screenrights

29 February 2008

Ms Helen Daniels
Assistant Secretary, Copyright Law Branch
Attorney-General's Department
Robert Garran Office
Barton ACT 2600

Dear Ms Daniels

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

Screenrights welcomes the opportunity to make a submission to the review. Screenrights, whilst supporting the Australian Copyright Council position in general, confines its direct submission to section110AA and argues strongly against any expansion of the section.

Summary

Screenrights has considered the questions raised in Issues 4 to 6 from the perspective of its members as the underlying rightsholders in broadcast television programs.

In relation to *Issue 4- the current operation of section110AA*, Screenrights submits that there should be no change to the section for although a remuneration scheme is preferable, the scope of the present unremunerated exception can be tolerated in the face of the current review.

In relation to *Issue 5- should section 110AA be changed to permit additional copying?* Screenrights submits that there should be no additional copying permitted within section 110AA given the absence of remuneration and the current developments of new markets in this area.

To expand section 110AA in the manner of section 109A would risk non compliance with Australia's international treaty obligations in TRIPS and the US-Australia Free Trade Agreement (FTA).

It would permit time shifted digital copies of audio visual content lawfully made under section 111 to then be copied into any format from which the subsequent copy could be repeatedly copied. The development of new markets such as digital download sales and video on demand and alternative revenue streams for producers such as DVD and pay television sales, would all be undermined.

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Further, as Australian producers are more dependent upon non-TPM protected distribution means such as free to air broadcasts than are overseas producers, and the fact that these unprotected distribution means are subject to any private copying exception whereas protected systems are not, means Australian producers suffer greater detriment from such a free exception than equivalent producers outside Australia.

In relation to *Issue 6 – should section 110AA be changed to limit permitted copying?* Screenrights remains of the view that if private use exceptions apply, they should be coupled with remuneration schemes to stimulate further investment in creative industries. This submission will not reiterate the previous arguments and ideas put forward by Screenrights in support of this view, as they have not been supported by government in the past. However Screenrights is happy to re-supply the Department copies of those relevant submissions on request.

Discussion

The Audio-Visual Copyright Society Ltd, trading as Screenrights, was established in 1990 and operates on a non-profit basis as a copyright collecting society for copyright holders in film, television and radio programs, including film producers, film distributors, script writers, visual artists and music publishers and composers.

Screenrights administers copyright royalties collected under provisions in the Australian and New Zealand Copyright Acts.

Screenrights has been declared by the Attorney-General to collect educational royalties under Part VA and VB of the Copyright Act 1968 and for the purposes of administering the retransmission statutory licence Part VC of the Act, and has been declared by the Copyright Tribunal to collect royalties for government copying under s183 of the Act.

As a declared collecting society, our operations are overseen by the Attorney-General who tables our Annual Report. We also adhere to the voluntary code of conduct for collecting societies.

Introduction

The review asks the basic question: should the private use format-shifting exceptions for photographs in section 47J and film in section 110AA be broadened to reflect the scope of the format-shifting exception for sound recordings in section 109A?[1] While supporting the Australian Copyright Council position in general, Screenrights confines its direct submission to section 110AA and argues strongly against any such expansion of the exception.

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[1] Copying Photographs And Films In A Different Format For Private Use - Review of sections 47J and 110AA of the Copyright Act 1968, Issues Paper January 2008, [9]-[13].

In essence sections 43C, 47J, 109A and 110AA confer upon the private owners of certain non-infringing copies of relevant subject matter ('legitimate media') a free exception to make so-called 'format-shift' copies. Subject to differing criteria their broad intention is to enable legitimate media to be copied so as to be rendered on future generations of devices. However quite important distinctions exist – in particular for the purpose of this review between section 109A and section 110AA which are discussed below.

These provisions that were introduced at the same time reform to section 111 included an unremunerated exception for the private recording of broadcasts and subject matter contained therein 'solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made'.

This is the so-called 'time-shifting exception' which is in terms which themselves are very loosely worded. The key concept of 'more convenient time' implies that could be any time, and is not obviously restricting repeated viewings over time of section 111 copies. In other words the creation of home libraries via section 111 seems open.

The enactment of these provisions occurred after a long period of sustained submission-making by Screenrights that any such private use exceptions should be considered only in conjunction with a constitutionally valid levy scheme. In the course of this submission-making in 2002 Screenrights put forward to government a draft legislative model prepared by Denis Rose QC and David Brennan.

While it is not Screenrights submission here to reiterate arguments that were previously rejected (although it will of course provide past relevant submissions on request), it is important to note that sections 43C, 47J, 109A, 110AA and the reformed section 111 are very disappointing to Screenrights. Within their scope they represent a rejection of the view that copyright owners should be paid for purely consumptive uses of their material by private individuals.

In particular, Australian consumers currently have quite broad-ranging free exceptions in current sections 111 and 110AA to enable them to make private use copies of audio-visual content. These provisions are very new and their impact has not yet been properly assessed.

Screenrights submits that now is not the time to undertake any reform which would broaden their effect.

Should the scope of section 110AA mirror that of section 109A?

Screenrights emphatically rejects the proposition that section 110AA should now be enlarged to mirror the scope of section 109A. Section 109A is notably broader than section 110AA insofar as:

1. Section 109A does not require that the later copy be in a form different from the form of the legitimate media and hence the description 'format-shifting exception' is a misnomer for section 109A.
2. Where section 110AA requires that the copy be made from an analogue videotape source, no such limitation exists in section 109A.
3. Whereas section 110AA requires that the excepted copy be made for private use 'instead of the [analogue] videotape', section 109A merely requires that the copy be made for private use on a device owned by the copyist.
4. Section 109A does not require that the owner must destroy, following the making of a later copy, any temporary reproduction of the sound recording that is incidental to the making of the later copy.
5. Section 109A permits the making of multiple later copies.
6. Section 109A permits the owner to (non-commercially) dispose of the legitimate media to another person.
7. Section 109A permits the owner of the legitimate media to engage in serial copying; because a later copy that is made pursuant to section 109A is not an infringing copy and may serve as legitimate media in an act of second generation copying, which may in turn spawn subsequent generations of copying.
8. Leaving aside a copy 'made by downloading over the Internet a digital recording of a radio broadcast or similar program', section 109A together with the reformed section 111 permits the owner of a copy of a digital sound recording made under section 111 to use that copy (because it is 'not an infringing copy') to make subsequent section 109A digital copies, such copies which may then also be used for serial copying purposes.

It is difficult for Screenrights to understand what economic or social needs led policy-makers to create an exception as broad as this for sound recordings. Section 109A could have been limited to a specified finite number of copies to prevent serial copying. Section 109A could have been confined to copying only from a retained, purchased physical media which had been licensed by the copyright owner. The issue of temporary or incidental copies could have been dealt with in a more targeted way. Such parameters – leaving to one side the regrettable absence of a levy scheme – could have met any reasonable needs of consumers and better preserved a copyright morality that artists should be paid by consumers for the cultural enjoyment they confer.

The current breadth of section 109A calls into doubt Australian compliance with international copyright standards in TRIPS and the US-Australia Free Trade

Agreement (FTA). The three-step test is directed at the following broad questions: (1) confinement of exceptions to "certain special cases" asks whether the exception is clearly defined and narrow in its scope and reach; (2) the requirement that exceptions "do not conflict with a normal exploitation of the work" asks whether the use enters into economic competition with the normal extraction of economic value from the work; and (3) the requirement that exceptions "do not unreasonably prejudice the legitimate interests of the author" asks whether the relevant use causes an unreasonable loss of income to the rights holder.[2]

In Screenrights view a very good argument could be mounted against Australia for non-compliance with the TRIPS agreement and the US-Australia FTA on the basis of the section 109A exception alone. The provision occupies such broad terrain that one academic commentator has described it as meaning that the owner of the relevant legitimate media, and members of his or her family and household, can expect to enjoy a 'once-only lifetime purchase of music'.[3] For example, the limitation of the exception to 'special' cases seems difficult to comprehend, unless the purchase of pre-recorded music once someone else in the family circle has acquired it lawfully (such as by lawfully making a copy of a terrestrial radio broadcast under section 111) is regarded as 'out of the ordinary' as a matter of fact.

To extend section 110AA so that it mirrors the scope of section 109A strikes Screenrights as extraordinary. It would extend the exception for film well beyond the scope of US fair use, and would do so in the absence of a private copying remuneration scheme typical in Europe. It would permit, *inter alia*, time-shifted digital copies of audio-visual content lawfully made under section 111 to be then copied into any format (including that suitable for a handheld device) from which the subsequent copy could be subjected to serial copying.[4] That is, broadening of section 110AA to equate it in scope to section 109A would mean that digital copies lawfully made under section 111 could then be digitally copied under section 110AA for viewing on other devices. However once this occurs, the section 110AA copy could then be used to make further copies within a broadened section 110AA.

Alternative revenue streams for producers such as DVD sales, pay-television sales, and video-on-demand must all suffer without any compensation scheme instituted. It might further open Australia to WTO action by expressing in our law a value that

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2 *United States – Section 110(5) of the US Copyright Act*, WTO Doc WT/DS160/R (2000) [6.112], [6.183] and [6.226]-[6.229] (Report of the Panel)

3 Melissa de Zwart, 'The Copyright Amendment Act 2006: the new copyright exceptions' (2007) 25(1) *Copyright Reporter* 4, 11.

4 Already at least one hardware manufacturer has foreshadowed this month its plans to drive hardware sales through facilitating the unremunerated consumer copying of section 111 digital copies of television broadcasts for handheld devices: Jason Hill, 'PS3 recovers its momentum', *The Age*, February 14, 2008 available at: http://www.theage.com.au/articles/2008/02/12/1202760382890.html

Australian consumers are not expected to pay for much of the film copyright that they consume. It would disregard the emerging professional-content delivery platforms of video-on-demand and mobile television, and it might, for reasons explained below when discussing the inter-operation with circumvention liability, operate especially harshly upon Australian film-makers.

Screenrights submits that, as an unremunerated exception, section 109A already has a scope which suggests non-compliance with international copyright norms and that propagating the scope of section 109A to section 110AA may give rise to WTO action.

Relationship between private use exceptions and circumvention liability

It is clear that the US-Australia FTA does not permit an exception for the supply of circumvention devices or services necessary for the private use purposes reflected in sections 43C, 47J, 109A, 110AA and 111.[5] Nor does it seem possible that any circumvention exception for the purpose of lawful format-shifting or lawful other private use could comply with the criteria that such an exception 'does not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures'.[6]

Given this position, in a post-FTA environment there appears a dichotomous treatment between copyright subject matter distributed in Australia with and without technological protection measures ('TPMs'). Content to which TPMs have been applied might be theoretically subject to the private use exceptions. However no FTA-permissible defence exists to allow an individual to circumvent the associated TPM for those exceptions. The effect of the FTA is to practically remove TPM-protected content from the operation of the private use exceptions. Content distributed without TPMs is subject to the full effect of the private use exceptions.

An audio-visual producer (and copyright owner) who wishes to digitally distribute its content is therefore faced with a choice between TPM-platforms and non-TPM-platforms. However in Australia this choice is artificial for many producers in the film and television industry. This is because the Australian film and television industry largely relies upon the Australian broadcast market. For Australian film producers there is often no option other than to agree to the free-to-air digital broadcast of their content in an environment in which there is no TPM protection applied.

To the extent film producers from other territories can choose to professionally distribute their content exclusively on TPM-platforms, the current effect of the *Copyright Act* tends to discriminate against the Australian film and television

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5 US-Australia FTA Article 17.4.7(e) and (f).

6 US-Australia FTA Article 17.4.7(f).

industry. It does this by creating a *de facto* enlarged practical operation of private use exceptions for content distributed 'in the clear' – without the application of TPMs – which includes everything broadcast on Australian free-to-air television.

This is an unacceptable and damaging position to the Australian film and television industry. To some small extent the current section 110AA limits this damage by confining its operation to analogue video tape sources. If this were to be removed by a broadening of its scope to that of section 109A, the effective discrimination against the local industry would by multiplied. Through such broadening, digital off-air recordings lawfully made under section 111 would now be subjected to further digital copying under 110AA.

Given this interplay between the private use exceptions and TPM liability, it is important to be mindful of the practical consequences of the expansion of the former.

Screenrights submits that because exceptions to circumvention liability can not under existing treaty arrangements extend to circumvention for private use, this renders the content included in Australian broadcast programming particularly susceptible to the private use exceptions.

Conclusion

It might be helpful to conclude with an example readily imaginable under a broadened section 110AA which equates in scope to section 109A, where anti-circumvention liability remains static. Time-shifted digital copies could be lawfully made under section 111 from a digital television broadcast of an entire series of *Kath & Kim*. This can occur today, but the digital copies so made can not be copied from under the existing section 110AA because they are not analogue videotapes. Under a broadened section 110AA, those section 111 digital copies could be further lawfully copied, and from that point lawful serially copying could occur. None of this could lawfully occur if *Kath & Kim* were distributed exclusively on a TPM-platform. However the nature of the Australian film and television industry makes this much less likely to be the distribution means of *Kath & Kim* as opposed to foreign content.

Therefore, the proposed reform appears to most particularly hit the Australian film and television industry because it is already effectively more subject to the practical operation of the private use exceptions. In so doing, alternative market opportunities for the Australian film and television industry (such as on-line or DVD sales) are especially prejudiced.

Screenrights therefore rejects that any reform to section 110AA to equate it to section 109A in scope is necessary or desirable because:

- The private use free exceptions are new and untested, and now is not the time to undertake any reform which would broaden their effect

- As an unremunerated exception, section 109A already has a scope which suggests non-compliance with international copyright norms and propagating that scope to section 110AA may invite WTO action

- Exceptions to circumvention liability can not under existing treaty arrangements extend to circumvention for private use, which renders the content included in Australian broadcasts particularly susceptible to the private use exceptions

Screenrights would be happy to discuss any aspect of this submission with the Department.

Yours sincerely,

Simon Lake
Chief Executive