



VIA ELECTRONIC MAIL to michelle.tippett@ag.gov.au

June 30, 2005

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600, Australia

RE: IIPA Comments on Issues Paper

Dear Ms. Daniels:

The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the Issues Paper on "Fair Use and Other Copyright Exceptions," issued by the Attorney General in May.

IIPA is a coalition of six trade associations representing the U.S. copyright-based industries – including the business and entertainment software, audio-visual, sound recording, and book publishing industries – in bilateral and multilateral efforts to improve international protection of copyrighted works. (A list of our member associations appears below.) Both directly and through our member associations, IIPA has a long history of involvement in the development of copyright law and enforcement policy in Australia.

I. INTRODUCTION

The Issues Paper essentially poses two questions. First, should additional exceptions to (or limitations on) copyright protection be recognized under Australian law, with particular reference to "time-shifting," "format-shifting," and "back-up copying"? Second, if Australian law is to be changed on one or more of these topics, should the change take the form of a new, specific exception tailored to the activity in question? Or should Australia instead enact a more general provision, whether labeled as a consolidated fair dealing provision or as fair use, under which the desired limitation on the scope of copyright protection can be recognized?

Our restatement of the questions posed reverses the order in which these topics appear in the Issues Paper itself. This is intentional, because the initial focus on which fork in the road to take may obscure the importance of the question which logically comes first: should any limitation be enacted on these topics, and if so with what contours?

IIPA wishes to emphasize that any decisions Australia takes on these topics must respect international norms and Australia's obligations under international agreements to which it is a party. These include multilateral agreements such as the Berne Convention (Berne) and the WTO TRIPS Agreement (TRIPS), as well as bilateral commitments such as the Australia-US Free Trade Agreement (AUSFTA).¹ Under all these agreements, Australia is committed to confining exceptions and limitations to exclusive rights to (1) those special cases that neither (2) conflict with a normal exploitation of the subject matter in question, nor (3) unreasonably prejudice the legitimate interests of the right holder.² This commitment must be respected no matter which statutory method Australia chooses to pursue.

The international copyright industry that IIPA represents does business in virtually every country of the world. The health and future prospects of this industry sector, and the livelihoods of millions of employees in or affiliated with that sector, depend to an unsurpassed extent upon the quality of copyright laws in those countries and their vigorous enforcement. In our experience, countries can succeed in these goals whether the limitations on copyright protection in their law take the form of specific exceptions; or of more general non-exhaustive provisions such as fair use or fair dealing; or, as current Australian law can accurately be described, a hybrid approach. All these approaches have their virtues and defects, but we believe that any of these systems can be successful in keeping the rights of copyright owners sufficiently strong while accommodating the legitimate interests of copyright users.

II. FAIR USE: THE U.S. EXPERIENCE

The Issues Paper perceptively notes that "the extent and purpose of exceptions [to copyright] are often misunderstood." Para. 3.2. Misunderstanding is especially likely when the exceptions are established under a law, and a legal system, other than one's one. Some of the enthusiasm for importing a fair use-style exception into Australia law may arise from misunderstandings about how the fair use doctrine is applied under U.S. law generally, and particularly with regard to time-shifting, format-shifting and back-up copying. At least, there is enough risk of such misunderstandings that it may be worthwhile at the outset to review the status of U.S. law on these questions.

Time-Shifting

The Issues Paper correctly notes that the leading – and indeed, virtually only -- U.S. court decision on the topic of time-shifting is *Sony Corporation of America v. Universal Studios, Inc.*,

¹ Berne Convention for Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round vol. 31, 33 I.L.M. 1197 (1994); U.S.- Australia Free Trade Agreement, May 18, 2004, *available at* http://ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html.

² See Berne, Art. 9.2 (reproduction right); TRIPS Art. 13 (all exclusive rights of authors); AUSFTA Art. 17.4.10 (exclusive rights of authors and of performers and producers of sound recordings). This is sometimes referred to in this submission as the "tripartite test."

464 U.S. 417 (1984), often referred to as the *Betamax* decision. This 1984 decision held that the analog recording of free-to-air broadcast programs for the purpose of watching them later constituted fair use. The decision was virtually the first to hold that fair use was a valid defense to infringement when an entire work had been copied. However, the decision certainly did not establish the proposition that “home taping” or “personal copying” of broadcast material was fair use. To the contrary, the decision explicitly excluded the “librarying” of taped broadcasts (retaining the recorded copy for multiple future viewings) from the scope of its fair use decision. It also noted that the case did not involve “the transfer of tapes to other persons, the use of home-recorded tapes for public performances, or the copying of programs transmitted on pay or cable television systems.” *Id.* at 425. None of these activities was involved in that case; and, consistent with the status of the fair use doctrine under U.S. as an equitable rule of reason, applied on a case-by case basis in accordance with particular facts and circumstances, *Betamax* establishes no clear precedent regarding the application of fair use to those activities. Significantly, in the 21 years since the *Betamax* decision was handed down, no court has extended its fair use holding to apply to librarying, transfer of recordings, or even simple time-shifting of anything other than free-to-air analog television broadcasts.

The Issues Paper is also correct that this decision “was based on obsolescent technology.” Para. 11.7.³ The environment in which the issue of time-shifting presents itself in 2005 is far different from that which existed in 1984, or more precisely in the late 1970’s when the trial in the *Betamax* case took place. Today, the broadcast in question would likely be digital, not analog; the recording being made would almost certainly be digital, not analog, and thus a perfect substitute for the original; the device making the recording would feature vastly increased capabilities for long-term storage of the recording, and likely would be capable of making an unlimited number of copies, and perhaps of transmitting them without limitation via the Internet; and perhaps most significantly, the relevant marketplace – the parameters of a “normal exploitation of the work” – would be completely different from the marketplace at issue in the *Betamax* case. For example, in *Betamax*, the revenue stream for the licensing fees to be paid to the right holders consisted solely of broadcast advertising, which the court found would be largely unaffected by time-shifting. This finding is probably invalid in today’s environment, in which recording devices can automatically skip commercial messages in the original broadcast.

³ The Issues Paper states that “the decision is currently under review by the United States Supreme Court in *MGM Studios v. Grokster*.” Para. 11.7. This statement was somewhat misleading when made, and even less useful in light of how the Supreme Court actually decided *Grokster* on June 27. The *Betamax* court’s holding on time-shifting as fair use was never challenged in the *Grokster* case. The aspect of *Betamax* that preoccupied the parties in *Grokster* was the rule (for which the fair use holding was a predicate) that the defendant could not be indirectly liable for infringements carried out by others through use of a device that the defendant distributed and that was also “capable of substantial non-infringing use.” As it turned out, the Supreme Court unanimously concluded in *Grokster* that the rule in *Betamax* was not even applicable to the case before it. *MGM Studios v. Grokster*, No. 04-480, slip op. at 16 (U.S. June 27, 2005). However, the discussion of *Betamax* in the two concurring opinions makes it clear that the majority of the current Supreme Court reads *Betamax* as holding that some, but not necessarily all, analog recording for time-shifting of free-to-air broadcast material is fair use. *See id.*, slip op. at 3 (Ginsburg, J., concurring) (explaining that “Time-shifting was non-infringing, the [*Betamax*] Court concluded, because in some cases ... it was authorized by the copyright holder, and in others it qualified as legitimate fair use”); *id.*, slip op. at 4 (Breyer, J., concurring) (stating that the *Betamax* majority found that “unauthorized time-shifting often constituted ‘fair use’”).

In short, there is no basis for assuming that the answer that a court would give today under the fair use doctrine regarding time-shifting in the modern environment would be the same one the *Betamax* court gave nearly a generation ago. Indeed, on the two most important factors listed in the codification of the fair use doctrine – the nature of the use and the potential impact on the market⁴ -- the analysis of the permissibility of time-shifting might well be fundamentally different than it was in 1984.

Format-Shifting

It seems even more unlikely that copying an entire work⁵ in order to access it on a different platform or in a different format is encompassed within the scope of the U.S. fair use doctrine. To the contrary, the precedents strongly suggest that quite the opposite is usually true: in order to platform shift, especially from one incompatible format to another, it is usually necessary to make a complete copy of an entire work, and such verbatim copying has often been viewed by the courts as quintessentially non-transformative and thus unlikely to fare well under the statutory test for fair use. See *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000). Other precedents support the proposition that platform-shifting forms no part of the concept of fair use. As the Second Circuit Court of Appeals has noted, “[f]air use has never been held to be a guarantee of access to copyrighted material in order to copy it by the fair user’s preferred technique.” *Universal Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).

The Issues Paper’s discussion of the *Diamond Multimedia* case (Para. 11.14-11.15) may not sufficiently highlight the fact that the decision did not turn on fair use, but rather upon a specific (and quite narrow) statutory exception for a specific type of platform-shifting. The Audio Home Recording Act (AHRA), codified as chapter 10 of Title 17 of the US Code, actually creates no exception to infringement liability, but prohibits the bringing of any infringement action against a consumer for “noncommercial use” of certain kinds of devices or media to make musical recordings. 17 USC § 1008. As a result of the *Diamond Multimedia* court’s interpretation of several of the statutory definitions in AHRA, this prohibition on infringement actions does not even apply to any activity that involves the use of a computer hard drive or any other medium that is substantially used to record material other than sounds, i.e., AHRA is limited to music-only devices.

Back-Up Copying

Finally, with regard to back-up copying, U.S. law contains a specific statutory exception with regard to archival copying of computer programs (17 U.S.C. § 117(a)(2)) that seems to be somewhat narrower than the corresponding Australian provision (Sec. 47C). Most of the proposals to broaden section 117 (which, as the Issues Paper correctly notes in Para. 11.19, “have not progressed”) have focused on back-up copying of works other than computer

⁴ See 17 U.S.C. § 107.

⁵ Unless otherwise indicated, references to “works” in this submission encompass other subject matter protected under Australian copyright law.

programs for security purposes, a topic that is at least partly addressed by Australia's Section 47C(2). With respect to fair use, the Issues Paper is correct that U.S. courts have not settled "whether making 'back-up' copies is a 'fair use,'" Para. 11.19, primarily because (to our knowledge) the issue has never been presented to them.

III. PROPOSED TOPICS FOR EXCEPTIONS AND INTERNATIONAL NORMS

We now turn to the merits of potential Australian legislation establishing exceptions in each of these areas, with particular regard for whether such exceptions would be consistent with Australia's international obligations. Our conclusion is that there is only a very restricted area within which such exceptions could properly be legislated.

Time-Shifting

The parameters of "normal exploitation" of works embodied in television and radio broadcasts have expanded dramatically in recent years. There is a market for consumption of such works in real time – i.e., at the date and time of the first scheduled broadcast or telecast. Part of this first market is free to the viewer (i.e., either advertiser- or state-supported); an increasing proportion of it is provided subject to payment of a subscription fee of some kind.

There is a distinct market for consumption of many such works at later times set by broadcasters, e.g., for television programming in syndication. Again, from the consumer's perspective, this may be free or provided for a fee.

A third market exists for consumption of these works at a subsequent time chosen by the viewer. In the most familiar portion of this third market, a viewer acquires the means to consume the programming an unlimited number of times (e.g., by purchasing a home video). But normal exploitation in this market also includes the right to consume the work on demand but only once (e.g., video on demand, online streaming), or to do so a finite number of times or during a predetermined time period (e.g., time limited downloads).

In such a complex and highly segmented marketplace, the terrain on which an unauthorized copying of an entire work for later viewing can be carried out without coming into conflict with "normal exploitation" is clearly quite limited. Moreover, as noted above, the devices and systems through which such copying would be carried out are almost infinitely more capable than their predecessors – such as the Betamax video tape recorder involved in the 1984 U.S. Supreme Court case – of making, storing, and disseminating perfect copies of the works. Thus the inherent risks that unauthorized copying would become unauthorized distribution and/or performance of the work, and that time-shifting for one-time use would become librarying for unlimited uses over an indefinite period, have been greatly magnified, and accompanied by an increased threat to normal modes of exploitation.

Accordingly, while there may be some very limited scope under international norms for Australia to define time-shifting of television and radio broadcasts as non-infringing, it seems unlikely that it would extend beyond analog copying of unencrypted free-to-air broadcasting for

the sole purpose of a single act of consumption at a later time – i.e., the activity at issue in the *Betamax* case. Beyond this scope, any exception – whether specific to this activity or deduced by a court from the application of general “fair use” or “fair dealing” factors – risks significant conflict with normal exploitation of the works involved, and thus runs afoul of the international standards which Australia is committed to respect.

Another practical consideration that counsels against codifying a new exception for time-shifting, at least in the digital environment, is its potential impact on market developments. Improved technology for digital rights management makes it possible for consumers to time-shift with the authorization of the copyright owner, and to do so with reduced risk that the scope of authorization will be exceeded. This enables further segmentation of the market, so that consumers with differing demands for access can all be served with maximum efficiency and at a price point most closely matched to their needs. A statutory dictate that time-shifting must be allowed in all circumstances would threaten to stop this dynamic market development in its tracks. If, for example, all pay-per-view broadcasting had to be priced on the assumption that a subscriber would be able to time-shift when and how often she would view the program, the price for this service would inevitably rise. The consumer’s option to choose between a “real-time only” and an “on-demand” program would disappear, since the former would effectively be rendered impossible. In sum, it is questionable whether, in the long run, consumers would benefit from enactment of any time-shifting exception, and seemingly inescapable that such an enactment would hamper the responsiveness of the market to consumer demands for greater flexibility and choice in enjoying television and radio programming.

Format-Shifting

The ways in which the market is responding to dynamism of the market in terms of the formats or platforms on which consumers may enjoy copyright works is, if anything, even greater than with regard to time-shifting. One need only consider recent developments in the recorded music market to know that legitimate distributors of copyright material are experimenting actively – and competing vigorously -- with business models in which consumers are authorized – and technologically empowered – to a great or lesser extent to rip, burn and transfer music from one format or platform to another. Enacting a statutory requirement to deprive copyright owners of the exclusive right to control the copying of entire works that underlies such platform shifts would make it far less likely that Australian consumers would benefit fully from this competitive ferment. Low-cost streaming applications would lose any competitive advantage over permanent download models and would consequently be threatened with extinction. Copyright owners would have to assume that a consumer’s access to a recording in any one format would permanently foreclose the ability to provide the consumer with access to it, on a commercial basis, in any other format, and would have to price the original sale accordingly. Introduction of a blanket format-shifting exception would also threaten to hinder the healthy growth of sectors such as videogames, where rivalry among incompatible platforms is a key driver of competition. Overall, the consequences of such an exception could well be adverse for consumers in terms of cost and choice.

Furthermore, in such a diverse and dynamic marketplace, the concept of “normal exploitation” of a work is in flux as well. To the extent that a format-shifting exception will impair or even extinguish the ability of a copyright owner to license distribution of the work in multiple formats, a conflict with normal exploitation arises that may well be sufficient to render the exception impermissible under the tripartite test. Furthermore, since every embodiment of a work is in some “format,” and since more than one commercially viable format probably exists for every such work, it is hard to say that the exception is confined to a “special case.” These considerations, as well as the potentially significant detrimental impact on competition and consumer choice summarized above, argue strongly against the recognition of an exception for copying works for the purpose of format shifting.

Back-Up Copying

Section 47C(2) already allows a consumer to back up, for security purposes, “any work or other subject matter held together with [a computer] program on the same computer system.” To the extent that this authorizes consumers to back up whatever legitimately acquired copyright material is on their computer’s hard drive, any proposed expansion of the existing exception must be driven by a desire to legalize copying, ostensibly for archival purposes, of copyright material residing on portable media such as a compact disc, CD-ROM, or DVD. This would take the exception well beyond what can be justified under international norms. As the Issues Paper notes in Para. 11.18, “commercially made CDs and DVDs ... may not be as easily damaged by normal use;” in effect, these products are already in an archival format, so further back-up copying is not needed, and a copy ostensibly made for that purpose risks being used in other ways more damaging to the interests of the copyright owner. Even the act of copying itself could be injurious, such as when a renter of a movie on DVD makes a “back-up copy” of it and thus converts her temporary license to access the work into a more permanent unauthorized possession of a copy of it.

Indeed, the U.S. experience under section 117 suggests that, if anything, it would be advisable to narrow the exception provided by section 47C, not broaden it. The World Wide Web is replete with sites purporting to offer “back-up copies” of videogames containing computer programs, or of the means for making them. Many of these sites specifically refer to section 117 of the U.S. law to provide a patina of legitimacy to their operations; in fact, however, all they offer is pirate copies of entertainment software and other products containing copyrighted computer programs. To the extent that this is a problem in Australia as well under section 47C, it would be useful to incorporate into Australian law some of the safeguards in US law that are designed to prevent abuse of the exception, such as the requirement that the archival copy be destroyed once continued possession of the original ceases to be rightful (17 USC § 117(a)(2)), and the prohibition on the transfer of an archival copy except in conjunction with the transfer of an original and the transfer of all rights in that original (17 USC § 117(b)).

IV. OTHER ISSUES

Statutory license for private copying

IIPA urges Australia to reject the option of creating a statutory license for private copying. Particularly in the digital environment, to tolerate widespread unauthorized copying in return for compensation from funds raised by a levy is an impractical bargain.

The difficulties of administering such a scheme have increased exponentially since the early 1990's when Australia's Parliament last considered the issue. Instead of a single item – blank audiotape – the levy would have to be imposed on a wide and ever-widening range of devices and media in order to capture the full spectrum of materials used to make unauthorized private copies. The impact of the use of technological protection measures further complicates the issue: either a levy will be imposed upon equipment or media which cannot practically be used to make unauthorized copies, or else a huge loophole will be opened in the protection of TPMs themselves. Perhaps most significantly, the concept of “private” copying is almost impossible to maintain in a digital networked environment; the interface between making an unauthorized “private” copy, and making that copy available – via the same device -- to countless others across Australia and around the world, is too fluid and permeable a basis on which to erect a statutory license.

Finally, any private copy statutory license scheme rests on the shaky premise that such a comprehensive derogation of the exclusive rights of copyright owners could pass muster under the tripartite test. This provides another reason why the concept of a blanket exception for “private copying,” which appears to be as alien to Australian law as it is to U.S. law, should not be endorsed, even if accompanied by a levy system.

Technological Protection Measures and Contract

Finally, IIPA urges the Australian government not to approach the issue of revised exceptions to copyright protection under the assumption that these exceptions will trump either technological protections used by copyright owners to control access to and use of their works, or contractual prohibitions against activities that would otherwise fall within the scope of exceptions.

With respect to TPMs, the assumption is demonstrably invalid, or more precisely ought to give way to a stronger assumption: that Australia fully intends to fulfill its obligations under the AUSFTA and to bring its TPMs regime into line with that treaty by the end of 2006. See generally AUSFTA Arts. 17.4.7, 17.12. The AUSFTA language makes clear that Australia may not permit the manufacture or trafficking in circumvention devices, or the offering of circumvention services, on the theory that such devices or services are being supplied for the purpose of exercising exceptions to copyright protection generally. The exceptions to the trafficking prohibitions must be limited to those specified in the AUSFTA, no matter what change Australia may choose to make in its copyright law with respect to exceptions to exclusive rights.

Exceptions to the prohibition on the act of circumvention, which Australia must bring into force by the same deadline, are similarly circumscribed by the AUSFTA. With respect to the ability under AUSFTA Art. 17.4.7.e.viii to grant temporary recognition to specific

circumstances under which the act of circumvention may be allowed in order to prevent significant adverse impacts on non-infringing uses, it is worth recalling that the U.S. Copyright Office, operating under a very similar mandate, see 17 USC § 1201(a)(1), has twice rejected proposals to make an exception whenever a TPM is circumvented in order to make a non-infringing use. Recognizing such a broad exception would, of course, be tantamount to making the TPM circumvention prohibition coextensive with copyright infringement, thus defeating the purpose of the TPM provisions themselves.

With respect to contracts, IIPA's view is that proposals to interfere with or restrict contractual freedom in the licensing of access to or use of copyrighted materials should be greeted with great skepticism, including those proposals deriving from perceived inconsistencies between license terms and statutory exceptions to copyright. The skepticism is warranted because maximizing contractual freedom in this sphere is in the best interests of copyright owners and the general consuming public alike. A licensing structure offers the parties the opportunity to draw the line between permitted and excessive uses with much greater clarity than any statute can provide. The applicability of the existing statutory exceptions to copyright in Australia turns upon the case-by-case interpretation of general concepts such as "reasonable portion," or "fair for the relevant purpose," or upon judicial definitions of what constitutes "criticism or review," or "news;" and adoption of some of the new exceptions considered in the Issues Paper could markedly increase uncertainty about the exact boundaries of many exceptions. To the extent that a license agreement is able to define permitted uses more clearly at the outset, both parties can proceed with the transaction with greater predictability and confidence that their legitimate interests will be protected. This is so even if the lines drawn in the agreement are not precisely congruent with those contained in the statute. Accordingly, IIPA urges that prohibitions in the Copyright Act against contractual override of exceptions to protection not be expanded, and that existing prohibitions to this effect be re-examined.

Thank you in advance for your consideration of our views. If we may provide further information or answer any questions about this submission, please do not hesitate to contact me.

Respectfully submitted,

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