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## **Article for Copyright World**

### ***New proposal for private copying and “blank tape” royalties***

Helen Dakin, Australian Copyright Council, 31 January 2003

A number of collecting societies and arts industry organisations have combined to put forward a proposal that a royalty be charged on sale of blank recording devices, and the Copyright Act be amended to introduce a right of “private copying”.

#### **The proposed scheme**

The proposed royalties would be charged on “recordable media” such as audio or video cassettes, recordable CDs or recordable DVDs, but excluding computer hard drives. Under the proposed scheme, the Copyright Act would be amended to allow purchasers of recordable items to reproduce copyright material on those items without infringing copyright. The licence would apply to the recordable items themselves, and could therefore be transferred by the purchaser.

The structure of the proposed scheme is that retailers of recordable media would collect the “private use royalty” from consumers and pass it on to the wholesaler, which would remit the payments to the appointed collecting society. The collecting society would distribute the payments to copyright owners. Retailers and wholesalers would each receive a proportion of the royalty to compensate them for costs incurred in collecting it.

Consumers would then have the right, for example, to record a sound recording of copyright music on a recordable item on which the royalty had been paid, provided that they only used the new recording for private purposes, and had not accessed the original music and sound recording using circumvention technology.

Consumers not wishing to make use of the private copying licence could “opt out” by providing the collecting society with a declaration that the item would not be used to infringe copyright: in this case, the collecting society would refund the royalty.

#### **Constitutional issues**

This is not the first attempt to introduce such a scheme in Australia. An earlier scheme was introduced in 1989, but on a challenge by manufacturers of recording materials, the High Court held in 1993 that the legislation was unconstitutional.

The majority found that the levy was not a royalty, since there was no direct connection between payment of the levy and the right to make copies. They held that the levy was raised “for a public purpose” since it arose out of “a complex problem of public importance” and had “the characteristics of an excise”: therefore the levy was in reality a tax. Since the legislation also related to copyright it was invalid, as it did not comply with the Constitutional requirement that legislation relating to taxation deal exclusively with that subject.

The proposers of the new private copying royalty scheme argue that the proposed legislation avoids the Constitutional problems since the statutory exception to infringement would apply only to copies made on media on which the royalty had been paid; and the primary liability would be imposed on the consumers rather than the retailers of the recording media.

### **Draft legislation**

The lobbyists have drafted proposed legislation introducing the scheme, and have called for the Government to establish an inquiry on the issue, to be conducted by the Copyright Law Review Committee. The Government has not yet made a response.

Information on the proposals is available at [www.screen.org](http://www.screen.org).