linked to specific purposes and difficult to apply to new technologies outside hard-copy books and journals.<sup>10</sup>
- In the journal article this criticism was unattributed. The commentator did not otherwise substantiate the fact of such criticism, or indeed its basis.
17. The background to the preparation of the 1998 Report included the CLRC publishing Issues Papers, conducting a public forum and receiving over 250 submissions.<sup>11</sup> Screenrights (then known as the Audio-Visual Copyright

---

<sup>6</sup> Ibid [6.143].

<sup>7</sup> Ibid [6.30].

<sup>8</sup> Ibid [6.33].

<sup>9</sup> Tim Power, "Digitisation of Serials and Publications" [1997] 8 *European Intellectual Property Review* 444.

<sup>10</sup> *Ibid.* 452-453.

<sup>11</sup> *Simplification Report – Part 1* [1.16-1.22].

Society) participated actively. Notwithstanding this extensive consultative process, the CLRC in 1998 resorted to the use of an unsubstantiated assertion in a journal article to support its key recommendation. Was there an absence of such criticism being levelled at the current four exclusive fair dealing purposes by relevant stakeholder interests? An absence of criticism would be unsurprising. As noted above it is difficult to understand how any of the current fair dealing purposes of research or study, criticism or review, reporting of news, or giving legal advice are anything but apt to be applied flexibly to new technologies. The purposes are manifestly technology non-specific

18. Screenrights submits that there is no foundation in either policy or need for there to be any reform to the fair dealing provisions along the lines recommended by the CLRC in 1998. Such reform would require extensive and frequent litigation to reveal the actual scope of the exception. What purposes will pass muster under the broad criteria suggested by the CLRC? A waste of resources occurs when the criteria used to delimit rights result in resources being employed solely to establish a claim. This is why there is the well-established and well-understood tradition in Anglo-Australian property rights system of the clear delineation of rights and exceptions. Courts in Australia are neither accustomed nor equipped to engage in balancing of rights exercises in the resolution of every dispute. As Justice Gummow has observed, when invited to establish judicially a public interest defence to breach of confidence:

The so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an *ad hoc* basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence.<sup>12</sup>

Screenrights submits that precisely the same outcome would arise under an open-ended fair dealing exception. Courts faced with minimal guidance will be required to do the best they could in balancing interests. This provides little predictive certainty.

---

<sup>12</sup> *Smith Kline & French Laboratories v Department of Community Services* (1990) 95 ALR 87 at 125.

19. It should be recalled that the CLRC also suggested recasting the nature of the fair dealing exception from a defence to infringement to a positive right of users.<sup>13</sup> In line with this recasting the CLRC suggested that:

Fair dealing provisions are needed to ensure the free use of copyright material in the digital environment for purposes that are socially desirable, especially as digital technology has the potential to restrict such use so as to enforce voluntary licensing agreements.<sup>14</sup>

This seems to indicate that fair dealing should justify the breaking of a TPM. Consistent with this sentiment, a differently constituted CLRC recommended in 2002 that the Copyright Act should be amended to provide that a contract has no effect to the extent that it excludes or modifies the operation of, *inter alia*, the fair dealing exceptions.<sup>15</sup>

20. Screenrights has noted that unfortunately the Issues Paper does not specifically seek comment on the interface between copyright exceptions and contract, and between copyright exceptions and legal protection of TPMs. However, it would seem that the model of reform that the CLRC has in mind for fair dealing is one in which fair dealing is not a shield, but a sword that can be used to cut through contracts and technological protection measures. Under this radical conception a person acting pursuant to the open-ended fair dealing exception might lawfully breach the iTMS Terms of Service, and circumvent the FairPlay TPM in order to obtain the copyright content without payment. The conception of fair dealing put forward by the CLRC undermines nascent business models and market solutions such as iTMS which are being currently arrived at by content creators and distributors.

---

<sup>13</sup> The CLRC stated that “fair dealing is not a defence to infringement; rather, it defines the boundaries of copyright owners’ rights”: *ibid* [4.01].

<sup>14</sup> *Ibid* [6.19].

<sup>15</sup> *Copyright and Contract* (2002), [7.49].

### ISSUE THREE: FAIR USE EXCEPTION SIMILAR TO THAT IN THE US

21. Fair use in the US does not provide ground to lawfully circumvent a TPM.<sup>16</sup> In the US a contract is not unenforceable to the extent that it excludes fair use.<sup>17</sup> However putting these matters to one side, the broad nature of the 1998 CLRC recommendation for an opened-ended fair dealing exception is broadly an equivalent to the US fair use exception found in section 107 of the US Copyright Act 1976. For the reasons set out above, no policy foundation or need has been established for such reform and much harm could arise from inflicting such uncertainty upon the market for copyright goods.
22. Under the US exception, in determining fairness four (inclusive) factors are to be considered. These factors are very similar to the five criteria suggested by the CLRC in their 1998 proposal.<sup>18</sup> Such factors will often involve value-judgement, balancing exercises ('character' of the use and the 'nature' of the copyright subject matter) and intensive forensic examinations ('effect upon potential market') by courts to arrive at outcomes as to whether the exception applies.
23. The US fair use defence is expressed to include within its purposes 'teaching (including multiple copies for classroom use)'. The fair use exception in the US does not adhere to the clear distinctions made in Australia between remunerated exceptions for teaching and unremunerated exceptions for research and study. On its face, the statutory exception would appear to create a blanket unremunerated exception for teaching purposes. This is not so. Apart from meeting the four criteria set out in section 107 to assess fairness, the US jurisprudence indicates that the fair use teaching purpose is to be read in the context of a set of Guidelines buried within the provisions legislative history.<sup>19</sup> Those Guidelines have been influential in limiting the teaching purpose (*inter alia*) to copying that meet the criteria (*inter alia*) of

---

<sup>16</sup> Section 1201 of the US Copyright Act 1976.

<sup>17</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (1996) and *Bowers v Baystate*, 320 F.3d 1317 (2003).

<sup>18</sup> The CLRC adds 'the possibility of obtaining the copyright material within a reasonable time at an ordinary commercial price'. This criteria appears to be largely a subset of the 'market effect' criteria.

<sup>19</sup> *Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions With Respect to Books and Periodicals*, HR 94-1476 (1976), 68-71.



'brevity' and 'spontaneity' ('the inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission').<sup>20</sup> US educational institutions face considerable uncertainty, as copying outside the murky scope of the fair use exception entails full copyright liability.

24. Moreover, the US fair use provisions can only be understood within a legal culture of high-volume litigation and a body of Constitutional law developed around the requirement that: 'Congress shall make no law abridging the freedom of speech, or of the press'.<sup>21</sup> Australia has neither feature in its legal system. A US-style fair use provision imported into the Australian Copyright Act 1968 would be alien not only to that Act, but to the legal system into which it would be imported.

25. Finally, Professor Sam Ricketson in 2002 engaged in an extensive analysis of whether the CLRC's 1998 open-ended fair dealing proposal complied with international copyright obligations, in particular the first aspect of the three-step test: confinement of exceptions to copyright to 'certain special cases'.<sup>22</sup> In so analysing, Professor Ricketson's conclusion (as he noted) necessarily reflected on the US fair use defence. His conclusion was:

The proposed CLRC formulation will not meet the first part of the three-step test as far as uses for purposes than those specified in the formulation are concerned. This same reasoning will obviously be applicable to the US fair use provision, although that is not the subject

---

<sup>20</sup> Ibid. An example of the teaching fair use purpose being found not to apply to the production of university 'course packs' can be found at: *Princeton University Press v Michigan Document Services*, 99 F 3d 1381 (6<sup>th</sup> Cir, 1996). Similar fair use Guidelines directed to off-air audio-visual copying permits retention of copies for no longer than 45 days: *House Report on Piracy and Counterfeiting Amendments HR 97-495* (1979), 8-9.

<sup>21</sup> The text of the First Amendment.

<sup>22</sup> *The three-step test, deemed quantities, libraries and closed exceptions: A study of the three-step test in article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement and article 10 of the WIPO Copyright Treaty, with particular respect to its application to the quantitative test in subsection 40(3) of the fair dealing provisions, library and educational copying, the library provisions generally and proposals for an open fair dealing exception* (2002, Centre for Copyright Studies).

of the present advice and there may be different factors that operate in the US context that do not arise in Australia.<sup>23</sup>

The note associated with the last sentence read: 'In this regard, I am conscious of the large body of US jurisprudence on fair use that will need to be taken into account in any assessment of Berne compatibility.'<sup>24</sup>

#### **ISSUE FOUR: TIME-SHIFTING**

26. Certain evidence given before the Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America ('Senate FTA Committee') helps put this issue into context. Dr Matthew Rimmer of the Australian National University stated:

I talked about time shifting before and the case of Sony against Universal Studios in which the Supreme Court of the United States held that it was a fair use to engage in time shifting. That would essentially mean that a consumer in the United States could make a copy of a show while they were out and then watch that when they came home, and they would not be breaching copyright. It seems ludicrous to me that in Australia engaging in that activity, such as copying *Queer Eye for the Straight Guy* and then coming back later in the day and watching that, would amount to copyright infringement in Australia.<sup>25</sup>

27. Dr Rimmer in his evidence referred to the 1984 US Supreme Court decision of *Sony Corp v Universal City Studios Inc* ('*Sony*')<sup>26</sup>. The action was brought by two film studios, Universal and Disney, against Sony. The claim, in essence, was that Sony's manufacture and sale of video cassette recorders constituted secondary infringement of the film studios' copyright. The opinion of the majority in *Sony* can be summarised by these three related propositions:

---

<sup>23</sup> Ibid 153.

<sup>24</sup> Ibid footnote 258.

<sup>25</sup> Senate FTA Committee Hansard, Monday 17 May 2004, 13. See also the discussion transcribed at Senate FTA Committee Hansard, Tuesday 18 May 2004, 85-101.

<sup>26</sup> 464 US 417 (1984).

- Recording without permission a broadcast program for the purpose of 'time-shifting' so that it is watched only once at a later time constitutes fair use;
- Evidence was tendered at trial that VCRs are often used for time-shifting; and
- Because Sony's VCRs were capable of this commercially significant non-infringing use, the manufacturer of those VCRs could not constitute secondary copyright infringement.<sup>27</sup>

28. The key aspect of the case was the first: that copying broadcast audio visual works for time-shifting constituted fair use under section 107 of the US Act. The third aspect of the case must now be reconsidered in light of the 2005 US Supreme Court decision in *MGM v Grokster*<sup>28</sup> it has been qualified somewhat: secondary infringement may arise when an actual purpose to cause infringement is shown by evidence arising separate from the design and distribution of the product in question – such as file-sharing software or an item of consumer home electronics.

29. The impacts of the *Grokster* decision are yet to be seen, however one possibility is that manufacturers of products which are substantively marketed as tools of copyright infringement may now be held liable for contributory infringement or inducement to infringe under US law. Australian law relating to liability for copyright infringement by authorisation has traditionally required more than purpose and 'arming conduct' to ground liability. What has been required under Australian law is actual control over the infringing act.<sup>29</sup>

30. The expressions 'time-shifting' and 'library building' were deployed extensively in the *Sony* litigation. 'Time-shifting' was understood in the case

---

<sup>27</sup> See generally William Fisher III, "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1661. See also *Copyright, Designs and Patents Act* 1988 (UK), section 70. Note that section 111 of the *Copyright Act* 1968 (Cth) pertains to broadcast signal copyright only.

<sup>28</sup> 27 June 2005.

<sup>29</sup> See for example *WEA International Inc v Hanimex Corporation Ltd* (1987) 77 ALR 456 where Gummow J held that Hanimex, which had advertised blank audio tapes in radio advertisements which stated "If you don't want your favourite recordings ruined, use Fuji GTI car tapes" and referred to artists such as Madonna, was not liable for infringement by authorisation.

to be where a user records a broadcast program (usually a television program) in order to watch it at a later time, and then records over it, and thereby erases the program, after a single viewing. 'Library building' was understood to be where the user records a program in order to keep it for repeated viewing over a longer term.

31. As digital broadcasting becomes more popular, and digital broadcast recording devices and media become better and cheaper, with vastly increased capacity, it is possible to deduce that the tendency to 'library build' will grow.
32. It may be noted that the trial judge in *Sony*, whose findings were ultimately upheld by the Supreme Court majority, dismissed the possibility that library building would cause undue harm to copyright owners for the reason that because a blank video tape then cost 'approximately \$20, an extensive library will be very expensive and it has not been proven that many persons will library build to any significant extent.'<sup>32</sup> Screenrights submits that there is obvious policy danger in applying a decision so premised, in an environment where some digital recording media is approaching an almost nominal price.
33. However, on a broader level Screenrights fails to understand how any exception can be sensibly conceived and drafted to be limited to time-shifting *per se*. The UK and New Zealand provide free exceptions for time-shifting (albeit not as fair dealing) in terms of recordings for the purpose of enabling a broadcast program to be viewed or listened to 'at a more convenient time'. What time would be longer than necessary? Would an off-air copy of a broadcast film kept on the shelf for viewing on a rainy day for (say) three years fall within the exception?
34. In section 111 the Copyright Act 1968 contains a limited private use exception for off-air copying of television or sound broadcasts. The exception applies only to copyright subsisting in the broadcast signal, not to copyright content included within the broadcast. The exception is limited by the

---

<sup>30</sup> *Universal City Studios Inc v Sony Corp* 480 F. Supp. 429 (1979).

<sup>31</sup> Survey Report *Private Copying On Videotape*, 26 October 1995.

<sup>32</sup> *Universal City Studios Inc v Sony Corp* 480 F. Supp. 429 at 467 (1979).

purpose of the copy being made 'for the private and domestic use of the person by whom it is made'. This exception is very limited in the subject matter of its scope, but creates more of a private use exception in so far as the provision is not couched in terms of time-shifting. One option for reform would be to amend this section so that within its scope is copyright subject matter included within the broadcasts. Screenrights submits that any such expansion of this exception along these lines is only supportable if there is some remuneration for this valuable use of the underlying copyright content. 'Private use' can not be excluded from copyright without the provision of some form of revenue stream to reflect the value derived from such private use.<sup>33</sup> This is a matter discussed below under statutory licence. There should not be a free exception. There should not be any assimilation of time-shifting within fair dealing as a designated purpose.

## **ISSUE FIVE: FORMAT-SHIFTING**

35. The term 'format shifting' is commonly used to refer to the copying of copyright subject matter from one format to a different format. This might take place in a variety of contexts. A vinyl record may be recorded to magnetic tape. A CDA digital file on an audio CD may be copied to a less memory intensive compressed file format such as MP3 for use in a device such as an iPod. The motivations for such copying within the private and domestic sphere may be varied.
36. The term 'space shifting' refers to something else. A person may copy (or as it is sometimes termed 'burn') the CDA files on their audio CD to have an extra copy for their car, walkman, or to take travelling. Space shifting may or may not involve format shifting. However both are commonly assumed to refer to copying sound recordings containing musical works.
37. However, consumers may copy music for a variety of (not mutually exclusive) reasons, such as: to make an extra copy for added convenience (space-shifting, such as for car use); to put music on other devices such as

---

<sup>33</sup> Commencing in March 2005, the distribution of the Foxtel IQ Personal Digital Recorder provides a timely illustration of the value of private use, and the need to reconsider how copyright owners should receive some share of that value.

MP3 players (format shifting); to make a CD compilation of music; to make a copy from a friend's copy of music; and to make a copy for a friend; to obtain music from the internet or file sharing. It is submitted that space-shifting and format-shifting form but two of the reasons people may copy music at home, and that music is copied at home for a variety of purely consumptive reasons.

38. Screenrights submits that consideration of creating any exception in relation to these activities within the private and domestic sphere requires acknowledgement that acts of private copying for consumer convenience increase the value of the copyright in the hands of the consumer. Copyright owners should be entitled to appropriate some of that value. Again, this is a matter discussed below under statutory licence. There should not be a free exception for format-shifting or space-shifting. There should not be any assimilation of such purposes within fair dealing.

#### **ISSUE SIX: BACK-UP COPYING**

39. Screenrights is unaware of any need to create an exception for back-up copies of mass-marketed copyright content. Electronic media (such as CDs, DVDs and TPM protected files sold by vendors like iTMS) does not seem any more fragile than (say) printed books. The fact that a book may be destroyed if accidentally dropped in an open fire does not seem to require a free exception so that all books may be copied as insurance against that eventuality.

40. However, to the extent it is considered an issue, the scope of a statutory licence discussed below may go some way to addressing this issue in relation to material able to be copied without circumventing TPMs.

## ISSUE SEVEN: PRIVATE USE STATUTORY LICENCE

### European Position

41. Many European countries have instituted some form of private use statutory licence or similar measure. Notably the solutions arrived at in these countries transcend merely 'time shifting' exceptions for broadcast content, and provide a remunerated exception to other acts of private copying such as the recording of pre-recorded music for private and domestic use. The three typical features of such schemes (first enacted in Germany in 1965) are (i) a copyright exception for acts of private copying; (ii) an obligation on the manufacturers of media and/or equipment suitable for private copying to pay a levy to a copyright collecting society; (iii) distribution of those funds to copyright owners by the collecting society on the basis of sampling data.

42. In 2001, after a lengthy deliberative process involving the Council of the European Union, the European Parliament and the European Commission, a common position was arrived at in the European Directive which harmonised 'certain aspects of copyright and related rights in the information society' ('Information Society Directive').<sup>35</sup>

43. Article 5(2)(b) of that Directive allows Member States to provide for an exception to the reproduction right 'in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, *on condition that the rightsholders receive fair compensation*'.<sup>36</sup> A recital to the Directive indicates that as digital copying is likely to be more widespread and have greater economic effect upon copyright owners, remuneration schemes that provide fair compensation should take 'due account of the differences between digital

---

<sup>34</sup> Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Spain and Sweden.

<sup>35</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>36</sup> Emphasis added.

and analogue private copying'.<sup>37</sup> Further, any exception under the Directive must comply with the three-step test.<sup>38</sup>

44. Several countries have implemented this Directive. Screenrights notes that the Business Software Alliance conducted a survey in October 2004 subsequent to such implementation ('BSA Survey').<sup>39</sup> In so doing it provided a useful, up-to-date snapshot of the operation of the statutory licence solution in certain European countries. From that survey five territories with mature schemes (Austria, Denmark, France, Italy and the Netherlands) will be outlined here to provide some illustration of practical implementations.

### *Austria*

45. In Austria, natural persons may make a single copy of a work for 'private use and not for direct or indirect commercial purposes'.<sup>40</sup> The applicable Austrian levies (as at 1 April 2004) in relation to this exception, as reported in the BSA Survey are:

<b>Products</b>	<b>Published Tariff</b>	<b>Tariff According to the General Agreement<sup>41</sup></b>
Audio analogue-tape	€ 0.18 per hour	€ 0.12 per hour
Audio digital (Audio CD-R/RW, MiniDisc, DAT)	€ 0.27 per hour	€ 0.18 per hour
Data CD-R /RW	€ 0.255 per hour	€ 0.17 per hour
Integrated memory stick in MP3-players	€ 1.88 up to 64 MB € 3.23 for 128 MB € 6.00 for 256 MB € 6.75 for 512 MB € 9.00 for 1 GB up to 1.5 GB	€ 1.25 up to 64 MB € 2.15 for 128 MB € 4.00 for 256 MB € 4.50 for 512 MB € 6.00 for 1 GB up to 1.5 GB

<sup>37</sup> Recital 38.

<sup>38</sup> Article 5(5).

<sup>39</sup> *Analysis of National Levy Schemes and the EU Copyright Directive*, October 2004 available at <http://www.bsa.org/eupolicy/copyright-and-intellectual-property.cfm> It should be noted that France, although included in the BSA Survey, had only prepared draft implementing legislation in October 2004.

<sup>40</sup> Austrian Copyright Act, article 42.

<sup>41</sup> The BSA Survey explains that 'While there are no published discounts, collecting societies may conclude agreements with the Austrian Chamber of Commerce that provide for levies lower than the officially published tariffs. These discounted tariffs are then available to all members of the Austrian Chamber of Commerce.'



Hard disks in MP3 – Jukeboxes	€ 12.00 up to 5 GB € 15.00 for 5 up to 10 GB € 18.00 for 10 up to 15 GB € 2.,50 for 15 up to 20 GB € 30.00 for 20 up to 25 GB	€ 8.00 up to 5 GB € 10.00 for 5 up to 10 GB € 12.00 for 10 up to 15 GB € 15.00 for 15 up to 20 GB € 20.00 for 20 up to 25 GB
Video analogue and digital (analogue and digital video tapes, DVD)	€ 0.27 per hour	€ 0.18 per hour (DVD 4.7 GB = 2 playing hours)
Hard disk in TV- respectively Video recording devices	€ 1.64 per hour	€ 1.09 per hour

### *Denmark*

46. Under Danish law anyone is entitled to make for private use a single copy of a published work if this is not done for commercial purposes. Digital copies can be only made if done 'exclusively for the personal use of the copying person himself or his household'.<sup>42</sup>

47. The applicable Danish levies as at 30 June 2004 and as consolidated within the Danish Copyright Act,<sup>43</sup> are:

<b>Products</b>	<b>Published Tariff</b>
Analogue sound media	€ 0.01 per minute playing time
Analogue image media	€ 0.01 per minute playing time
Digital sound media	€ 0.24 per exemplar
Digital image media	€ 1.28 per exemplar
Digital memory cards	€ 0.54 per exemplar

### *France*

48. French law provides that once a work has been published, its author may not prohibit copies made solely for the private use of the copier. Certain works of art, software and databases are excluded from this exception.<sup>44</sup> The levies in France which support this private use exception are set by a Public Commission and for 2004 were summarised in the BSA Survey as:

<sup>42</sup> Danish Copyright Act, article 12.

<sup>43</sup> Danish Copyright Act, article 40.

<sup>44</sup> French Intellectual Property Code, article L122.5(2).

<b>Products</b>	<b>Published Tariff</b>
Audio cassettes	€ 0.2851 per hour
Video cassettes	€ 0.4284 per hour
MiniDisc	€ 0.4573 per hour
CD-R and RW audio	€ 0.4573 per hour
DVD-R and RW	€ 1.2577 per hour
CD-R and RW data	€ 0.5043 per hour
DVD-RAM, DVD-R and RW, DVD+RW data, video	€ 0.5043 per hour
DVHS	€ 1.2577 per hour
Memory cards	€ 0.0105 per MB
MP3	€ 0.0105 per MB
Hard-disks in TV, tape player, decoders <ul style="list-style-type: none"> <li>▪ up to 40 GB</li> <li>▪ 40+ GB</li> </ul>	€ 10.00 € 15.00

### *Italy*

49. Italian Copyright Law provides an exception for the copying of sound recordings or films by an individual exclusively for personal, non-commercial use and so long as the copying does not entail TPM circumvention.<sup>45</sup> In relation to this exception, the levies determined by decree to apply in Italy (2003-2005) are:

<b>Products</b>	<b>Published Tariff</b>
Analogue audio media	€ 0.23 for each recording hour
Dedicated digital audio media, such as MiniDiscs, audio CD-R and CD-RW	€ 0.29 for each recording hour (The compensation is increased proportionally for media having higher duration)
Non-dedicated digital media, suitable for phonogram recording, such as data CD-R and CD-RW	€ 0.23 per 650 MB
Digital memories capable of audio and video recording, fixed or transferable, such as flash memories of MP3 player cartridges and similar	€ 0.36 per GB
Analogue visual media	€ 0.29 for each recording hour
Non-dedicated digital visual media, such as DVHS, video DVD-R and DVD-RW	€ 0.29 per hour, equal to €0.87 for media having recording capacity of 180 minutes (Compensation is proportionally increased for media having a higher recording capacity)

<sup>45</sup> Italian Copyright Law, article 71 sexies.

Digital media suitable for phonogram and videogram recording, such as DVD-RAM, DVD-R and DVD-RW	€ 0.87 per 4.7 GB (Compensation is proportionally increased for media having a higher recording capacity)
Devices exclusively designed for analogue or digital audio or video recording	3% of the retail price to the reseller
Devices exclusively designed for DVD and CD burning, as well as software for burning activities	3% of the price for the dealer

### *Netherlands*

50. The Dutch Copyright Act provides that private copying 'without any direct or indirect commercial purpose' is excepted from the exclusive rights of copyright owners. The rates which relate to this exception, as at the date of the BSA Survey (October 2004), were:

<b>Products</b>	<b>Published Tariff</b>
Video analogue	€ 0.33 per hour
Audio analogue (tapes)	€ 0.23 per hour
MiniDisc	€ 0.32 per hour
Audio CD-R and CD-RW	€ 0.42 per hour (€ 0.52 per 74 minutes)
Data CD-R and CD-RW	€ 0.14 per disk
DVD-R and DVD-RW	€ 1.00 per 4.7 GB
DVD+R and DVD+RW	€ 0.50 per 4.7 GB

### **Other countries**

51. Private copying schemes are also in place in Japan, and a Canadian scheme was introduced in 1997. Although only a limited scheme has operated in the US since 1992, together with the extensive schemes in Europe, Screenrights submits that an international norm of effective remuneration for the reproduction right in the private copying context has emerged.

### **TECHNICAL MEASURES AND PRIVATE USE STATUTORY LICENCE**

52. An important issue in this area has been the impact of TPMs used by copyright owners, or as part of technical standards.

53. The approach taken to private copying and digitization in the US has had a technical focus. There, the Copy Protection Technical Working Group has been in existence for several years. It is a non-government consortium comprising content providers (including the Motion Picture Association of America), consumer electronics manufacturers and representatives from the information technology industry ('MPAA/5C').<sup>46</sup>
54. The consortium's aim has been to develop workable standards to protect digitised audio-visual works from widespread unauthorised dissemination. It was this group which devised and continues to revise the copy protection standards for digital versatile discs ('DVDs').
55. A sub-group of this working group was formed to deal exclusively with digital broadcasting. This MPAA/5C proposal was adopted in the US Federal Communication Commission's *Digital Broadcast Content Protection 2003* Rulemaking which mandates this proposal, coined the 'broadcast flag' standard.<sup>47</sup> This technological standard is primarily directed to limiting the ability to redistribute digitally broadcast content using the digital networks, in particular the Internet. The standard does not affect the ability to make digital private copies on compliant devices. In 2005 a United States Court of Appeal found that this rulemaking exceeded the delegated authority vested in the FCC.<sup>48</sup>
56. Under the European Information Society Directive, fair compensation for private copying should take account of 'the application or non-application of technological measures'.<sup>53</sup> A recital to the proposed Directive provides that:

---

<sup>46</sup> '5C' are five companies: Hitachi Ltd., Intel Corporation, Matsushita Electric Industrial Co. Ltd., Sony Corporation, and Toshiba Corporation.

<sup>47</sup> FCC 03-273, 4 November 2003.

<sup>48</sup> *American Library Association v Federal Communications Commission*, 406 F 3d 689 (DC Cir, 2005).

<sup>49</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>50</sup> Emphasis added.

<sup>51</sup> Recital 38.

<sup>52</sup> Article 5(5).

<sup>53</sup> Article 5(2)(b).

When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.<sup>54</sup>

57. This is reflected in article 6(4). That article provides that:

A Member State may also take such measures in respect of a beneficiary of [the private copying exception], unless reproduction for private use has already been made possible by rightsholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions [the private copying exception], without preventing rightsholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

58. The effect of this is to permit the joint existence in national law of laws protecting technological measures and a home copying statutory licence. When enacting laws that protect technological measures, a national legislature may ensure that private copying can occur on the payment of fair compensation. Such a private copying exception should not, however, inhibit the law's general protection of technological measures.

59. Significantly, in all cases of private copying, the Directive provides as a minimum for the possibility of copyright owners receiving fair compensation for the use.

## **AUSTRALIAN LAW AND PRIVATE COPYING LICENCE**

60. Australia once attempted to introduce a private copying scheme into Australian law in the context of home audio copying. This came out of a

---

<sup>54</sup> Recital 39.

recommendation from a 1986 Commonwealth inquiry into the Arts.<sup>55</sup> The levy was to apply to audio tapes with playing times in excess of 30 minutes and was calculated by reference to the length of the playing tape.

Consumers were to be able to home-tape either directly from pre-recorded media or from broadcasts so long as the copy was for their private and domestic use without infringing copyright.

61. The blank tape levy was characterised by the High Court as a tax and ruled unconstitutional.<sup>56</sup> Alternatively, if not a tax the High Court would have found the levy to be an acquisition of property not on just terms and therefore unconstitutional on that basis. In both respects this was because the drafting of the scheme failed to link the levy as a payment for the statutory licence to make private copies. This was a mere drafting flaw; a statutory copyright licence could be drafted in Australia without any likelihood of characterisation as a tax.

62. In 2002 to further the public debate on the issue of private copying, the Australian Performing Right Association, the Australasian Music Publishers Association, Screenrights, the Screen Producers Association of Australia, the Australian Screen Directors Association and the Australian Writers Guild made to the Attorney-General and the Minister for Communications, Information Technology and the Arts an extensive written submission dedicated exclusively to the issue of private copying. That submission is here annexed.

63. An aspect of that submission was a proposed private copying scheme jointly drafted (in legislative form) by Mr Denis Rose QC (Special Counsel, Blake Dawson Waldron) and Dr David Brennan (Faculty of Law, University of Melbourne). Key features of the proposed scheme are:

---

<sup>55</sup> *Patronage, Power and the Muse: Inquiry into Commonwealth Assistance to the Arts*, House of Representatives Standing Committee on Expenditure, September 1986 (Recommendation 24).

<sup>56</sup> *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480 which declared Part VC invalid by reason of non-compliance with section 55 of the Constitution. Part VC was formally repealed by Act 107 of 1993, section 13.

- i. A licence to purchasers (that is, consumers) of levied recordable media to reproduce works on that media for private use without infringing copyright.
- ii. Private use is defined as reproduction or copying by a person for that person's own private and non-commercial use, or such use within that person's domestic circle. Accordingly, the exception to infringement of copyright does not apply where the reproduction or copy is: (a) sold or let for hire; (b) used so as to cause a work to be performed, seen or heard in public (whichever is applicable); (c) used so as to communicate to the public the work; or (d) used otherwise than for a private use.
- iii. The royalty is imposed on recordable media, a term defined to mean 'any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use'.
- iv. The licence allows for both on-line and off-line copying. However, the exception to copyright infringement will not apply where the reproduction or copying is made using a circumvention device or service.
- v. It is possible for a purchaser of recordable media to 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.
- vi. The purpose of the royalty is to provide equitable remuneration to copyright owners for the reproduction and/or copying of their works by consumers for private use. The Copyright Tribunal determines the appropriate amount of equitable remuneration for private copying.

64. Mr Dennis Rose QC provided an opinion (which forms part of the 2002 submission) that an enactment in accordance with the proposed scheme would comprise a valid exercise of Commonwealth powers.

65. Screenrights submits that this framework provides a useful starting point to consider how a statutory licence for private copying might apply. There are

aspects of the 2002 proposal which Screenrights would submit may now require some reconsideration. These are

- The scope of leviable items (point iii above) might be expanded beyond media to include electronic consumer items of a kind ordinarily supplied for private use or uses that include private use, such as those containing hard disk drives or flash memory. This might include personal video recorders and iPods, but exclude computer hard drives. This modification arises as a consequence of the proliferation of hard drive memory consumer devices in time since the proposal was published in 2002.
- The scope of the licence (points i, ii and iv above) might be contracted to exclude copying from any source not authorised by law or the copyright owner (such as through peer-to-peer networks or from pirated broadcast signal). This modification is a question of balance, in relation to which Screenrights observes that whether the licence is broad or narrow should be reflected directly in the scope and amount of levies payable in relation to the licence.
- In determining the level of equitable remuneration and eligible copyright owners to whom distributions might be made (point vi above) account could be taken of the use of TPMs and related contractual stipulations. For example, copyright owners who have made its subject matter solely available through submission to effective TPMs may be ineligible to receive private use royalties and the overall incidence of such reliance on TPMs could be a factor the Copyright Tribunal is directed to have regard to in setting rates. This would be consistent with the principles set out in the European Information Society Directive and with the point made directly above: licence scope and amount of payment should be in accord.

## **THE ISSUES PAPER'S 'DISADVANTAGES'**

66. The Issues Paper sets out seven disadvantages associated with the introduction of a statutory licence. Screenrights here responds to them.



*One: Copyright owners may seek to stop permitted copying by technological protection measures and/or contracts*

67. As has been pointed out above, the Issues Paper does not invite comment in relation to reform of fair dealing on either of the issues raised here: the potential for TPMs and contracts to override the exception.

68. Screenrights position in relation to any statutory licence exception is the same as that for a free exception: these are exceptions to an exclusive right in property, not a positive right in the hands of users. TPMs and contracts should not be required to yield to either type of exception. Neither a private use remunerated exception nor a free exception should ever disrupt the type of business model used by the iTMS, which relies upon the interoperation of TPM and contract to permit limited multiple private copying of files purchased.

69. Moreover, and consistent with the Information Society Directive, Screenrights has suggested that licence scope and payment amount should have a direct relationship in relation to the operation of TPMs. That is, to the extent TPMs become prevalent in the control of private use, the effective licence scope would diminish as would payment obligation.

*Two: Compensation for copyright owners may not match lost sales resulting in under-investment in new creative material for public use  
(and relatedly)*

*Three: regulation may stifle the development of flexible licensing arrangements*

70. Any payment made to copyright owners under a remunerated exception will provide more compensation and more incentive than the zero payment under a legislated free exception, or indeed than under the current *de facto* free exception that currently exists.

71. The private use statutory licence suggested by Screenrights is offered as an adjunct to the primary means by which copyright owners are remunerated by the market. It is not put forward as some type of radical 'alternative compensation system', but rather to acknowledge that an ever-increasing

disparity is emerging between market means of provision of copyright content (through means such as iTMS and DVD sales of television programming) and unremunerated, uncontrolled private copying. As noted under the first disadvantage, Screenrights consistent view is that private use exceptions (whether remunerated or free) should yield to market provision facilitated by contracts and TPMs.

72. Assuming digitisation continues apace, this disparity is simply not sustainable under a free exception – *de jure* or *de facto*. Two outcomes are foreseeable:

- Uncontrolled, unremunerated private copying may lead to a rapid diminution of the market for copyright content, leading to less copyright content and content of an ever lower quality.
- Uncontrolled, unremunerated private copying may lead to large-scale investment in TPMs which might more greatly inhibit private use of copyright content to which individuals have access.

*Four: Compliance burdens would be imposed on some Australian business*

73. While the draft model put forward in 2002 does entail some administrative burdens on certain businesses, it also provides a means by which those affected will be able to obtain compensation from the scheme, an amount determined by the Copyright Tribunal as a portion of the sum collected.<sup>57</sup> In this respect, the scheme would provide compensation for any compliance burden, quite unlike most other regulatory obligations imposed on business.

*Five: Private copying licences have administrative costs – and may raise concerns about oversight and transparency*

74. While it is true that the administration of any statutory scheme entails expense, Screenrights anticipates that a private use scheme will be able to be administered very efficiently as much data which pertains to distribution to copyright owners is currently collected, such as television ratings data.

---

<sup>57</sup> Draft provisions 100X(7), (9) and (10) of the 2002 proposal.

Any cost associated with the remittance of the levy borne by business in the distribution chain is compensated, as described under the fourth disadvantage.

75. Assuming a model of a declared collecting society was chosen for the statutory licence, well-established means of Parliamentary oversight and transparency exist. Screenrights has operated as a declared society under Parts VA and Part VB of the Copyright Act for over 15 years, without issues of lack of oversight or transparency emerging.

*Six: Revenue collection can be inequitable (eg under a statutory scheme users who frequently copy copyright material may receive maximum benefit at the expense of individuals and organisations who purchase blank media or devices for other business or private uses)*

76. Under the proposal a means exists for the refund of the private use levy where a person has purchased a levied item and will not use the item for the purpose of making a reproduction of a work, copy of a sound recording, or a copy of a cinematograph film not authorised by the copyright owner.<sup>58</sup>

*Seven: Treaty obligations of 'national treatment' may require levy collections to be paid to foreign copyright owners in countries that do not provide reciprocal compensation to Australian copyright owners*

77. Screenrights submits that the principle of national treatment enshrined in the Berne Convention and TRIPS should be reflected in any private use statutory licence. This principle is reflected in the proposal.<sup>59</sup> To the extent other countries fail to provide private use remuneration to Australian copyright owners on the basis of reciprocity (that is the current absence of an Australian private use statutory licence) this will no longer be an obstacle. The failure of other countries to properly observe their international copyright obligations to the disadvantage of Australian copyright owners is a matter that can only be addressed through diplomatic channels and, ultimately international fora such as the WTO.

---

<sup>58</sup> Draft provisions 10(1) of the 2002 proposal.

<sup>59</sup> Draft provisions 1 (definition of 'relevant copyright owner') and 11(3)(d) of the 2002 proposal.

## CONCLUSION ON PRIVATE USE STATUTORY LICENCE

78. Any free exception, which undermines the market provision of cultural content, must be viewed with scepticism if it is justified on the basis purely of private consumption or convenience. A necessary condition for the market provision of much copyright content is the appropriation of value from private consumption and convenience.
79. The purchase or rental of the boxed sets of programmes such as (in terms of Dr Rimmer's example) *Queer Eye for the Straight Guy* is as much for private use as the act of off-air copying of the program. The purchase of a song in file format from iTunes is a copy made for private use is as much for private use as the act of copying the song from a compact disc.
80. It is sometimes said that what people do in the privacy of their own homes is not a matter for copyright law. Monitoring private consumption of any thing (such as electricity) raises its own set of privacy issues, but those issues do not deny the desirability – indeed need if market provision is to occur – of some form of payment for use.
81. The private use statutory licence suggested by Screenrights is offered as an adjunct to the primary means by which copyright owners are remunerated. It is not put forward as a compensation system alternative to the market, but to acknowledge that an ever-increasing disparity is emerging between market means of provision of copyright content (through means such as iTunes and DVD sales of television programming) and unremunerated, uncontrolled private copying.
82. Moreover, what consumers want most is a fresh supply of copyright content to use in their ever more powerful audio-visual equipment. Without some dedicated remuneration feedback loops built in to offset the exponential growth of private use, copyright industries could be diminished, or if not diminished, then protected solely through heavy reliance on TPMs.

## **ISSUES 8, 9 AND 10: OTHER MATTERS**

83. Screenrights makes no submission on other reform options at this point. However Screenrights would like to flag for future consideration another reform matter, namely the inclusion of copying from datacasts within the scope of the Part VA statutory licence.

84. Screenrights would be happy to address the issues raised in our paper.

Simon Lake  
Chief Executive

8 July 2005