

Fair Use and Other Copyright Exceptions

**An examination of fair use, fair dealing and other exceptions
in the Digital Age**

Issues Paper

May 2005

Foreword

The Coalition Government is committed to maintaining an effective and relevant copyright law that achieves an appropriate balance between the rights of copyright owners and reasonable access to copyright material for users.

The *Copyright Act 1968* (the 'Copyright Act') gives copyright owners certain exclusive rights to promote creativity and innovation. However, there are also exceptions to these rights which allow others, in various circumstances, to use copyright material without the permission of the copyright owner.

Digital technologies give people great freedom over when and how to use copyright material. New forms of expression, entertainment and public communication are continuing to emerge. These developments in digital technology pose new challenges for the policy balance.

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.

Many observers believe copyright law should be reformed to reflect public attitudes and practices. Some interest groups feel a copyright balance might be better maintained in a rapidly changing digital environment if the Copyright Act were to include an open-ended 'fair use' exception that would allow the courts to determine whether a particular use of copyright material is 'fair' and should be lawful. Others argue the present specific exceptions in the Act should be amended to make certain uses of copyright material lawful.

For copyright owners, digital technology offers great opportunities. It also poses significant threats, with copyright material now easier than ever to copy. Copyright owners are concerned about increasing copyright piracy and believe it is necessary to exercise closer control over the way their material is used.

I seek submissions on ways of addressing these conflicting views and canvass options in this paper. In particular, I seek views on whether the Copyright Act should include more specific exceptions or a fair use exception which would facilitate the public's access to copyright material.

I appreciate the issues associated with 'fair use' and copyright exceptions, including personal copying, provoke significant debate amongst copyright owners and users. These issues affect many Australians from those recording television programs at home to others who work in Australia's growing copyright industries. These issues should be properly considered.

I encourage those who have a view to make a submission on the options proposed in this paper for reforming the exceptions to copyright and any other options the Government should consider.

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1. Introduction

1.1 The purpose of this paper is to invite comment on whether the Copyright Act should include a general exception associated with principles of ‘fair use’ or specific exceptions which would facilitate the public’s access to copyright material in the digital environment.

1.2 The Government made a commitment to examine this issue in its 2004 election policy *Strengthening Australian Arts*.

1.3 In general terms, a ‘fair use’ exception would introduce a general exception or defence to copyright infringement for activities that are determined to be ‘fair’. This would allow people to use or copy copyrighted material for those purposes without needing permission from the copyright owner.

1.4 Different interests have varying perspectives about the meaning of ‘fair use’. Individual users may look to private or domestic uses of copyright material that have qualified as a fair use in the United States. Business or institutional users may be interested in uses for a commercial or public purpose.

1.5 A fair use exception, based on the model in the United States, would list a number of factors or principles of ‘fairness’ for a court to consider in deciding whether any activity should be an exception to copyright (ie outside the uses that the copyright owner is able to stop). A specific exception would identify a particular activity (eg. time-shifting) that would be an exception to copyright. The main difference between the two approaches is that a fair use exception would be open-ended and flexible while a specific exception would be more certain but confined by its scope.

1.6 The Copyright Act currently contains a number of exceptions to copyright known as the ‘fair dealing’ exceptions. The fair dealing exceptions are also based on a concept of fairness but are confined to four specific purposes, such as study criticism and review. The Government is reviewing whether these and other current exceptions are adequate - or whether a new general exception based on ‘fair use’ or new specific exceptions might be appropriate.

1.7 The issues paper outlines the nature of copyright under the Copyright Act, the nature of and rationale for exceptions and the impact of relevant international obligations. It then discusses fair dealing exceptions under the Act and proposals for reform made in reports by the Copyright Law Review Committee (CLRC) and the Joint Standing Committee on Treaties (JSCOT). ‘Fair use’ under US copyright law – the focus of the review – is discussed, along with comparable exceptions under European Community (EC) directives and under the national laws of the UK, New Zealand and Canada. The use of technological protection measures and of new forms of consumer contracts to restrict access to exceptions is referred to. The paper concludes by raising a number of possible options for reform. A table of the existing exceptions and statutory licences under the Copyright Act is an attachment to the paper.

1.8 Submissions are sought on the issues raised. A number of questions that may be useful in preparing submissions are included at the end of this paper (see section 15). Submissions are requested by **1 July 2005**. Submissions should be sent to:

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

It would be appreciated if submissions could be provided electronically. Submissions should be emailed to michelle.tippett@ag.gov.au. Questions concerning this review may be directed to Norman Bowman by email at norman.bowman@ag.gov.au or by telephone 02 6250 6324, or facsimile 02 6250 5929.

Submissions may be made public on the Attorney-General Department's website unless otherwise specified. Persons providing a submission should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

1.9 The Government will analyse the information and views provided in the submissions carefully and make a decision on whether the Copyright Act should be amended. If there is a need for legislative change, the Government will consider further consultation on that legislative change before introduction.

2. Copyright – an overview

What is copyright?

2.1 In Australia, copyright is governed by the Copyright Act¹. Under the Copyright Act, copyright is the exclusive right to do, or authorise others to do, a number of specific acts in relation to works and other subject matter. Essentially, copyright is the right to prevent copying, ie the exclusive right to reproduce the tangible form in which the material is expressed. Copyright also includes the exclusive right to control the way material is publicly disseminated, eg through public performance, broadcasting or making it available on line. This bundle of rights is personal property that can be sold, licensed or otherwise transferred or devolved by will or by law.

2.2 Copyright protects original literary, dramatic, musical and artistic works. It also protects four 'other subject matter': sound recordings, cinematograph films, television and radio broadcasts and published editions of works.

(i) *Works*

- *Literary works*: Works that are not trivial and are expressed in print, writing or some other material form. These include books, poems, journal articles, newspaper articles, letters, e-mails, song lyrics, time-tables, databases and computer programs. No level of literary merit is required.
- *Dramatic works*: Works that are intended to be presented by humans or other characters such as a play, choreographic works or scripts for films or television programs.
- *Musical works*: This term covers musical compositions.
- *Artistic Works*: Includes paintings, sculptures, drawings, engravings, photographs, prints, buildings, models of buildings and works of artistic craftsmanship. Material that is not of artistic quality may still qualify.

(ii) *Other subject matter*

- *Sound recordings*: Audio CDs (album and singles), records, tapes and digital sound files (such as in MP3 format).
- *Cinematograph films*: All manner of moving pictures recorded on film, video tape, and optical disc (DVD) or other material, including feature movies, television programs, computer games, advertisements and home movies.
- *Sound and television broadcasts*: This category includes radio and television broadcast transmissions.
- *Published editions*: The typographical arrangement of a published work (and includes the combination of features such as font size, style, size, headings, margins and the positioning of text and illustrations).

(iii) *Performers*

- Performers have personal rights against unauthorised recording and communication to the public of their live performances.
- Performers are makers and as such joint first owners of copyright in sound recordings of their performances along with the producer.

2.3 The copyright in each type of work or other subject matter exists independently. For example, a song recorded on an audio CD may be protected by copyright - the score as a musical work and accompanying lyrics as a literary work. In addition, the sounds recorded on the CD capturing the performance of the song may be copyright protected as a sound recording. The former copyright rewards the creative effort involved in writing the song while the latter recognises the artistry and investment necessary to make and distribute sound recordings to the public.

2.4 The property rights comprising copyright are entirely separate from owning an article that contains a copy of a work or other subject matter. A person may purchase a music CD, but the sale normally does not transfer to the purchaser any part of the copyrights in the sound recording or music copied on that CD. Buying a CD does not give the purchaser a right to copy or otherwise deal with the material recorded on it. Similarly buying a book does not give the purchaser a right to copy the book.

2.5 Copyright creators also have non-economic rights - known as moral rights. The moral rights recognised in Australia are the right of integrity of authorship, the right of attribution of authorship and the right against false attribution of authorship. Makers of sound recordings do not currently enjoy moral rights (legislation to confer moral rights on performers has been enacted but has not commenced).

Copyright balance and technology

2.6 Copyright law promotes creativity and innovation. It does this by providing exclusive economic rights to copyright owners to control certain uses of their works. At the same time, copyright law also seeks to promote the social benefits that arise from a free flow of knowledge and expression. To achieve this second objective, the Copyright Act contains exceptions to copyright.

2.7 In the past, the policy balance between incentives to engage in creative activity and maintaining access to copyright works has been placed under pressure by new technology - such as the photocopying machine or the video-cassette recorder – that enabled copyright works to be easily and cheaply copied. The use of these technologies had the potential to reduce revenues to authors and producers, which would threaten the future supply of creative works. However, the effectiveness of the copyright law ultimately was preserved. This was due in part to new laws that strengthened the legal remedies of copyright owners against unauthorised use while also recognising legitimate user interests. Amendments in 1980 introduced a detailed system of permissible copying under fair dealing provisions and statutory licences that implemented Government policy on the use of photocopy technology.

2.8 Other factors assisted to keep copyright law relevant. For example, while duplicating copyright material was often inexpensive, the copies were generally inferior to the original. Also copyright owners, after initial alarm, often found ways to exploit the technologies that generated new source of income and even increased market size overall.

2.9 The rapid developments in digital technologies pose a much bigger challenge for copyright law. Continuing improvements to personal computers and consumer electronics have changed user behaviour and expectations. For example, it is easy to store huge quantities of music on a personal computer to be further copied on CDs or in the embedded memory of a portable player, despite the fact that the Copyright Act does not permit such uses without a licence from the copyright owner. Users also need no longer be passive consumers of digital content but can change it to participate in the creative chain.

2.10 Copyright owners have an incentive to meet user expectations. Digital technologies create potential new revenue sources for copyright owners by allowing protected material to be sold, licensed and distributed in ways not previously possible. However, material in digital form can be flawlessly and inexpensively reproduced and distributed worldwide through the Internet. This has caused copyright owners to fear that unauthorised copying and redistribution will destroy the value of their works. It also creates legitimate enforcement concerns for them. In short, digital technology is causing growing friction between copyright owners who see a commercial necessity to exercise greater control over access to and distribution of their material and

copyright users who have become accustomed to being relatively free of practical constraints in exploiting new technology.

2.11 It also needs to be recognised that any changes to copyright law may have implications for important related industries producing goods and services used in conjunction with copyright material: particularly, computers, consumer electronics and telecommunications. How the copyright balance between owner and user interests is maintained may influence future technological progress - and hence economic growth.

3. Exceptions to copyright – policy perspective

3.1 All copyright systems around the world include exceptions and limitations on the rights on the rights of copyright owners. An ‘exception’ to copyright is a full exemption that permits copyright material to be used without authority or compensation. By contrast, a ‘statutory licence’ is a partial exemption that allows another person to use the material, but requiring payment of a set fee or royalty to the copyright owner. Statutory licences are also referred to as compulsory licences or limitations.

3.2 Exceptions to copyright are an essential part of copyright law. But the extent and purpose of exceptions are often misunderstood. On the one hand, some consumers may believe that they can make a copy of an item that they have purchased containing copyright material, provided they do not sell the copy. On the other hand, some copyright notices placed on copyright material appear to claim that any copying is unlawful. Neither position is accurate.

3.3 There are a large number of exceptions to copyright scattered through the Copyright Act. These exceptions recognise that in some circumstances the rights of copyright owners should not apply. Giving owners an absolute right to control all uses by other persons would be economically inefficient and, importantly, frustrate the policy objectives copyright is intended to achieve.

3.4 Decisions on the nature and scope of exceptions will reflect assessments of public and private interests by national legislatures. Consequently exceptions can vary greatly between countries, and are subject to treaty obligations as discussed below.

Copyright Act - current exceptions and statutory licences

3.5 A table of the current exceptions and statutory licences in the Copyright Act is at **Attachment A**.

3.6 These exceptions and statutory licences were adopted for different historical and policy reasons. Each provision represents an assessment by Parliament of the need and desirability for the public or specified persons to be able to use copyright material, notwithstanding the impact of the measure on the economic interests of the copyright owners.

Policy justifications for exceptions and statutory licences

3.7 Speaking generally, three reasons are advanced to explain exceptions and statutory licences:

- (i) It may recognise that particular uses and commercial arrangements have developed before the right of copyright owners to control that use was fully recognised or developed. Examples are the recording licence that permits record companies to make sound recordings of musical works (ss 55-64) and the broadcast licence allowing broadcasters to use sound recordings for television and sound broadcasts (ss 109).
- (ii) A particular use may be so minor and incidental that it causes the copyright owner no substantial financial harm. It also may be impractical for the copyright owner to prevent the conduct because it is difficult to detect. The exception permitting the copying of a live television or radio broadcast for private use is an example (s 111).
- (iii) A provision may reflect a specific situation where Parliament has decided that a broader policy goal cannot be met through unregulated market exchange. The provisions with respect to fair dealings and uses by educational institutions, persons with disabilities, libraries, archives and governments illustrate this category.

3.8 The above categories are not exhaustive. The Copyright Act also establishes exceptions that provide for the private economic interests of consumers. For example, the owner or licensee of a computer program is permitted to make a back-up copy in case the original is lost, destroyed or damaged (s 47C). This exception recognises both the potential vulnerability of computer programs (eg to computer viruses) and that the program and associated data can represent an important investment in money and resources for an organisation or an individual.

3.9 While exceptions and statutory licenses can be important policy instruments, their scope is restricted by the international agreements to which Australia is a party (see Section 4 below).

Distinguishing between exceptions and statutory licences

3.10 Determining when an exclusive right should be constrained by a (free) exception or a (compensatory) statutory licence is often a difficult issue. In the former case the rights of the copyright owner will be completely set aside, though usually subject to conditions. Under a statutory licence, the exclusive right is restricted to an entitlement to fair compensation.

Specific or general exceptions

3.11 An exception may be either specific or general. Australia and many other countries have opted for a set of specific exceptions which define in detail when a particular use is not an infringement of copyright. The Australian fair dealing exceptions are in specific terms. United States law also contains a range of specific exceptions. The 'fair use' exception is different. Instead of providing a clear rule,

copyright law confers on United States courts the ability to decide, necessarily after the event, whether a particular activity should be within the copyright owner's rights.

4. International copyright treaties – the three-step test

4.1 Several international copyright treaties prescribe conditions for exceptions to copyright.

4.2 Materials protected by copyright are easily moved between countries, and are an important aspect of international trade. Consequently there have been efforts over many years to create an international system for copyright protection under which material produced in one country will receive effective protection in others. Australia is a party to a number of international treaties that collectively contain detailed minimum standards for the copyright laws of member states.

4.3 The key international agreements are:

- Berne Convention for the Protection of Literary and Artistic Works (Berne Convention),
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention),
- Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),
- WIPO Copyright Treaty (WCT), and
- WIPO Performances and Phonograms Treaty (WPPT).

Australia is a party to the Berne Convention, the Rome Convention and the TRIPS Agreement, and is in the process of joining the WCT and WPPT.

4.4 Apart from the Rome Convention, each of these agreements includes a common international standard for copyright exceptions and limitations. The Australia-US Free Trade Agreement (AUSFTA) also contains this standard. Under the WTO Dispute Settlement System (DSS), a state can bring a complaint against another member state of the WTO, claiming that the other state's copyright exceptions do not comply with relevant treaties. A decision made under the WTO DSS is binding on member states to the dispute. Dispute resolution mechanisms are also available under the AUSFTA.

The Three-Step Test

4.5 The international standard for copyright exceptions and limitations is referred to as the 'three-step test'.

4.6 Article 9(2) of the Berne Convention, article 13 of the TRIPS Agreement, article 10 of the WCT, Article 16 of the WPPT and Article 17.4.10(a) of the AUSFTA set out a three-step test for exceptions to the exclusive rights of copyright owners.

Under this test, exceptions and limitations to the rights of copyright owners must be confined:

- to certain special cases,
- which do not conflict with a normal exploitation of the work, and
- do not unreasonably prejudice the legitimate interests of the right holder.

4.7 Proposals for new exceptions, or changes to existing exceptions, in the Copyright Act must be consistent with the above three-step test. Interpretation of this test has been closely considered in a decision under the WTO DSS. Before any exception can be introduced or extended, consideration must be given to: whether the exception is clearly defined and narrow in scope and reach, whether it will conflict with existing or potential new uses of copyright material, or whether the exception would cause disproportionate prejudice to the economic and personal interests of copyright owners.

5. Fair dealing – the Australian situation

5.1 Among the many exceptions and statutory licences listed in Attachment A are the important exceptions which allow ‘fair dealings’ for particular purposes. What is ‘fair’ depends on the particular circumstances, but the Copyright Act provides guidelines on what is deemed fair in relation to dealings for research and study (ss 40(2), (3) and 103C).

5.2 The fair dealing exceptions are confined to four purposes:

- research or study (ss 40 and 103C),
- criticism or review (ss 41 and 103A),
- reporting of news (ss 42 and 103B), and
- professional advice given by a legal practitioner, patent attorney or trade marks attorney (s 43(2)).

5.3 The provisions are in two parts of the Act, given the distinction between ‘works’ (Part III) and ‘subject matter other than works’ (Part IV²). In addition, exceptions to performers’ rights in live performances are dealt with in Part XIA (see the definition of ‘exempt recording’ at s 248A(1)).

Fair dealing for research or study

5.4 Section 40(1) provides, ‘A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for the

purpose of research or study does not constitute an infringement of the copyright in the work.’ Section 103C(1) is in similar terms in relation to dealings with ‘audio-visual items’ (defined as sound recordings, films and broadcasts).

5.5 The Copyright Act sets out a non-exclusive set of factors to be taken into account in determining whether one form of dealing (ie copying) of works for research or study is fair. Section 40(2) provides:

- (2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of reproducing the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for the purpose of research or study include:
- (a) the purpose and character of the dealing;
 - (b) the nature of the work or adaptation;
 - (c) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price;
 - (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
 - (e) in a case where part only of the work or adaptation is copied - the amount and substantiality of the part copied taken in relation to the whole work or adaptation.

5.6 Section 103C(2) is in similar terms in relation to any dealings with ‘audio-visual items’. Section 248A(1A) is in similar terms in relation to a fair dealing sound recording for research or study of a live broadcast of a performance.

5.7 Prior to 1980, the concept of ‘fairness’ under s 40 was not defined. Section 40(2) is based on recommendation by the Franki Committee³ which was established in response to concerns on the part of users of copyright material, particularly educational institutions. The Franki report recommendation, enacted in s 40(2), was influenced by the then proposed s 107 of the United States Copyright Act relating to fair use, which at the time was before the Congress.

5.8 In making its recommendation, the Franki Committee recognised there would be criticism that the principles later enacted in s 40(2) still left considerable room for judicial interpretation. However, the Franki Committee believed there were so many factors which may have to be considered in determining whether a particular instance of copying would be fair dealing that it was quite impractical to attempt to remove from s 40 the need to consider individual circumstances.

5.9 Section 40(3) sets out further guidance on maximum quantities of reproductions that will be deemed to be a fair dealing, provided they are made for the purpose of research or study. Reproducing the whole or part of an article in a

periodical publication or not more than a 'reasonable portion' of a work or adaptation is deemed to be fair, regardless of the factors to be taken into account in determining fairness under s 40(2).

5.10 A 'reasonable portion' is defined non-exhaustively in s 10(2) of the Copyright Act. The definition provides that a copy will be a 'reasonable portion' if the pages copied, in relation to a published edition of a literary, dramatic or musical work,

- do not exceed, in the aggregate, 10% of the number of pages in that edition, or
- in a case where the work is divided into chapters exceed, in the aggregate, 10% of the number of pages in that edition but contain only the whole or part of single chapter of the work.

5.11 In relation to 'audio-visual items', s 103C does not provide a quantitative test equivalent to that provided for under s 40(3).

5.12 The Copyright Act contains no definition of the term 'research or study'. The courts have consistently held that it is the purpose of the person making the dealing, rather than the ultimate use to which the material is put, that is relevant when assessing whether the dealing can be regarded as a fair dealing for the purpose of research or study.

5.13 Before 1980 'study' was qualified by the adjective 'private'. The *Copyright Amendment Act 1980* deleted the word 'private' from s 40(1) consistent with another recommendation made by the Franki Committee. That Committee considered that the exception was intended to distinguish use of material for private study from use for classroom instruction, but it regarded the distinction as artificial and difficult to maintain.

5.14 The Australian courts are yet to consider whether copying and other such use of copyright material for the purpose of commercial research and development could be regarded as a fair dealing for research or study. The Australian Law Review Commission in its Report *Gene Patenting and Human Health*, presented to Government in June 2004, recommended that the Copyright Act be amended to provide that commercial research is 'research' for the purposes of the fair dealing exceptions. The Government is considering that recommendation.

Fair dealing for criticism or review

5.15 Under s 41, a fair dealing with a work or with an adaptation of such a work (other than an artistic work) does not constitute an infringement of the copyright in the work if done for the purpose of criticism or review of that work or of another work. Section 103A provides a similar fair dealing for an audio-visual item. Also, the definition of 'exempt recording' in s 248A(1)(fa) allows live recordings and recordings of live broadcasts of performances by way of fair dealings for the purpose of criticism or review of that or another performance.

5.16 Unlike fair dealing for the purpose of research or study, the Copyright Act provides no guidelines as to what constitutes fair dealing for the purpose of criticism or review.

Fair dealing for reporting news

5.17 Under s 42(1), a fair dealing with a work, or with an adaptation of such a work (other than an artistic work) does not constitute an infringement of the copyright in the work if done for the purpose of, or associated with, reporting news.

5.18 The fair dealing can involve reporting news through the following mediums:

- a newspaper, magazine or similar periodical provided that a sufficient acknowledgment of the work is made (s 42(1)(a)),
- in a cinematograph film (s 42(1)(b)),
- by means of a communication (s 42(1)(b)); and

5.19 A similar exception is provided for in s 103B, which applies fair dealing for the purpose of reporting news to an ‘audio-visual item’. Also, the definition of ‘exempt recording’ in s 248A(1)(fa) exempts live recordings and recordings of live broadcasts of a performance for the purpose of reporting news to a similar extent as does s 42.

Fair dealing for the purpose of giving professional advice

5.20 Under s 43(2) a fair dealing with a work does not constitute an infringement of copyright in the work if it is for the purpose of the giving of professional advice by a legal practitioner or patent or trade marks attorney.

5.21 This exception does not have a ‘fair dealing’ counterpart in relation to audio-visual items. Sections 104(b) and 104(c) provide for a broader exception in relation to subject matter other than works. The exception covers all acts done for the purpose of seeking professional advice from a legal practitioner or patent or trade marks attorney or for the purpose of or in the course of the giving of advice by such a person. The exception is not subject to a ‘fairness’ requirement and therefore is not limited to what would be a ‘fair dealing’.

6. Australian fair dealing – proposals for reform

6.1 There have been several recent proposals for reforming the fair dealing provisions. In part, these proposals reflect policy and technical concerns over whether the current exceptions are too complex or are sufficiently flexible to provide for new uses that are possible with digital technology.

6.2 Proposals for change also arose because of copyright user concerns about amendments to the Copyright Act implementing the Australia-United States Free Trade Agreement (AUSFTA). Some user interests expressed unease that the

amendments followed aspects of United States copyright law that strengthen the ambit of copyright protection without also adopting an open-ended fair use exception which provides a balancing element for users in the United States.

Copyright Law Review Committee Recommendations

6.3 In September 1998, the Copyright Law Review Committee (CLRC) in its report *Simplification of the Copyright Act: Part I* made recommendations to simplify the fair dealing exceptions. The CLRC sought to achieve a model that was simpler than the current range of fair dealing provisions and also sufficiently flexible to accommodate the challenges posed by technological developments. The CLRC also considered it important that any new model should contain enough detail to provide guidance to both copyright owners and users.

6.4 The CLRC recommended the following changes:

- consolidation of the current fair dealing provisions - ss. 40, 103C, 41, 103A, 42, 103B and 43(2) - in a single provision;
- expansion of fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes - research or study (ss. 40 and 103C), criticism or review (ss. 41 and 103A), reporting news (ss. 42 and 103B) and professional advice (s. 43(2)) - but is not confined to those purposes; and
- general application of the non-exclusive set of factors provided for in s. 40(2) to all fair dealings.

6.5 The CLRC summarised its view of the advantages of the recommended approach as follows:

- It continued to build on existing jurisprudence that has developed around the current fair dealing provisions.
- It was consistent with Australia's current international obligations and with the spirit of the yet-to-be-adopted WCT and WPPT.
- It struck a fair balance between the competing interests of copyright owners and users and described the limits to copyright owners' rights in a manner that maximised the public interest.
- It simplified the Act.
- It was not limited to an exclusive set of purposes and therefore offered greater flexibility in allowing courts to determine new circumstances to which fair dealing could apply in response to changing technology.
- It provided greater certainty in the determination of 'fairness' through the general application of the non-exclusive set of considerations (under s. 40(2)) to all fair dealings.

- It preserved the valuable guidance provided by the quantitative test under s 40(3) through a new test expressly confined to dealings for the purpose of research or study of published literary, dramatic or musical works, or adaptations of such works, in printed form.

6.6 The CLRC considered its recommended approach would provide a provision akin to, but more precise than, the open-ended ‘fair use’ provision in the United States. It is apparent that the CLRC considered its proposed model would be more compatible with the Australian legal system than a ‘fair use’-style provision.

6.7 The CLRC recommendation was considered in the September 2000 report of the Intellectual Property and Competition Review Committee (the ‘Ergas Committee’) which examined the Copyright Act under competition principles.⁴ The Ergas Committee did not support the CLRC proposal for an open-ended fair dealing provision. In its view, the CLRC model did not offer sufficient benefits to justify its costs and uncertainties.

6.8 The Government’s response stated that it would take the Ergas Committee’s views into account in its consideration of the CLRC’s recommendations. The views of both the CLRC and the Ergas Committee need to be examined against subsequent developments, including the AUSFTA obligations and implementing legislation.

Issue: Should the Copyright Act be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

JSCOT Fair Use Recommendation

6.9 On 23 June 2004, the Parliamentary Joint Standing Committee on Treaties (JSCOT) tabled its report on the AUSFTA.

6.10 The JSCOT heard evidence and received submissions that consideration should be given to changing the existing fair dealing provisions to a more open-ended exception, similar to the ‘fair use’ exception in the United States. In general, the individuals and organisations supporting this view considered the AUSFTA strengthened the rights of copyright owners and that the introduction of an open-ended exception could provide a balancing mechanism for users of copyright material. The AUSFTA implementing legislation extends the term for most copyright material by 20 years, gives more extensive owner control over temporary copies and provides stronger protection for technological measures used by owners to control access to and use of copyright material.

6.11 The JSCOT also heard contrary arguments from copyright owner interests that a fair use scheme would not be certain in scope and that litigation would be required to determine when it would apply. Concerns were also raised regarding how the implementation of such a doctrine would fit within Australian copyright law and whether such a provision would be consistent with treaty obligations.

6.12 The JSCOT expressed its understanding that the application of the fair use exception, as interpreted by United States courts, permits some private, non-commercial uses of copyright material that in Australia would infringe copyright. The Committee referred particularly to copying for the purposes of what the Committee referred to as ‘time-shifting’ or ‘space-shifting’:

16.42 The application of fair use in the United States as determined by their legal system specifically provides for several unique copyright doctrines, namely time shifting and space shifting. An example of time shifting is when consumers record a television program for later use, on a device such as a video recorder, or more recently other types of storage mediums. Space shifting is when digital content is recorded onto a different device than that for which it was originally assigned, e.g. purchasing a CD and copying it onto an MP3 player.

16.43 Current Australian legislation makes these activities illegal. The debate as to whether there are exceptions in Australian legislation or case law is beyond the scope of this Committee's review. However, the Committee notes that the application of the US' fair use doctrine may resolve any confusion and correct a legal anomaly should Australia decide to adopt a similar regime.

6.13 The JSCOT recommended that:

... the changes being made in respect of the *Copyright Act 1968* replace the Australian doctrine of fair dealing for a doctrine that resembles the United States' open-ended defence of fair use, to counter the effects of the extension of copyright protection and to correct the legal anomaly of time shifting and space shifting that is currently absent.

Senate Select Committee Fair Use Recommendations

6.14 The Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (Senate Select Committee) also heard evidence and received submissions along the lines of those to the JSCOT Committee. The Senate Select Committee tabled its final report on 5 August 2004⁵.

6.15 The Senate Select Committee noted that the United States 'fair use' doctrine has been judicially interpreted as permitting activities which are an infringement of copyright in Australia. The Committee considered that adoption of a broad, open-ended fair use doctrine in Australia might resolve this legal anomaly in Australian copyright law and assist in legitimising several common activities undertaken regularly by Australians. The Government Senators adopted the conclusions expressed by JSCOT. The Labor Senators separately recommended that the Senate establish a Select Committee on Intellectual property to, inter alia:

investigate options for possible amendments to the *Copyright Act 1968* to expand the fair dealing exceptions to more closely reflect the 'fair use' doctrine that exists in the United States and to address the anomalies of 'time shifting' and 'space shifting' in Australia.

7. Fair use – the United States situation

7.1 Copyright law in the United States contains exceptions and limitations that allow specific uses of copyright material (including ss 108-122 of the United States Copyright Act). The United States also has a limited statutory licence scheme that covers digital audio device manufacturers to compensate for private copying (the Audio Home Recording Act). However, United States copyright law is exceptional

among that of comparable jurisdictions in that it has an open-ended fair use exception that is not restricted to specific purposes (s 107).

Section 107 Limitations on exclusive rights: Fair use:

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

7.2 Under s 107, fair use is a mixed question of law and fact. Where a defendant raises a fair use defence in proceedings, the court must establish and evaluate the facts relevant to each of the statutory factors before determining as a question of law whether or not the challenged use qualifies as a fair use.

7.3 The following sections are a brief elaboration on the four factors as applied in United States case law.

The purpose and character of the use

7.4 The first factor in a fair use enquiry is the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. In the case of *Campbell v Acuff-Rose* 510 U.S. 569 (1994), Justice Souter of the Supreme Court stated that the central purpose of this enquiry was to see whether the new work merely superseded the original, or if it added something new thereby altering the original. Justice Souter further stated that, whilst “such a transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works.” In general, the more transformative the new work, the more likely it is that a finding of fair use will be made and a court will have less regard to other factors such as commercialism.

The nature of the copyrighted work

7.5 The second factor, the nature of the copyright work, directs enquiry to the value of the materials used. This factor recognises that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. The more creative a copyright work, the less likely that a finding of fair use will be made. Conversely if the copyright work is less creative then it is more likely that a finding of fair use will be made.

The amount and substantiality of the portion used

7.6 The third factor is the amount and substantiality of the portion used in relation to the copyright work as a whole. The purpose of this enquiry is to determine whether the quantity and value of the proportion used was reasonable with respect to the purpose of copying: *Harper and Row Publishers v Nation Enterprises* 471 U.S. 539 (1985). The third factor is related to the fourth factor in that the enquiry may turn upon whether the amount copied adversely affects the market for the original work.

The effect of the use on the potential market for or value of the copyrighted work

7.7 The fourth factor is the effect of the use upon the potential market for or value of the copyright work. This enquiry must take account of not only harm to the original but also harm to the market for derivative works. It is possible for the second work to harm the market for the original and still qualify as a fair use. *Campbell v Acuff-Rose* 510 U.S. 569 (1994) is an example of fair use where the second work was determined to be a parody.

Examples of fair use

7.8 It is understood that the defence of fair use can be raised in the United States in relation to any use, commercial or private. If the challenged use is commercial, there is generally a presumption against fair use which the defendant must displace. Where the use of copyright material is non-commercial, the copyright owner must prove either that the particular use was harmful or that it could adversely affect the potential market for the material.

7.9 Any attempt to list the uses that qualify as a fair use is extremely difficult as the distinction between fair use and infringement can be unclear and not easily defined. Reflecting this uncertainty, the United States Copyright Office refers to a 1961 Report of the Register of Copyrights on the General Revision of the United States Copyright Law that was prepared as part of the general revision of United States copyright law leading to the adoption of s 107. It cites examples of activities that courts have regarded as fair use⁶:

- quotation of excerpts in a review or criticism for purposes of illustration or comment,
- quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations,

- use in a parody of some of the content of the work parodied,
- summary of an address or article, with brief quotations, in a news report,
- reproduction by a library of a portion of a work to replace part of a damaged copy,
- reproduction by a teacher or student of a small part of a work to illustrate a lesson,
- reproduction of a work in legislative or judicial proceedings or reports,
- incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.’

7.10 It is understood that, when enacted in 1976, s 107 was intended simply to codify pre-existing judicial interpretation of ‘fair use’ rather than enlarge it. More recently, United States courts have accepted, among other uses, that a parody of a work may be a fair use and that a computer program may be reverse-engineered to examine its ideas and any unprotected expression.

7.11 Most of the well known case law in the United States concerning ‘fair use’ deals with commercial or business uses rather than private copying. Some commentators observe that the courts generally are reluctant to approve copying that is not for a productive or transformative use but merely reproduces entertainment material for its intrinsic value. One ‘fair use’ case which recognised a private copying activity is the benchmark decision of the Supreme Court that copying a free-to-air television broadcast by a home VCR to watch later (‘time-shifting’) is a fair use (*Sony Corporation v Universal City Studios* 464 USC 417 (1984, S.C (‘Betamax decision’)). This is one of few decisions in which copying a complete work for entertainment purposes has clearly qualified as a fair use. It is contended by some commentators that the Betamax decision combined with *RIAA v. Diamond Multimedia*, 180 F. 3d 1072, 1079, 9th Circ. 1999 indicates that ‘format shifting’ might also qualify as a fair use. Other commentators disagree with this view.

Features of the US Fair Use doctrine

7.12 The following points about the fair use exception can be made:

- The open-ended fair use exception is broader in scope than the Australian fair dealing exceptions, which are restricted to specific purposes.
- Many uses that have qualified as a fair use under United States copyright law are allowed in Australia under other exceptions or statutory licences (ie other than the fair dealing exceptions).
- The flexibility of the fair use exception has allowed the courts to play an active role in adapting United States copyright law to major changes in technology.

- The fair use exception arguably assists copyright law to adapt to market failure or market inefficiencies better than laws that provide specific exceptions for set purposes.
- The fair use exception is technologically neutral and does not require revision through legislation.
- There are no clear-cut rules for distinguishing between infringement and a fair use. The only way to get a definitive answer on whether a particular use is a fair use is to have it resolved in a court.
- Outcomes in fair use disputes can be hard to predict. Applying the statutory principles can be difficult for the courts. Fair use cases have been characterised by decisions in lower courts that have been overturned in courts of appeal and reversed again in the United States Supreme Court.
- Copyright owners may vigorously oppose fair use claims to ensure that the doctrine does not expand by increments.
- Defending a fair use claim in court can be expensive. The defendants in many fair use cases that are fought out in the courts are corporations with considerable financial resources.

Issue: Should the Copyright Act be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law?

8. Exceptions and limitations – the EU situation

8.1 In the European Union, a series of directives on copyright have been approved to harmonise the copyright laws of Member States and comply with international treaties. The directive that is most relevant to copyright exceptions is the Information Society Directive (Directive 2001/29/EC of 22 May 2001). This Directive entered into force on 22 June 2001.

8.2 The Information Society Directive obliges Member States to provide for three exclusive rights. It also introduces a regime of compulsory and permitted exceptions to these three rights (Art. 5). A technical reproduction exception is mandatory, while Member States may provide for the remaining listed exceptions at their own discretion, but cannot provide for any additional exceptions.

8.3 Article 5(2) provides for specified acts as exceptions or limitations to the reproduction right. For example, reproduction may be permitted if right holders receive fair compensation, and the reproduction is:

- by photocopying-type technology and is in hard-copy format (Art. 5(2)(a)),

- by reproduction on any medium for private and non-commercial ends (Art. 5(2)(b)), or
- of a broadcast and by a non-commercial social institution (Art. 5(2)(e)).

8.4 Article 5(2)(b) allows, but does not require, Member States to adopt compensation schemes for private copying. A number of Member States with a civil law heritage have adopted various schemes for private copying funded by levies placed on blank recording media or equipment. Copyright users in these Member States may have greater private copying rights than users in the United States. However, the operation of private copying statutory licenses has been challenged in some countries by the existence of technological protection measures that stop users from making copies as permitted under national law. The United Kingdom and Ireland do not have such compensations schemes.

8.5 Article 5(3) deals with exceptions to the rights of reproduction and communication to the public. Under Art 5(3), Member States may choose to provide exceptions or limitations for the following cases:

- teaching, scientific research, and certain other private study purposes,
- the benefit of people with a disability,
- certain purposes relating to the dissemination of news, political speeches and public lectures,
- criticism, review, caricature, parody and pastiche,
- certain Governmental, judicial, ceremonial and public security purposes,
- advertising an artistic work or publicly displaying a piece of architecture or sculpture,
- demonstrating and repairing equipment or reconstructing a building,
- incidental inclusion in other material, and
- other minor cases of analogue use that are already recognised in national laws.

8.6 In all cases the optional exceptions are required to comply with the three step test (see para 4.5). It appears that the Information Society Directive would not allow a Member State to have an open-ended 'fair use' exception.

9. Fair dealings – the UK, NZ and Canadian situations

United Kingdom

9.1 As in Australia, the *Copyright, Designs and Patents Act 1988 (UK)* contains specific fair dealing provisions for the purposes of 'research and private study' and 'criticism, review and news reporting'. While not defined as a fair dealing, there is no infringement of copyright for anything done for the purpose of parliamentary or judicial proceedings.

9.2 The Australian and United Kingdom fair dealing provisions are generally similar reflecting their shared legislative and common law history. However, the United Kingdom provisions are more limited in a number of ways. First, fair dealing is restricted to ‘research and *private* study (s 29). In 2003 this exception was further narrowed to implement the Information Society Directive (see para 8.2). The exception now expressly excludes commercial research.

9.3 In addition, the United Kingdom Act provision only applies to works and not to sound recordings, films or broadcasts. Also, the fair dealing provision for reporting current events (s 30(2)) does not apply to photographs. The Australian exceptions are not limited in these ways.

9.4 The United Kingdom provisions do not contain a quantitative test similar to s 40(3) in the Copyright Act.

New Zealand

9.5 The New Zealand fair dealing exceptions are substantially similar to those United Kingdom before the 2003 amendments.

Canada

9.6 The Canadian Copyright Act contains specific fair dealing exceptions similar to Australia, the United Kingdom and New Zealand. They cover research and private study, news reporting and criticism and review.

10. Other related issues

10.1 Copyright is not the only option that copyright owners have to limit unauthorised uses of their works. Two other important methods are technological protection measures and contract law. Both can have an impact on the ability of users to take advantage of an exception provided for in copyright law.

Technological protection measures

10.2 Digital technology enables users easily to copy and distribute copyright material. But, it also strengthens the ability of copyright owners to control how their material is used.

10.3 Digital content is increasingly protected by technological protection measures designed to prevent unauthorised access to, or use of, copyright material. Technological protection measures have legal protection against circumvention, even where a proposed use might otherwise be permitted. Legal action has been taken against persons who make or deal in software that allows technological protection to be circumvented.

10.4 United States In the United States, the Digital Millennium Copyright Act 1998 (DMCA) prohibits circumvention of access control technologies used by copyright owners to protect their work. The DMCA does not permit users to interfere

with technological protection measures to exercise a fair use. As a result, users may be permitted to copy digital material for private purposes as a fair use but have no practical means of obtaining the tools necessary to make a copy if that material is copy protected. Concerns of copyright users were countered in the United States by the argument that technological protection measures would be of little value if they could be freely circumvented.

10.5 European Union The use of technological protection measures is also an issue of controversy in the European Union with respect to private copying schemes. The Information Society Directive allows, but does not require, Member States to take measures to ensure that right holders make available to the public the means to take advantage of a private copying scheme established under Art 5(2)(b). This provision is directed at rights holders. It does not envisage that users might circumvent technological protection themselves. Italy appears to be one of the few Member States with a compensation scheme that has made provision for technological protection measures by obliging rights holders who apply such measures to allow the owner of a legitimate copy to make a copy for personal use. The circumvention of anti-copying protection remains prohibited. In general, copyright users may be no better off under private copying schemes than those in the United States, as far as protected material is concerned.

10.6 United Kingdom The United Kingdom, in implementing the Information Society Directive, has adopted a remedy where technological measures prevent an act that is permitted under certain provisions of its copyright law. This process provides for complaints to the relevant Minister who, in the absence of voluntary measures taken by the copyright owner, may give directions requiring the copyright owner to make available the means of carrying out the permitted act. This remedy is available for a fair dealing for research or private study and the exception for time-shifting.

10.7 Australia For Australia, amendments to the Copyright Act that commenced on 4 March 2001⁷ provide for a range of civil remedies and criminal sanctions against the manufacture, commercial dealing, importation, making available online, advertising, marketing and supply of a device or service used to circumvent technological protection measures (as defined by the Copyright Act). These provisions contain exceptions that allow circumvention devices to be supplied, and made or imported, for certain 'permitted purposes'. However, the Copyright Act does not permit a circumvention device to be supplied for the purpose of a fair dealing with material that is protected by a technological protection measure.

10.8 The above amendments align the Copyright Act with obligations of the WIPO Copyright Treaty (WCT) which requires that technological protection measures receive adequate legal protection. Australia is currently in the process of acceding to the WCT.

10.9 Under the AUSFTA, the Government is committed to tighter controls on circumventing technological protection measures. For example, restrictions will be placed on the use of circumvention devices. The Government has until 31 December 2006 to implement these obligations and will be conducting a review regarding exceptions that should be permitted, and which are consistent with the AUSFTA obligations. That review will provide an opportunity for further public consultation

on this issue. The obligations in the AUSFTA with respect to technological protection measures are at **Attachment B**.

Contract law

10.10 Copyright owners can limit copying and other copyright uses by contract. For example, a copyright owner may offer to sell or licence use of copyright material subject to an end user licence agreement containing terms that override exceptions provided for in the Copyright Act. Such terms may be included in mass-market contracts that are not negotiated between the parties (eg 'shrink-wrap' or 'click-through' agreements). International contracts may also specify that the law of another country will apply in determining the rights of the parties or that a foreign court has exclusive jurisdiction over disputes.

10.11 In 2001 the Copyright Law Review Committee (CLRC) was asked to examine the extent to which electronic trade in copyright works is subject to contracts which exclude or modify exceptions to copyright provided for under the Copyright Act. This review was prompted by concerns whether the growth of electronic commerce has facilitated the use of contracts to set terms and conditions for access to and use of copyright material. The Government was concerned about the potential for such contracts to displace the balance of owner and user rights provided for in the Copyright Act.

10.12 The CLRC concluded that contracts were being used to modify or exclude the copyright exceptions in Australia, and that available remedies were inadequate. The CLRC recommended that the Copyright Act should be amended to preserve the integrity of certain exceptions which it identified as being fundamental to the copyright balance in Australia. Specifically, the CLRC recommended that the Copyright Act should provide that an agreement that excludes or modifies a specified exception has no effect.⁸

10.13 The Government is considering the CLRC's report.

11. Possible new exceptions to copyright

What additional uses might be permitted as an exception to copyright

11.1 The following examples of copying for private non-commercial purposes have been put forward as uses that should not be an infringement of copyright law. For present purposes, a question is whether these are uses that should, or might be, allowed as a 'fair use' exception to owners' rights, or through some other type of exception. .

Time-shifting

11.2 'Time-shifting' is recording a television or radio program to watch, or listen to, it at a later time. This has been a common practice at least since the video-cassette recorder (VCR) came into general household use. Today a wide range of digital recording devices are being used for the same purpose. As indicated above, the

JSCOT and the Senate Select Committee identified the failure of the Copyright Act to provide for time-shifting as an anomaly that should be addressed. ‘Librarying’ - recording programs to keep indefinitely - is not considered time-shifting.

(i) as a specific exception

11.3 The Copyright Act currently contains an exception (s 111) which allows the making of sound or audio-visual recordings of radio and television broadcasts for the ‘private and domestic use’ of the person by whom it is made. This exception does not really provide for time-shifting:

- Section 111 is too narrow in that it applies only to the copyright in a broadcast transmission. Recording a broadcast may still infringe the copyright in any work, film or sound recording that is included in the broadcast and may infringe performers’ rights if it is a live broadcast of a performance.
- Within its limited scope, s 111 also goes beyond time-shifting in that a recording of a broadcast transmission may be kept indefinitely.
- In effect, s 111 only permits the recording of a live-to-air broadcast, eg of a sporting event.

11.4 The United Kingdom and New Zealand copyright legislation contains time-shifting exceptions that allow the private copying of broadcast or cable programs including the program content. The United Kingdom exception also requires that the recording must take place in domestic premises. The United Kingdom and New Zealand exceptions only permit a broadcast to be retained for the purpose of enabling it to be viewed or listened to at a more convenient time, thereby excluding ‘librarying’ (ie the time-shifted material may not be kept indefinitely). Neither the United Kingdom nor New Zealand exception requires that the copyright owners be paid compensation. The New Zealand Government is currently considering a proposal that the present time-shifting exception be made technology-neutral in that it would apply to all communications, except on-demand services that can be accessed on request.⁹

<p>Issue: Should the Copyright Act be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances - and if so, under what conditions?</p>
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(ii) as a fair use exception

11.5 In the United States, owners of copyright in television programs initially sought to suppress home recordings by suing the Sony Corporation for contributory copyright infringement by virtue of its distribution of Betamax VCRs that enabled viewers to infringe the copyrights in television programs by copying them onto tape. The Supreme Court held that Sony would not be liable so long as the machines were capable of substantial non-infringing uses. Evidence showed that the primary use of the machines for most viewers was private, personal time-shifting. By a bare majority, the Supreme Court decided in favour of Sony because private, non-

commercial time-shifting of television programs qualified as a fair use under s 107 (*Sony Corporation v Universal City Studios* 464 USC 417 (1984, S.C)).

11.6 In its analysis of the fair use principles, the Supreme Court accepted that expanding public access to free broadcast programs yielded public benefits. Importantly, the Court concluded that private home time-shifting would not decrease revenues for rights owners or harm their market, since advertisers could be assured that their programs would still be watched and they would therefore still willing to pay market prices. Also favouring fair use was the fact that viewers were recording and watching programs they had been invited to watch for free.

11.7 The decision in *Sony Corporation v Universal City Studios* was based on obsolescent technology. In July 2004, the Register of Copyrights in evidence to a Congressional committee proposed that it might be appropriate for Congress to take a 'fresh look' at the decision in new copyright legislation.¹⁰ In addition, the decision is currently under review by the United States Supreme Court in *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*. This case deals with the question whether distributors of Grokster and Morpheus software used for peer-to-peer file-sharing are liable for contributory or vicarious copyright infringement by users. It is understood from media reports that a decision is expected by June.

Format-shifting

11.8 Format-shifting is the practice of copying material from one format to another. This is also sometimes called 'space-shifting' or 'platform shifting'. Item-to-item copying in the same format (eg duplicating an audio CD) is not format-shifting.

11.9 Format-shifting is a common practice for music. An old example was copying a vinyl record to an audio-cassette so the music could be played on a portable player or in a car. Digital technology permits an audio CD to be copied in a compressed format (through a personal computer) in the embedded memory of a portable music player. In the near future it appears that an increasing range of copyright material will be used by way of mobile phones. The JSCOT and Senate Select Committee also proposed that format-shifting (or space-shifting) for personal use should not be an infringement of copyright.

(i) as a specific exception

11.10 There currently is no exception in the Copyright Act for format-shifting.

11.11 A number of European Union member states and other countries may allow format-shifting through statutory licences for private copying.

11.12 The New Zealand Government has issued a position paper which proposes a narrow exception that would permit the owner of a legitimate copy of a sound recording to make one copy of that sound recording (and the music it contains) in each format for his or her personal use¹¹. The New Zealand Government notes that remunerated statutory licences operating in other countries (such as in Europe and Canada) generally have broader private or personal copying rights than its proposed exception. It is understood that a levy scheme was not pursued because of the New

Zealand Government's assessment of the administrative costs of establishing such a system, as well as the cost to consumers who are purchasing blank media for the purpose other than copying copyright material. The New Zealand proposal would not allow copying of borrowed or hired sound recordings.

11.13 The reason given by the New Zealand Government to support a narrow exception for format shifting is that consumers are unlikely to purchase the same sound recording in a variety of different formats.

Issue: Should the Copyright Act be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions?

(ii) as a fair use exception

11.14 The United States Audio Home Recording Act (1992) has three objectives: (a) to permit non-commercial audio home recording, (b) to give legal protection to the makers and distributors of Digital Audio Tape (DAT) players – provided they incorporated a system to prevent serial copying, and (c) to compensate copyright owners through a levy. The Act does not apply to personal computers or computer peripheral devices. Subsequently, the record industry sought to stop the sale of a particular MP3 player that did not have the required anti-copying mechanism and for which royalties had not been paid. The record industry action failed because an appeals court determined that devices storing music files copied from a computer, such as MP3 players, were not within the scope of the Audio Home Recording Act (*RIAA v Diamond Multimedia Sys* 180 F.3d 1072 (9th Cir. 1999)).

11.15 Although the court had not looked at the case from a fair use perspective, it went on to compare the space-shifting (or format-shifting) of a digital music file from a personal computer to a portable music player as a use similar to time-shifting. Many commentators refer to this case as indicating that the United States courts would approve format-shifting of music as a fair use if required to decide this question. However, other commentators caution that that this decision does not establish a precedent for format-shifting as a fair use, but rather interprets a specific provision within a statutory scheme that gives consumers a 'right' to make non-commercial audio recordings.

Back-up copying

11.16 Back-up copying refers to the action of a purchaser of a legitimate copy of copyright material making a permanent copy in the same format as the original copy in case it is lost or damaged. An exception of this kind is to be contrasted to format-shifting which is making a reproduction in a different format to the original copy.

(i) as a specific exception

11.17 The Copyright Act contains an exception that allows the making of back-up copies of computer programs where done by, or on behalf of, the owner or licensee of the original copy (s 47C). This exception is limited and the back-up copy can only be

made for certain specified purposes. It does not include the copying of other copyright material that is usually associated with computer programs such as images, sound recordings and cinematograph film.

11.18 Relevant policy considerations in relation to the existing exception in s 47C are that computer programs may be more likely to be corrupted and are utilitarian in nature. Computer programs and associated data may also represent a considerable investment for users. These considerations do not necessarily apply to other copyright material, such as commercially made CDs and DVDs which may not be as easily damaged by normal use in a player.

Issue: Should the Copyright Act be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions?

(ii) as a fair use exception

11.19 The United States Copyright Act contains a specific exception that allows the owner of a copy of a computer program to make a back-up copy for archival purposes (17 U.S.C. s 117). There have been proposals to legislate exceptions for other forms of back-up copying but they have not progressed. It has not been settled by the United States courts as to whether making ‘back up’ copies is a ‘fair use’.

Uses for other purposes

11.20 It is acknowledged that some consider many other uses of copyright material should be subject to an exception in the Copyright Act. One example may be ‘orphaned works’ ie copyright works whose authors are difficult or even impossible to find. Another possible situation is the use of a copyright work as a parody.

11.21 The Government is interested in whether there are other uses of copyright material that should be considered as an exception to the exclusive rights of the copyright owner and the proposed form of any such provision.

Issue: Should the Copyright Act be amended to include any other new specific exception to copyright and, if so, under what conditions?

12. Other policy options

Private copying under a statutory licence scheme

12.1 As noted above, a number of countries allow the private copying of copyright material, particularly music and sound recordings, under statutory licences. In Australia, statutory licensing was also seen at one time to be a solution to the private copying of music. In 1989 a blank tape royalty scheme was added to the Copyright

Act which permitted published sound recordings to be copied on a blank audio-tape for private or domestic use. Copyright owners were to be compensated by a levy on the sale of blank tapes. The amount of the levy was to be determined by the Copyright Tribunal. In 1993 the High Court determined that the proposed levy was a tax and, as such, unconstitutional because the legislation did not comply with s 55 of the Constitution (*Australian Tape Manufacturers Assn Ltd v Commonwealth* (1993) 25IPR 1). The legislation was therefore invalid and the scheme did not come into operation. The intended scheme would have permitted copying for purposes broader than item-to-item copying. For example, it would have permitted off-air copying of radio broadcasts and item-to-item copying of a borrowed sound recording so long as the required levy had been paid on the blank tape used.

12.2 Some copyright owner interests continue to support the adoption of a statutory licence for the private copying of music, films and television and radio broadcasts. They argue that a levy would give owners some compensation for the loss of legitimate sales caused by private copying. Other copyright owner interests believe the implications of permitting relatively wide private copying are entirely different with digital technology and oppose Government intervention in the form of a levy. The opposing owner interests argue that a statutory licence would not provide adequate compensation to owners, undermine enforcement action in the on-line area and conflict with new licensing markets.

12.3 For consumers, the question may be whether it is preferable to have an unqualified free exception or to pay a fee under a statutory licence. The answer may depend on the nature of the copyright material and the use involved. Many consumers may think it would be fair to time-shift a television broadcast or to format-shift their own CD for free. Other consumers may consider paying a levy would be fair in return for a broader right of private copying, eg one that permitted copying of a CD borrowed from a friend.

12.4 However, a statutory licence may not actually give consumers the opportunity to make private copies if the copies put on the market by producers include technological protection measures, as is the case with some music CDs and most audio-visual DVDs.

12.5 In December 2000 the House of Representatives Standing Committee on Legal and Constitutional Affairs in a report into copyright enforcement in Australia (*Cracking down on copycats*) recommended against the re-introduction of a blank tape levy scheme.¹²

12.6 Some of the advantages and disadvantages with respect to private copying licence schemes include:

a. advantages

- private copying is made lawful for copyright users,
- copyright owners receive financial compensation for lost sales, and
- copyright law may have greater credibility in reflecting consumer practices.

b. disadvantages

- copyright owners may seek to stop permitted copying by technological protection measures and/or contracts,
- compensation for copyright owners may not match lost sales resulting in under-investment in new creative material for public use,
- regulation may stifle the development of flexible licensing arrangements,
- compliance burdens would be imposed on some Australian business,
- private copying licences have administrative costs – and may raise concerns about oversight and transparency,
- 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), and
- 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 Australia copyright owners.

Issue: Should the Copyright Act be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances?

Market place solutions

12.7 Current copyright law envisages that viable markets can be maintained for digital entertainment products if copyright industries provide business models that reflect changing user expectations and users accept the need to pay an appropriate amount for lawful uses. Allowing markets the flexibility and time to adapt may provide benefits for both owners and users.

12.8 There are encouraging signs that maturing licensing agreements and technological protection measures are allowing for flexibility and ease of use while still impeding unrestricted copying. Many consumers who purchase music files on-line expect to be able to transfer those files to other platforms in their homes in the course of private use. Licence arrangements now permit music files to be shared between specified numbers of computers and to be ‘burnt’ to CD a set number of times.

12.9 Proponents of market based solutions suggest that, given time, they may produce the right balance between the rights of copyright owners to protect their

material and the entitlement of copyright users to make reasonable use without the need for additional legislation. They argue that markets are able to adapt to technological changes, while changes to the law inevitably lag behind.

12.10 A market approach necessarily implies there would be no or minimal legislative action. This may disadvantage copyright users. It fails to respond to public expectations that the Copyright Act should be aligned with popular practice and that Australian consumers should not infringe copyright in using popular consumer devices, such as MP3 players or DVD/VCR recorders. This approach also requires the maintenance of strong legal remedies against copyright infringement, including protection for technological protection measures.

13. Adopting fair use in Australia?

How would Australian courts interpret a fair use exception?

13.1 The key fair use decisions by United States courts can be viewed as an outcome of the United States legal system: the constitutional framework (including the First Amendment right of free expression), the specific text of its copyright law and the greater willingness of judges to play an active role in the development of solutions to technological changes that alter copyright markets.

13.2 If a fair use-style provision was adopted in Australia it could result in a wider range of purposes being regarded by the courts as falling within that exception. There are likely to be widely varying expectations about what these additional purposes might be. These would have to be determined on case-by-case basis by the courts.

13.3 It is possible that Australian courts operating in a different legal system may take a different approach. To date they have been more concerned with the interpretation of statutory provisions and looking to Parliament for explicit direction on the application of intellectual property law to new technology. Australian courts could read down any new fair use type exception, particularly if it appeared to overlap with other specific exceptions in the Australian Copyright Act.

How would a fair use provision be implemented?

13.4 The Australian fair dealing exceptions and the United States fair use doctrine should not be viewed as simple equivalents.

13.5 Some acts may be permitted as a fair dealing or a fair use. However, other acts permitted as a fair use in the United States may be allowed in the Copyright Act under a specific exception or statutory licence. But there are differences. As discussed above, the United States doctrine has been interpreted to allow some uses that are not covered by an exception or statutory licence in the Copyright Act. On the other hand, Australian provisions can be broader than fair use. The statutory licences for educational use in the Copyright Act give Australian educational institutions wider permissions to use copyright material than fair use allows to similar United States institutions (but on payment of equitable remuneration for copyright owners).

13.6 Consequently, if the Government were to consider amendments it may not be an appropriate solution to simply ‘replace’ the fair dealing exceptions or ‘add on’ an open ended fair use provision. The relationship of such a provision to other exceptions and statutory licences in the Copyright Act would be carefully considered to avoid problems arising from any overlap and consequent disruption to existing business and licensing arrangements. This issue is addressed further below.

14. Options for implementing reform

14.1 This section outlines possible options that the Government could consider for reform of exceptions under the Copyright Act if it decided that legislative reform was required. The options listed should not be viewed as exhaustive. Views on other realistic options are sought.

Option 1 – consolidate the fair dealing exceptions in a single open-ended provision

14.2 The Copyright Law Review Committee in its report *Simplification of the Copyright Act Part 1* proposed that the Copyright Act might be amended to provide a consolidated and expanded fair dealing provision that is less complex, sufficiently flexible to adapt to new uses that emerge with technological developments, but also contain enough detail to provide useful guidance to both copyright owners and users.

14.3 The Copyright Law Review Committee’s proposal was to:

- consolidate the current fair dealing provisions in a single provision,
- expand fair dealing to an open-ended model that specifically refers to the current exclusive set of purposes - research or study, criticism or review, reporting news and professional advice - but is not confined to those purposes, and
- generally apply the non-exclusive set of factors provided for in s 40(2) to all fair dealings.

14.4 Under this approach, the new consolidated provision would encompass the present ss 40-43 and 103A-103C. This would continue to provide copyright owners and users with a measure of certainty, while also giving courts a measure of flexibility to decide whether other uses would be fair. This would permit the courts to approve new or minor uses that do not cause significant harm to copyright owners.

14.5 On the other hand, this option would require judicial interpretation on a case-by-case basis to determine what, if any, new uses are allowed by the consolidated provision. Prior to interpretation by the courts, there is no way to know if acts such as time-shifting or format-shifting would be lawful (unless specific exceptions for these uses were also included in the Copyright Act).

Option 2 – retain the current fair dealing provisions and add an open-ended fair use exception

14.6 This option would retain ss 40-43 and 103A-103C, and other existing exceptions, but add a new open-ended fair use style provision. This provision would include the non-exclusive set of factors provided for in s 40(2) .

14.7 The enactment of an open ended exception would extend the flexibility of the Copyright Act and, compared to option 1, could indicate to the courts that the new provision is intended to permit additional uses over and above those already covered by the existing fair dealing exceptions.

14.8 On the other hand, this approach may add to the complexity of the Copyright Act. There would be considerable uncertainty as to the scope of the open-ended until case law developed. A user considering relying on this exception would need to weigh the legal risk of possible litigation. Until the scope was interpreted by the courts, there may be significant disruption to existing licensing arrangements. No comparable jurisdiction has enacted both specific fair dealing exceptions and a similar open-ended provision.

14.9 There would be no certainty under this option whether acts such as time-shifting or format-shifting might be lawful.

Option 3 – retain current fair dealing exceptions and add further specific exceptions

14.10 This option would retain the existing exceptions, including the fair dealing provisions, while adding new specific exceptions. This approach would maintain current policy of providing certainty for copyright owners and users as to permitted acts, while updating the Copyright Act to include other uses including common consumer practices that do not cause significant harm to copyright owners. For example, s 111 might be amended to allow the time-shifting of television and radio broadcasts (including program content) for private use as a free exception. An exception permitting format-shifting similar to the New Zealand approach might also be considered.

14.11 This option would not allow a court to decide whether a new or minor use should qualify. As at present, Parliament would be required to review and update the Act in response to future uses to which technological developments may give rise.

Option 4 – retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material

14.12 This option would maintain certainty for owners and users with respect to the current fair dealing provisions. In addition, it would make lawful some specified forms of private copying (such as time-shifting and format-shifting) by users and ensure compensation is paid to copyright owners. It may be possible under the three-step test for a statutory licence scheme to permit a wider range of private copying than

could be allowed under one or more exception that does not compensate the copyright owners.

14.13 However, there are significant difficulties connected with the operation of private copying schemes (see para 12.6). In particular, there would need to be a practical solution to the problem of giving copyright users legal means to make permitted copies of material protected by technological protection measures applied by copyright owners. There also may be problems with administration of a scheme.

14.14 This option also would not allow a court to decide whether a new or minor use should qualify as a fair use, particularly where the use is other than private copying. As at present, Parliament would be required to review and update the Act in response to future uses to which technological developments may give rise.

Option 5 – other combinations or alternatives

14.15 The Government seeks your views on combinations of these options or any other options for implementing reform with respect to exceptions.

The Government seeks your view as to options for implementing reform, and the costs and benefits of those options.
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15. Issues for consideration in submissions

Your views are sought on the following issues.

1. The Government seeks your view on the operation of the exceptions in the Copyright Act (particularly the fair dealing exceptions in ss 40-43(2) and ss103A-103C) in providing a balance between the interests of copyright owners and copyright users.
2. The Government seeks your view on whether the Copyright Act should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?
3. The Government seeks your view on whether the Copyright Act should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.
4. The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances - and if so, under what conditions.
5. The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.
6. The Government seeks your view on whether the Copyright Act should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.
7. The Government seeks your view on whether the Copyright Act should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances
8. The Government seeks your view on whether the Copyright Act should be amended to include other specific exceptions or statutory licences, and if so, under what conditions.
9. The Government seeks your view on other options for implementing reform, and the costs and benefits of those options.
10. The Government seeks your view on any other matters arising out of this Issues Paper.

Submissions

Submissions are invited from interested parties on the matters covered in this paper. Submissions are also invited to address any other relevant issues not specifically addressed in the paper.

Submissions should be made by **1 July 2005** and should be addressed to:

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

It would be appreciated if submissions could be provided electronically. Submissions should be emailed to michelle.tippett@ag.gov.au. Questions concerning this review may be directed to Norman Bowman by email at norman.bowman@ag.gov.au or by telephone 02 6250 6324, or facsimile 02 6250 5929.

Submissions may be made public on the Attorney-General Department's website unless otherwise specified. Persons providing a submission should indicate whether any part of the content should not be disclosed to the public. Where confidentiality is requested, submitters are encouraged to provide a public version that can be made available.

Attachment A - Table of exceptions and statutory licences

Note: this table is a revised version of an appendix to the CLRC Copyright and Contracts Report.

Section	Exception	Historical / Policy Justification
	FAIR DEALING	The concept of fair dealing has evolved as an integral part of copyright as understood in the common law tradition.
ss 40, 103C	Research or study	<p>Introduced as a ‘matter of principle’, in terms of promoting the public interest in a free flow of information in education and research.</p> <p>The 1980 amendments were influenced by the Franki Report and removed the limitation on copying for private study so as to facilitate education generally. The previous distinction between private copying for research and study, and copying for educational purposes was removed on the grounds that it was seen to be artificial and difficult to maintain.</p>
ss 41, 103A	Criticism or review	<p>Policy basis is mainly found in the common law, with ‘fairness’ assessed on the facts of each case.</p> <p>The exception is designed to provide information and comment for possible consumers and audiences. It is considered that copyright owners ordinarily expect to have their works, or parts of them, used for criticism and review.</p>
ss 42, 103B	Reporting news	<p>Policy basis is derived from the case law, which acknowledges:</p> <ul style="list-style-type: none"> - the public interest in promoting the free flow of knowledge, ideas and information; and - the difficulty in protecting only the ‘expression’ and not the underlying information in relation to news.
s 43(2)	Giving professional advice	The exception is designed to facilitate the administration of justice and to assist people to understand their legal rights and obligations.

	<p>COPYING BY LIBRARIES AND ARCHIVES</p>	<p>Initial copying provisions adopted the recommendations of the Spicer Committee. These largely followed similar UK provisions designed to remove the potential for librarians to be held liable for copyright infringement by copying material for alleged fair dealers.</p> <p>These exceptions were also initially introduced to facilitate education and scientific research (including the then need to access specialist research material from overseas) given the geographical constraints to accessing material in Australia.</p> <p>It was considered that access to copyright material would be increased by improving the traditional role of libraries as repositories of copies of research material.</p> <p>The Digital Agenda Act updated the library and archives provisions to allow them, in response to user requests, to copy electronic material, reproduce hard copy material in electronic form, and to communicate electronic material forming part of the library's and archive's collection. These amendments are seen to allow the use of new technology to provide the general community with access to copyright material without unreasonably prejudicing copyright owners.</p>
ss 48A, 104A	Copying by Parliamentary Libraries for MPs	Public interest in having an informed political process.
s 49	Reproducing and communicating works for: Users for research and study (user requests)	In order to ensure that research and education are not unduly hampered, it was considered logical to extend the permission granted to a student to make a fair dealing copy of a work to a librarian acting on a student's behalf.
s 50	For other libraries or	The exception was justified on practical grounds.

	archives (inter-library copying for document supply)	The Franki Committee argued that Australia's geographical constraints made the lending of books and periodicals (via inter-library loans) impractical on cost and efficiency grounds.
s 51 s 110A	Reproducing/ communication of old unpublished works, films or sound recordings in libraries or archives	Facilitates scholarly research and dissemination of its results.
s 51AA	Reproducing / communicating works in Australian Archives	Assists in making the Australian Archives' collection more accessible throughout Australia.
ss 51A, 110B	Reproducing / communicating works for preservation and other purposes	Assists in maintaining the collection of a library or archives by enabling replacement of works, films and sound recordings that have deteriorated, or been damaged, lost or stolen.
s 52	Publication of old unpublished works that are kept in libraries or archives and to which s51 applies	The exception acknowledges the potential historical significance of unpublished works and the reasonableness of allowing these works to be used so as to facilitate public dissemination of scholarship and research, where the owners of copyright are not known.
s 53	Extension of exceptions under ss 48A-52 to illustrations that accompany works copied &c	This recognises impracticality of excluding illustrations accompanying works, when copying or communicating the works under the library and archives copying provisions.
	OTHER (TECHNOLOGY BASED) EXCEPTIONS	
ss 43A,	Temporary	Introduced for practical reasons and to ensure that

111A	Reproductions – in course of communications	the technical processes underlying new technologies (such as those occurring unavoidably in the process of viewing, browsing and caching on the Internet), do not jeopardise such access to copyright material.
ss 43B, 111B	Temporary Reproductions – as part of technical process of use	Introduced to ensure that the making of electronic copies of a transitory nature does not jeopardise the normal use of non-infringing material. The exception was added as a consequence of other amendments that provide stronger copyright protection against the making of unauthorised temporary copies.
ss 47AA, 110C	Reproduction for purpose of simulcasting in digital form	Allows broadcasters to comply with requirements under the <i>Broadcasting Services Act 1992</i> that material be simulcast in digital and analogue form as part of the phase-in of digital television in Australia.
s 116A	Permitted purposes exceptions to anti-circumvention sanctions	The exceptions are designed to prevent digital lock-out in certain instances, considered vital to ensuring reasonable access to copyright material in electronic form.
	<i>Computer program exceptions</i>	
s 47B	Reproduction for normal use/study of a computer program	The provision is aimed at ensuring that normal use can be made of computer programs, and facilitating the growth and competitiveness of the computer software industry.
s 47D	Reproduction for making interoperable products (decompilation)	Specifically introduced to maintain the international competitiveness of Australia's software developers.
s 47E	Reproduction for correcting errors	Introduced to ensure that users of software, particularly businesses, could promptly repair malfunctions in vital systems. There was also a particular concern at the time in relation to the

		year 2000 date / Y2K bug problem as a result of which error-free copies of computer programs might not have been readily available.
s 47F	Reproduction for security testing	Security testing is seen as a legitimate activity.
	STATUTORY LICENCES	The justification of each licence differs. In general, statutory licences were introduced as a response to market failure. They are seen as a practical means of remunerating copyright owners, particularly where it is impossible to monitor usage in situations where technology (such as digitisation) has made the reproduction of copyright material easier, cheaper and of better quality. They also provide a practical solution to the inefficiencies and high transaction costs involved in seeking permission from the copyright owner.
ss 47, 70, and 107	Ephemeral reproductions made for the purpose of broadcasting, where the maker is not the broadcaster	Promotes efficiency in broadcast programming.
Part III, Division 6	Recording of musical works	Introduced for historical reasons as the statutory licence was seen as a means of moderating the feared high royalty demands of music copyright owners for consent to the recording of their works.
s 47A	Sound broadcasting of literary and dramatic works by holders of a print disability radio licence	Introduced to assist those with a print disability.

s 108	Public performance of sound recordings	Facilitates access to published sound recording repertoire.
s 109	Broadcasting of sound recordings	Facilitates access by broadcasters to published sound recording repertoire.
Part VA	Off-air copying of broadcasts (including underlying works, films and sound recordings) by educational institutions and institutions assisting persons with an intellectual disability. (S 200AA allows free sound recording of a broadcast – but not any underlying works – by an institution assisting persons with an intellectual disability.)	<p>Designed to provide institutions operating under Part VA with the flexibility to make off-air copies of any television programs for educational purposes without having to seek permission from copyright owners.</p> <p>The Digital Agenda Act introduced amendments to ensure that Part VA was capable of adapting to future technological developments.</p>
Part VB	Copying of works and other subject matter by educational institutions and institutions assisting persons with an intellectual or print disability	<p>Originally introduced to meet the desire of educational institutions to make multiple copies of works for teaching; and to reduce the inefficiencies and high transaction costs involved in individually seeking permission from copyright owners.</p> <p>The Digital Agenda Act introduced amendments to ensure that Part VB was capable of adapting to future technological developments.</p>
Part VC	Retransmission of free-to-air broadcasts	<p>Prior to this amendment, retransmitters (such as pay-television operators) were able to retransmit free-to-air broadcasts without the permission of or payment of remuneration to either the owner of the copyright in the broadcast or the owner(s) of copyright in the underlying works, such as any music, written material or film.</p> <p>The Digital Agenda Act introduced a statutory</p>

		licence scheme to allow owners of copyright in works, films and sound recordings embodied in free-to-air broadcasts to obtain remuneration for the retransmission of the broadcasts.
Part VII, Div 2	Use of copyright material for the services of the Australian and State and Territory governments	Designed to promote the administration of justice and the procedures of government by providing an administratively simple means of remunerating copyright owners.
	MISCELLANEOUS FREE EXCEPTIONS	There is no one underlying rationale for the miscellaneous exceptions and they are not organised in a consistent way throughout the Act
ss 43(1), 104	Acts done for judicial proceedings	These exceptions are designed to facilitate the administration of justice.
	<i>Reproduction and Related Uses</i>	
ss 44B, 112B	Reproduction of writing on approved labels on chemical products containers	Introduced in 1994 as part of Government policy on the marketing of generic agricultural and veterinary chemical products in Australia.
ss 47, 70, 107	Reproduction of works and sound recordings by a broadcaster for purpose of broadcasting	The making of ‘ephemeral’ reproductions of works, the broadcasting of which has been licensed, is expressly recognised in the Berne Convention on copyright as a practical incident of broadcasting.
s 65	Specified reproduction and publication of works in public places: - sculptures and works of artistic craftsmanship	Considered reasonable to allow the making of a painting, drawing, engraving or photograph of these works as it is impractical to control this type of copying. It is also considered reasonable to allow the publication of legitimate reproductions of such works.

s 66	- buildings and models of buildings	
s 68	- publication of legitimate reproductions of artistic works in public places (or films referred to in s 67)	
s 67	Incidental filming or televising of artistic works	It is considered reasonable to allow such inclusion of these works in a cinematograph film or television broadcast, as it is often impractical to control this type of copying.
s 72	Reproduction of part of an artistic work in later artistic work	Designed to accommodate copying of parts of an artistic work by its author in a later work.
s 73(1), (2)	Reconstruction of buildings	Seen as practical to allow the reconstruction of a building.
s 111	Filming and recording broadcasts for private and domestic use	The exception is of limited application as it does not allow home copying of any underlying works included in the broadcast. The exception only extends to the copying of live, extempore broadcasts such as sporting events.
s 112	Reproductions of editions of works	<p>This section allows the reproduction of the whole or part of an edition of a work without infringing copyright in the edition if the reproduction is made in the course of specific dealings with the work that is exempted under the Act (ie, dealings exempted under ss. 40-43, ss. 49-50 and s. 51A and copying of works pursuant to the statutory licences under Part VB and s. 182A).</p> <p>The provision was introduced to provide consistency within the Act, as the above-mentioned exceptions do not apply to published editions.</p>
s 182A	Reproduction of	Allows a single copy of the whole or part of a

	statutory instruments and judgments	prescribed work, such as statutory and judicial material to be made by or on behalf of a person for a particular purpose. This facilitates access to and awareness of the law.
	<i>Performances, transmissions and broadcasts</i>	
s 28	Performance of works or other subject-matter in the course of educational instruction	Facilitates education.
s 45	Reading or recitation of a work in public or for a broadcast with sufficient acknowledgment	To assist in the public dissemination of information.
s 46	Performance of literary, dramatic or musical works at premises where persons reside or sleep	The Spicer Committee concluded that it is logical to allow this type of exception in situations where the type of performance given in a guesthouse is similar to the performance that a person might receive in their own home.
s 106	Causing sound recording to be heard at a guest house or club	As above. However, the exception under s. 106(2)(b) does not apply to performances for which an entry fee is charged, and is limited to non-profit organisations whose principal objects are charitable or are concerned with the advancement of religion, education or social welfare.
s 199(1)	Playing/showing in public of broadcasts of literary/dramatic works	See s 45 above.
s 105	Public performance	Aims to prevent performing and broadcasting

	and broadcasting of sound recordings that originate overseas	rights being extended to foreign-origin sound recordings that were first published in Australia.
s 199(2)	Public performance of sound recordings by playing/showing of broadcast in public	Exemption was recommended by the Spicer Committee.
s 110(1), (2)	Public performance of old news films; and public performance of works contained in old films	Promotes public access to film footage of historical events. It also ensures that where the exception allows the public showing of a film, the copyright in underlying works, such as speeches and music, is not infringed
	OTHER USES	
s 110(3)	Use of sound recording made simultaneously with film soundtrack	Ensures that playing in public of such sound recording does not infringe copyright in the film.
s 44(1)	Inclusion of short extracts of copyright works in print or audiovisual collections for use in education	Designed to facilitate education. The exception is heavily circumscribed, and has been partly superseded by the introduction of s. 135ZG which allows institutions under the Part VB statutory licence to make copies of short extracts of works for inclusion in materials to be distributed to students.
s 200(1), (2) & (2A)	Use of works and broadcasts for educational purposes	To assist in educational instruction.
ss 44A, C, D, E & F ss 112A, C, D & DA	Importation of infringing articles: - books and published editions (ss. 44A & 112A)	These are exceptions to indirect infringement of copyright consisting of acts done in relation to an article that is an infringing article rather than the doing, or the authorisation of the doing, of an act comprised in the copyright. Therefore, these provisions are not true exceptions to the exclusive

	<ul style="list-style-type: none"> - accessories to imported articles (ss. 44C & 112C) - sound recordings (ss. 44D & 112D) - computer programs (s 44E) - electronic literary or music items (ss 44F & 112DA) 	<p>rights of copyright owners arising under s. 31(1) (works) and ss. 85-88 (subject-matter other than works). Rather, they provide a defence to actions under ss. 37 and 102 which state that copyright in works and subject-matter other than works will be infringed by the importation of an article into Australia without the licence of the copyright owner.</p>
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Attachment B – Australia-United States Free Trade Agreement

Art. 17.4.7 – circumvention of effective technological measures

7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:
- (i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or
 - (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
 - (A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
 - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
 - (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,
- shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.
- (b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.
- (c) In implementing sub-paragraph (a), neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing sub-paragraph (a).

- (d) Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.
- (e) Each Party shall confine exceptions to any measures implementing sub-paragraph (a) to the following activities, which shall be applied to relevant measures in accordance with sub-paragraph (f):
 - (i) non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
 - (ii) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorisation for such activities, to the extent necessary for the sole purpose of identifying and analysing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
 - (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing sub-paragraph (a)(ii);
 - (iv) non-infringing good faith activities that are authorised by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;
 - (v) non-infringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;
 - (vi) lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes;

- (vii) access by a non-profit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and
 - (viii) non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.
- (f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (e) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:
- (i) any measures implementing sub-paragraph (a)(i) may be subject to exceptions with respect to each activity set forth in sub-paragraph (e);
 - (ii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions with respect to activities set forth in sub-paragraph (e)(i), (ii), (iii), (iv), and (vi); and
 - (iii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that protect any copyright, may be subject to exceptions with respect to the activities set forth in sub-paragraph (e)(i) and (vi).

References

¹ The Copyright Act can be found at <http://scaleplus.law.gov.au/html/pasteact/0/244/top.htm>.

³ Copyright Law Committee on Reprographic Reproduction 1976, - referred to as the Franki Committee

⁴ Review of intellectual property legislation under the Competition Principles Agreement – September 2000 – Final report by the Intellectual Property and Competition Review Committee

⁵ See Senate Select Committee Final Report at

http://www.aph.gov.au/Senate/committee/fretrade_ctte/report/final/index.htm.

⁶ <http://www.copyright.gov/fls/fl102.html>

⁷ *Copyright Amendment (Digital Agenda) Act 2000*

⁸ http://agnet.ag.gov.au/agd/WWW/clrHome.nsf/Page/Overview_Reports_Copyright_and_Contract

⁹ http://www.med.govt.nz/buslt/int_prop/digital/position/index.html

¹⁰ <http://www.copyright.gov/docs/regstat072204.html>

¹¹ http://www.med.govt.nz/buslt/int_prop/digital/position/position-08.html#P368_100583

¹² <http://www.aph.gov.au/house/committee/laca/copyrighthenforcement/contents.htm>