



AUSTRALIAN
COPYRIGHT
COUNCIL



***Response to issues paper:
Copying Photographs and Films in a
Different Format for Private Use:
Review of sections 47J and 110AA of the
Copyright Act 1969.***

February 2008

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Organisations affiliated with the Copyright Council include Australian Institute of Professional Photography (AIPP), Australian Commercial Media Photographers (ACMP), Screenrights, Media Entertainment & Arts Alliance (MEAA), Australian Writers Guild (AWG) and Australian Screen Directors Association (ASDA). Some of the organisations affiliated with the Copyright Council are making separate responses to the government's issues paper on Copying Photographs and Films in a Different Format for Private Use (the Issues Paper).

Summary of our position

3. The Copyright Council opposed the introduction of the private use provisions, including ss47J and 110AA. The justifications for the provisions were unclear, and the provisions allow people to produce, without payment, copies that copyright owners sell and license. The provisions are thus non-compliant with Australia's international treaty obligations.
4. Our position has not changed, and we are therefore of the view that the private copying exceptions should be repealed or made subject to equitable remuneration to copyright owners.
5. It follows that we oppose any expansion of the provisions. We have, on the contrary, made some proposals for limiting the provisions.
6. We particularly oppose the extension of s110AA to allow the copying of digital content. The reasons put forward for the introduction of s110AA were different from those put forward for s109A. The key driver for s110AA was the impending obsolescence of video players, and a view that consumers should be allowed to "upgrade" the content of videotapes to view on replacement technology. The key driver for s109A, on the other hand, appeared to be a view that a consumer who purchases a CD should not be required to purchase additional copies for playing on devices other than CD players (such as iPods). Section 109A in fact operates more widely than that, but it is not clear that that was intended.

Objectives of ss47J and 110AA

7. In paragraph 3, the Issues Paper seeks views on the following key issues:
 - is the new exception for reproducing a photograph in a different form (section 47J) achieving its objectives – or are there policy reasons for change; and

- is the new exception for making a copy of a film in a different form (section 110AA) achieving its objectives – or are there policy reasons for change.
8. The Issues Paper does not, however, say what those objectives are. Neither were they clearly articulated at the time the exceptions were introduced. This presents some difficulties in responding to paragraph 3.
 9. The Issues Paper refers to copyright policy objectives in paragraphs 1 and 2. It also lists four policy considerations in paragraph 27, which are referred to as “objectives” in paragraph 28.¹
 10. It is possible that the references to objectives in paragraph 3 are intended to refer to the objectives in paragraphs 1, 2 and 27, but the wording in paragraph 3 suggests that it is the particular objectives of sections 47J and 110AA that need to be addressed.
 11. There are key differences between s47J and 110AA (and between these provisions and s109A). This suggests that the objectives are different for each exception.
 12. In this submission we have attempted to articulate the apparent objectives of these provisions, in order to address whether or not the provisions meet the objectives.

Section 110AA

13. There appear to have been two reasons for the introduction of s110AA:
14. The first was to allow consumers to transfer the content of a videotape to a digital format where the content is not available in digital format.
15. The second appears to have been a view that consumers should not have to pay for audiovisual content in digital form if they have previously purchased that content on a videotape. The view appears to have been influenced by an assumption that the replacement digital content was only available on DVD, and a view that the price of a DVD is too high if a consumer is “upgrading” from an analogue version of the content.
16. Section 110AA allows consumers to produce digital versions of content that is available for sale or under licence. To the extent that it does this, it is, in our view, inconsistent with the three-step test in Australia’s international treaty obligations.
17. We note that audiovisual content is increasingly being made available for digital download, and that DVDs are not the only means by which digital audiovisual content can be acquired.
18. Section 110AA has a broader application than apparently intended in a number of respects, including:
 - it allows copying of a videocassette that a person has acquired by means other than purchase – including, it would seem, a time-shift copy made under s111;²
 - it allows the making of a digital copy even if the videocassette is still being used;

¹ There are also some broad “objectives” in the paragraphs in the Explanatory Memorandum to the Copyright Amendment Bill 2006 under the headings “Problem identification” and “Objectives”.

² Section 111 does not prohibit the copying of a time-shift copy. Sections 110AA and 47J, on the other hand, prohibit further copying of a format-shift copy.

- unlike s109A, there is no requirement that the copy be for a device owned by the videotape owner.
19. In our view, if section 110AA is to remain in the Copyright Act, it should be amended to add the following requirements to those already in the section:
- the videotape containing the content being copied was purchased by its owner;
 - the content is unavailable in digital form;
 - the digital copy is to replace a videocassette that is no longer being used; and
 - the copy is to play on a device owned by the videotape owner.

Section 47J

20. There is no reference to photographs in the “Problem identification” section of the Explanatory Memorandum to the Copyright Amendment Bill 2006. Nor was there any reference to photographs in the government’s issues paper on Fair Use. Nor is there any illumination in the Senate Legal and Constitutional Affairs Committee report on the Copyright Amendment Bill. It is thus difficult to identify the reasons for s47J.
21. We sought information from the government about the reasons for s47J on a number of occasions preceding the introduction of s27J, but received none.
22. One reason for s47J may have been to allow people to scan personal photographs such as wedding photographs.³ Copying of wedding photographs is usually covered in the contract between the photographer and the clients, so the operation of s47J is likely to be limited where the owner of the photographs was party to a contract for the taking of the photographs.
23. The reference to the copyright in the published edition in s47J(1)(b) suggests that the section is intended to apply to photographs published in books and newspapers, although it is difficult to imagine a scenario where the copyright in the published edition would be infringed by the copying of the photograph alone.
24. The section thus seems intended to apply to the owner of an object embodying a reproduction of a photograph (such as a photographic print or a book or a postcard), rather than a “photograph” as defined in s10(1) (which refers to the copyright work – an original artistic image – produced by a certain process, rather than the object in which that item is embodied).
25. We do not know what situations the government had in mind for the application of s47J to “owners” of photographs in electronic form. Presumably it was intended to apply to an owner of an object such as a CD-ROM embodying photographic files, but it is less clear whether (and the extent to which) it applies to the “acquisition” of a digital file by email or digital download. For example, does it apply to a non-infringing digital file downloaded from the internet? Is a person who acquires a copy of a digital file, for example by downloading it from the internet, the “owner” of that copy?

³ *Taking forward the Gowers Review of intellectual property: proposed changes to copyright exceptions* refers at paragraph 90 to “scanning a copy of wedding photograph to use as wallpaper on a home computer”.

26. In our view, s47J is inconsistent with the three-step test in Australia's international treaty obligations to the extent that it allows the making of a copy in a form that can be purchased, or is available under licence.
27. In our view, if section 47J is to remain in the Copyright Act, it should be amended so that, in addition to the requirements already in the section, it only applies if:
- the "photograph" was purchased by the owner;
 - a copy in the required format is not available for purchase; and
 - a copy in the required format cannot be made under licence (whether contractual or not).

Section 109A

28. According to the Issues Paper, some people have argued that s110AA should be extended to operate in a similar manner to s109A. One of our reasons for opposing this proposal is that s 109A appears to have a wider than intended operation.
29. The apparent primary purpose of s109A was to allow people who buy a CD to play the contents of the CD on other devices, such as iPods. A subsidiary purpose appears to have been to allow people to transfer the contents of obsolete carriers such as vinyl and audiotape to digital files.
30. In our view, s109A operates more widely than intended because:
- it is not limited to CDs, vinyl records and audiotapes;
 - it does not require the "earlier copy" to have been purchased by owner;
 - it allows the making of a copy for a device even if the "earlier copy" can be played on that device;
 - there is no limit on the number of copies that can be made for a device;
 - there is no limit on the number of devices for which copies can be made; and
 - you can make copies for a device even though copies made for another device will work on it – for example, you can make copies for a portable CD player even though the copies you made for the car CD are playable on the portable CD player.
31. In our view, in addition to the existing requirements, s109A should be further limited so that:
- it only applies to CDs, vinyl records and audiotapes purchased by the owner;
 - it only allows the making of a copy for a device if neither the "earlier copy" nor a format shift copy made for another device will work on that device; and
 - it only allows one copy per device.

Technological protection measures (TPMs)

32. We agree with the view in para 42 of the Issues Paper: it is unlikely that s249(4) would allow the introduction of an exemption for circumvention for private use. In

addition, we think that such an exemption would be contrary to Australia's obligations under the Australia-US Free Trade Agreement.

Images embodied in computer programs

33. We do not know from the Issues Paper (or elsewhere) why the government is considering the possibility of a private copying exemption for computer games.
34. It appears from para 49 that the government has not been informed of any circumstances warranting an exception for format-shifting or space-shifting of computer games, but rather it is canvassing in the Issues Paper the consequences of extending s110A to allow copying of films in electronic form.
35. Our understanding is that the moving images of a computer game are produced by, rather than "embodied in", a computer program. In any event, copying a computer game is likely to result in the reproduction of a computer program as well as the copying of a cinematograph film.
36. Our understanding is that copying the contents of a DVD containing a linear film may also result in reproduction of a computer program.⁴

Australian provisions compared to those in other countries

37. Paragraph 27 of the Issues Paper says that one of the policy considerations to be taken into account in the review is that "Australian consumers should not be in a worse position than consumers in other countries".
38. As far as we are aware, the private use provisions in Australian copyright law are already more generous to consumers than those in any other similar country.
39. All member countries of the European Union are required to ensure that copyright owners receive equitable remuneration for private copying.
40. In the UK, the *Gowers Review of Intellectual Property* (December 2006) recommended a limited format-shift exception that would only apply to works published after the exception took effect, in order to allow copyright owners to charge more upfront in anticipation of copying.⁵ It suggested that collecting societies could offer licences to allow copying of works published before the commencement date of the exception.
41. The follow-up report *Taking forward the Gowers Review of intellectual property: proposed changes to copyright exceptions* (November 2007) puts forward a number of options in relation to a format-shifting exception, including different types of exceptions for different subject matter. Responses to the proposals are due by 8 April 2008.

⁴ The DVDs at issue in *Australian Video Retailers Assoc Ltd v Warner Home Video Pty Ltd* (2002) 53 IPR 242, for example, contained computer programs as well as cinematograph films.

⁵ Recommendation 8.

42. The operation of the fair use exception and the Audio Home Recording Act provisions in the US operate more restrictively than the private use provisions in Australia.
43. The New Zealand Copyright (New Technologies and Performers' Rights) Amendment Bill includes a provision (s81A) that would allow format-shifting of music. It is much more limited than s109A. In its report on the Bill, the New Zealand Commerce Committee recommended that s81A be even further limited in a number of respects. The Committee also recommended against the extension of s81A to other material; in its view, such an extension would not be justified under the Berne Convention.
44. Canada has a remunerated private copying scheme for audio. There have been proposals to extend the scheme to audiovisual material: *Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act* (October 2002) at paragraph 39.
45. Japan has a remunerated private copying scheme for audio and audiovisual.
46. As far as we are aware, no other country is considering an unremunerated "space-shift" exception like s109A, whereby the owner of an item containing recorded music (such as a CD) can make any number of copies for devices he or she owns, irrespective of whether or not the item can be played on those devices.

Responses to specific questions in issues paper

Issue 1: Current operation of section 47J

- a. *Does section 47J provide an appropriate balance between the rights of copyright owners and other interests?*

No. It allows people to make copies that they can purchase or make under licence.

- b. *If section 47J is not appropriate, what are the options for achieving a better policy outcome?*

See paragraph 27 above.

- c. *What are the benefits and costs of those options?*
 - Photographers would be compensated for the additional uses of their photographs.
 - Australia would more likely comply with its treaty obligations.
 - Consumers would pay for copies made available or licensed by copyright owners.

Issue 2: Should section 47J be changed to permit additional copying

- a. *Under what additional circumstances should section 47J permit a reproduction to be made of a photograph for private and domestic use?*

None.

- b. *What are the kinds and sources of photographs that are likely to be reproduced under any proposed changes?*

We assume “any proposed changes” here means changes proposed by us – in which case: none.

- c. *To what extent are photographs likely to be reproduced under any proposed changes subject to TPMs (such as anti-copying measures) to block unlicensed copying?*

We propose that there be no additional copying under s47J, but our understanding is that the use of TPMs by photographers – particularly photographers for the domestic market – is rare.

- d. *How would any proposed changes affect the normal market exploitation of photographs and other legitimate interests of copyright owners?*

We propose that there be no additional copying under s47J, but proposals by others that would allow consumers to make more copies of photographs that copyright owners sell or make available under licence is likely to conflict with normal exploitation and unreasonably prejudice the legitimate interests of rights owners.

Issue 3: Should section 47J be changed to limit permitted copying

- a. *What changes should be made to section 47J to limit making reproductions of photographs?*

See response to Issue 1.

- b. *How would any proposed changes affect the normal market exploitation of photographs and other legitimate interests of copyright owners?*

Our proposed changes would reduce the conflict with normal exploitation and reduce prejudice to copyright owners.

- c. *How would any proposed changes affect the Government’s policy objectives, including fair and balanced copyright law?*

Our proposed changes are aimed at implementing more precisely the apparent objectives of s47J.

Issue 4: Current operation of section 110AA

- a. *Does section 110AA provide an appropriate balance between the rights of copyright owners and other interests?*

No.

- b. *If section 110AA is not appropriate, what are the options for achieving a better policy outcome?*

See the proposals in paragraph 19.

- c. *What are the benefits and costs of those options?*

- Owners of copyright in films would be compensated for the additional uses of their films.
- Australia would more likely comply with its treaty obligations.
- Consumers would pay for copies made available or licensed by copyright owners.

Issue 5: Should section 110AA be changed to permit additional copying

- a. *Under what additional circumstances should section 110AA permit a copy to be made of a cinematograph film for private and domestic use?*

None.

- b. *What are the kinds and sources of films that are likely to be reproduced under any proposed changes?*

We assume “any proposed changes” here means changes proposed by us – in which case: none.

- c. *To what extent are films likely to be reproduced under any proposed changes subject to TPMs (such as anti-copy measures) to block unlicensed copying?*

We propose that there be no additional copying under s110AA, but our understanding is that TPMs are commonly used on DVDs containing films.

- d. *How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?*

We propose that there be no additional copying under s110AA, but proposals by others that would allow consumers to make more copies of films that copyright owners sell or make available under licence is likely to conflict with normal exploitation and unreasonably prejudice the legitimate interests of rights owners.

- e. *How would any proposed changes improve achievement of the Government's policy objectives, including economic incentives for the creation and distribution of films?*

Expanding the operation of s110AA would not improve implementation of the Government's policy objectives.

Issue 6: Should section 110AA be changed to limit permitted copying

- a. *What changes should be made to section 110AA to limit making copies of cinematograph films?*

See response to Issue 4.

- b. *How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?*

Our proposed changes would reduce the conflict with normal exploitation and prejudice to the copyright owner.

- c. *How would any proposed changes affect the government's policy objectives, including fair and balanced copyright law?*

Our proposed changes would more closely align the legislation with the apparent objectives of the provision.

Issue: 7 Visual images embodied in a computer program

- a. *In the event that proposed changes to section 110AA would extend to a cinematograph film embodied in a computer game or program, should the making of a reproduction of that game or program be permitted – and if so how would this be implemented?*

We oppose any such changes.

- b. *How would the issue of TPMs (such as anti-copy measures) be dealt with?*

We oppose any such changes.