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More Convenient Copyright? The Copyright Amendment Act 2006

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"Copyright legislation now is a bugger's muddle as far as the ordinary citizen is concerned."

- The Hon. Duncan Kerr, Labor MP for Denison¹

The above outburst from the Hon. Duncan Kerr did not occur during a heated argument, nor was it said in a radio interview or more informal setting. It occurred during Mr. Kerr's Second Reading Speech regarding the Bill that was to become the *Copyright Amendment Act 2006* (Cth) ("the Act") and it reflects the passionate responses that the passage of this legislation created in not only Parliamentarians, but also lawyers, academics, businesses, educators, not-

for-profit organisations and individuals. Introduced into Parliament on 19th October 2006 by the Attorney General Philip Ruddock,² this legislation will serve to fundamentally change the nature of Australian copyright law and many are not pleased by this prospect.

On its introduction to the Senate, the proposed legislation was referred to the Senate Standing Committee on Legal and Constitutional Affairs for public consultation and inquiry.³ The Committee was given a very limited time period to undertake its inquiry, with a report due by 10 November.⁴ After receiving approximately 74 submissions, holding a day-long public hearing and receiving a brief

extension of time, the Committee released its final report on the proposed provisions on 13 November 2006.⁵

In their report, the Committee made 16 recommendations illustrating both the multiple problems with the drafting of the Act at Bill stage and the serious implications of its provisions.⁶ The Government sought to rectify a number of these concerns and several amendments were made prior to the passing of the Act, although many fear that these changes will not go far enough to eliminate any potential problems.

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Arguably the most controversial draft provisions contained in this 221-page Act that will amend the *Copyright Act 1968* (Cth) were those aimed at implementing Australia's obligations under the Australia-United States Free Trade Agreement (AUSFTA) regarding technological protection measures (TPMs). Initially, most academic and public attention was given to these proposed provisions. Such concern is understandable given the detrimental impact that these proposed sections may have on the ordinary usage of copyright material in Australia.

The Act, however, also introduces new exceptions to infringement of copyright (Schedule 6), responses to the *Digital Agenda* review (Schedule 8), makes a number of amendments to the operation of the Copyright Tribunal (Schedules 10 and 11) and includes a number of new criminal provisions (Schedule 1). As discussion concerning these provisions increased in the legal, academic and general communities, the problems with and implications of these changes were also recognised.⁷

Given the significant scope of the Act, this article will not deal with all the amendments but will instead focus on several provisions with strong connections to technology and law issues: the proposed "time-shifting" and "format-shifting" exceptions. It will discuss these provisions in light of several reviews undertaken by the Government and whether these amendments solve the issues they are intended to address.⁸

Background to the Amendments

These particular amendments were the result of several reviews undertaken by the Federal Attorney General's Department over the last few years. The major review aimed at investigating these specific issues was titled the "Fair Use and Other Copyright Exceptions Review." This review, one of the first in years to discuss strengthening exceptions rather than owner rights, considered whether Australia should implement a US-style "fair use" provision or whether specific exceptions should be introduced.⁹ According to Professor

Brian Fitzgerald, many Australians thought that given the other elements of US law introduced into Australia by the AUSFTA – for example, a copyright term extension and tougher technological protection measure provisions – a "fair-use" provision should also be expected.¹⁰

The review itself was prompted by the fact a number of acts undertaken by Australians for many years – including videotaping television shows and copying legitimately purchased CDs onto personal MP3 players – were still illegal under Australian law.¹¹ This illustrated that many Australian copyright provisions were becoming increasingly out-of-touch with modern personal uses of copyright material.¹² Further, many Australians would probably not have realised that such practices constituted an infringement of copyright and that they could be held liable for such infringement.

An Issues Paper was released in May 2005 and 162 submissions were received from academia, businesses, individuals, legal publishers and other organisations in response.¹³ Despite the number of submissions favouring the introduction of a 'fair use' exception, it became increasingly clear that it was unlikely the Australian public would be given such a broad provision. In May 2006 this was confirmed in a media release from the Attorney General's Department, announcing that specific new exceptions, in addition to several changes to the fair dealing provisions, would be introduced.¹⁴

With this background in mind, this article will now consider the specific provisions identified earlier and their place in the modern Australian copyright landscape.

The "Time-Shifting" Exception

In any conversation concerning copyright today, one question that inevitably arises is "is it legal to put music onto my iPod?" On hearing that it was technically an infringement of copyright, individuals are usually even more stunned to realise that taping television shows to watch at a later time has also not been legal.¹⁵ This is despite the existence of VCRs

in Australia for the last twenty five years and their use for this precise purpose. It is unsurprising that one of the major issues in the 'Fair Use' review was to legalise this "common consumer practice."¹⁶ This practice is generally referred to as "time-shifting", where an individual tapes a television or radio program to usually view or listen to at a later time.¹⁷

Several months prior to the public release of the then-proposed amendments, the Attorney General's Department announced in a press release that a time-shifting exception would be introduced, but with the restriction that individuals would only be able to view or listen to this recording once.¹⁸ It appears that the Attorney General's Department realised how unrealistic such a restriction would be and it was not included in either the *Copyright Amendment Bill* or final Act.

In the *Copyright Amendment Bill*, section 111 was titled "Recording broadcasts for replaying for a more convenient time." It would replace the existing section 111 in the *Copyright Act*, titled "filming or recording broadcasts for private and domestic use". The proposed section stated that it would apply where a person made a "cinematograph or sound recording of a broadcast" in domestic premises and solely for the private use of watching or listening to this recording at a more convenient time compared to the time when the broadcast is made.¹⁹ The term "more convenient time" was not defined in the Bill although Explanatory Material prepared by the Attorney General's Department stated that "the length of a 'convenient time' will depend on the circumstances."²⁰ Section 111(2) then stated that this action will not be an infringement of copyright.²¹

Section 111(3) provided that the above exception would not apply if an "article or thing embodying the film or sound recording" was ever sold, let for hire, by way of trade offered for those purposes, or distributed for the purpose of trade.²² This was obviously aimed at ensuring that this exception would be solely invoked for private copying and the proposed

section 111(4) supported such a suggestion, allowing a loan of the recording within the lender's household to another household member for private and domestic use.²³

A number of changes, however, were made to the time shifting exception before the *Copyright Amendment Act* was passed. The first concerns the terms "domestic premises" and "private and domestic use." In its final report, the Senate Standing Committee on Legal and Constitutional Affairs recommended that subsection 111(1) as it appeared in the *Copyright Amendment Bill* "be re-drafted to make absolutely clear that individual consumers are not restricted to watching and listening to broadcast recordings in their own homes."²⁴ This issue was raised by both the Committee and in the House of Representatives due to fears that the term "private and domestic use" would inhibit legitimate usage of the time-shifted copy outside the home. As the Hon. Nicola Roxon noted:

"What does domestic use mean? Does it mean that there should be some sort of geographic limit – that is, you can only watch it in your own house – or does it really mean that you can only use it for your personal use? Maybe you can take your video to the beach house with you on the weekend and watch it there."²⁵

In response to such a suggestion, both the Hon. Paul Neville and the Attorney General reassured the House of Representatives that material taped inside the home could be used outside of the household residence.²⁶

In addition, in its Supplementary Report to the final report of the Senate Committee, Senators for the Australian Labor Party also recommended that the suggested changes go further, allowing users to create copies outside the home.²⁷

To its credit, the Federal Government sought to formally clarify the situation and introduced several amendments aimed at rectifying these issues prior to the passing of the Act. First, one amendment inserted a new definition of "private and domestic use" to be included in section 10(1) of the *Copyright Act*. This amendment defines "private and domestic use" to mean "private and domestic use *on or*

off domestic premises" (emphasis added).

Second, section 111 was also altered. Subsection 111(1) now states that

"This section applies if a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made."²⁸

The new definition of "private and domestic use" appears to ensure that the changed provision is more permissive.

While the majority of the section remained the same, the Government did make one further amendment to the proposed section 111 before it was passed. Section 111(3) now contains two further subsections. Section 111(3)(e) now states that the time shifting exception will not apply where the "article or thing embodying the film or recording is...used for causing the film or recording to be seen or heard in public."²⁹ Section 111(f) also states that the exception will not apply where the article embodying the film or recording is used for broadcasting the film or recording.³⁰ These changes serve to narrow the exception, aimed at ensuring that time shifted recordings will only be used for personal viewing purposes.

In addition, a number of issues can be raised concerning the new time-shifting exception. First, the wording of this exception is arguably broad enough to allow behaviour that the Government did not envisage should be permitted. For example, there is confusion as to whether the exception unintentionally permits the building of time-shifted collections of television shows. This is arguably not within what the Government intended to permit, given that these actions may affect the after-broadcast markets – specifically any future DVD sales of a television show. A series of "Frequently Asked Questions" released by the Attorney General's Department about these new provisions denies that the provision permits such behaviour.³¹ According to these FAQs, a distinction is drawn between "time-shifting", which is permitted under the provision and "librarying", the type of behaviour

discussed here, which the Government states is not permitted.³²

Second, it must also be questioned whether this exception adequately reflects the current practices of consumers of copyright content in Australia today. Arguably, while it is not perfectly drafted, this section does address what Australians have been doing for the last twenty-five years – although whether it is sufficiently well-drafted to address what may be occurring in twenty-five years time is another question entirely. The Attorney General's Department appears to have gone as far as it felt permissible to protect consumer behaviour but also to ensure that this exception would not detrimentally impact upon copyright owners. However, given the issues identified above, it is questionable whether it achieves any significant progress for either group.

The "Format-Shifting" Exceptions

While only one exception has been drafted in relation to time-shifting, there have been several "format-shifting" exceptions included in the Act. Rather than include one general format-shifting exception, each provision is specifically defined to a cover a certain type of format and copying. The Act contains four format-shifting provisions:

- Reproducing works in books, newspapers and periodicals in a different format for private use³³
- Reproducing a photograph in a different format for private use³⁴
- Copying a sound recording in a different format for private use;³⁵ and
- Copying a cinematograph film in a different format for private use.³⁶

The exception that will arguably concern most Australians will be the third exception, regarding the copying of sound recordings and it will be the focus of discussion here. This exception went through a variety of changes from the initial version in the *Copyright Amendment Bill* to its final appearance in the *Copyright Amendment Act*.

When it was first released, the proposed section 109A was divided into seven subsections. First, it was stated that this section would apply if

the owner of a sound recording made a copy of a record embodying this recording, defined as the "main copy", for private and domestic use.³⁷ This record must not have been made via an Internet download and the original record must not have been an infringing copy.³⁸

Section 109A(1)(d) and (e) then stated that the main copy format must differ from the original record and at the time the owner is making the copy he or she must not have made or is not making another copy.³⁹ Section 109A(2) further provided the actual exception; the making of this main copy would not constitute an infringement of copyright.⁴⁰ The remaining sections then sought to clarify when the exception would and would not apply.

Both critics of the *Copyright Amendment Bill* and the Senate Standing Committee on Legal and Constitutional Affairs, however, argued that the drafting of this proposed provision would not have as broad effect as it was intended. It was suggested that the use of certain technologies, including the much-lauded, crowd-pleasing iPod – would not be permitted under this exception as it was currently drafted. It has been rightly noted that the two-step nature of copying a song onto an iPod – first, the song must be uploaded into the iTunes software provided with the iPod, then copied a second time onto the iPod – would be precluded under the proposed exception.⁴¹

This problem was recognised by the Federal Government and the Attorney General in his Second Reading Speech to the *Copyright Amendment Bill* stated that

"there has been some commentary on the technical aspects of the exposure draft of the bill in relation to the format shifting to iPods. That is why the drafts of this bill were made publicly available for comment. The government will listen to and consider comments and make any necessary technical changes to ensure the bill achieves the government's objectives."⁴²

The Committee noted this statement in its final report and commented that it "welcomes this undertaking."⁴³ However, it still made a specific recommendation that Schedule 6 of

the Bill "be amended with respect to format-shifting to specifically recognise and render legitimate the ordinary use by consumers of digital music players."⁴⁴

True to its word, the Attorney General's Department introduced an altered section 109A. Shorter in length to its proposed predecessor, the new section 109A is titled "Copying sound recordings for private and domestic use." Section 109A(1) states that it will apply where the owner of an "earlier" copy of a sound recording makes another, "later" copy of the recording using this earlier copy.⁴⁵ This must be for the sole purpose of making this later copy available, for private and domestic use, on a device that he or she owns and that can be used to hear sound recordings.⁴⁶ This earlier copy must not be a digital recording of a radio broadcast that was downloaded over the Internet and the earlier copy must not be an infringing copy of the recording.⁴⁷

If these requirements are satisfied, it is stated that the exception will apply.⁴⁸ The final two subsections in the Act state where the exception will or will not apply and those that appear in the time shifting exception.⁴⁹

Given that one of the express intentions of the Government, in undertaking its "Fair Use" inquiry was to ensure iPod and MP3 player use in Australia became legal, the existence of this exception achieves such an aim. However, whether the wording of this provision remains relevant in light of changing technologies is another question entirely.

Conclusion

"...And as the Bill in its final form was only seen two weeks ago, I think it is a little unrealistic of the government to expect the opposition, the parliament and the industry to be able to absorb, advise, propose changes and support a bill, all in that time frame."

- The Hon. Nicola Roxon, MP for Gellibrand⁵⁰

Since the turn of the century, it appears that every year the Federal Government has been either discussing, reviewing, or amending the *Copyright Act*. In the majority of cases, these amendments have usually been aimed at strengthening the rights of copyright owners – introducing a

new communication right, moral rights, and a copyright term extension. The exceptions discussed in this article are among the first set of amendments aimed at strengthening the rights of copyright consumers and users. These changes have obviously been a long time coming: VCRs have been in Australia for over twenty five years and format-shifting has also been occurring for many years prior to becoming a Federal Government issue.

The changes discussed in this article are clearly aimed at strengthening user rights – whether these users are ordinary Australians or special groups, for example, educators. Not all amendments contained in the Act are as user-friendly as initially envisaged by commentators. In addition, the impact of the new technological protection measure (TPM) provisions on the proposed time-shifting and format-shifting exceptions has also been questioned.⁵¹ If, for example, a CD is protected by a TPM, then, given that there is no provision that expressly allows for the circumvention of a TPM for these purposes, the CD owner will not be able to legitimately format-shift the contents of the CD.⁵²

Further, whether these proposed provisions actually cure any of the problems identified is another question. The amendments have been drafted in a manner that "will not be easily understood by anyone other than copyright lawyers."⁵³ In an obvious effort to solve this problem, the first recommendation of the Senate Standing Committee on Legal and Constitutional Affairs was that the Federal Government undertake a public campaign and "develop a 'plain English' consumer guide" aimed at educating consumers on their copyright use "rights and obligations."⁵⁴ However, it may be that Australians do not take any notice of these provisions, or only take notice should private copying ever become a litigated issue.

¹ The Hon. Duncan Kerr MP, Second Reading Speech, *House of Representatives Hansard*, 1 November 2006, p. 40.

² See House Bills List, http://parlinfoweb.aph.gov.au/piweb/vicw_docu

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[ment.aspx?ID=1085&TABLE=BILLSLST](#) at 23 November 2006.

³ See Information about the Inquiry, http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/info.htm at 24 November 2006.

⁴ Id.

⁵ See http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/ at 20 November 2006.

⁶ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006), accessible at http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/report/index.htm at 23 November 2006.

⁷ See, for example, Lisa Murray, "Hold Those Phones, Rockers, Soon Your Recordings Will Be A Crime", *The Sydney Morning Herald* (Sydney), 14th November 2006, <http://www.smh.com.au/news/technology/soon-recordings-will-be-a-crime/2006/11/13/1163266483975.html> at 20 November 2006.

⁸ Given that this article will refer to the provisions of both the Copyright Amendment Bill and the *Copyright Amendment Act*, each reference to these provisions will detail whether this is the amendment as it was included in either the Bill or Act to avoid confusion.

⁹ Attorney General's Department, *Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age* (May 2005) [1.1].

¹⁰ Brian Fitzgerald, "Copyright Vision: Copyright Jails" *Online Opinion*, 26 October 2006, <http://www.onlineopinion.com.au/view.asp?article=5068> at 2 January 2007.

¹¹ For a discussion on the "reality of copying", see Kimberlee Weatherall, "A Comment on the Copyright Exceptions Review and Private Copying" (Working Paper No. 14/05, Intellectual Property Research Institute of Australia, University of Melbourne) at [2.1].

¹² *Ibid.* at [2.3].

¹³ See Attorney General's Department – Copyright - *Fair Use and Other Copyright Exceptions* - http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExeption-May2005 at 3 January 2007.

¹⁴ Attorney General's Department, "Major Copyright Reforms Strike Balance" (Media Release 088/2006, 14 May 2006).

¹⁵ See Weatherall, above note 11, at [2.2].

¹⁶ The Hon. Philip Ruddock, *Copyright Amendment Bill 2006* Second Reading Speech, *House of Representatives Hansard*, 19 October 2006, p. 1.

¹⁷ See Attorney General's Department, above note 9, [11.2].

¹⁸ Attorney General's Department, above note 14.

¹⁹ The proposed section 111(1), as it appeared in the Copyright Amendment Bill 2006 (Cth).

²⁰ Attorney General's Department, *Copyright Amendment Bill 2006: Explanatory Material for Exceptions and other Digital Agenda review measures*, September 2006, p.3, <http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/RWPCC1088C809F10F7ACA2571E800095372> viewed 26 October 2006.

²¹ The proposed section 111(2), as it appeared in the Copyright Amendment Bill 2006 (Cth).

²² The proposed section 111(3), as it appeared in the Copyright Amendment Bill 2006 (Cth).

²³ The proposed section 111(4), as it appeared in the Copyright Amendment Bill 2006 (Cth).

²⁴ See Recommendation 4, Senate Standing Committee on Legal and Constitutional Affairs, above note 6, [3.147].

²⁵ The Hon. Nicola Roxon MP, Second Reading Speech, *House of Representatives Hansard*, 1 November 2006, p.32.

²⁶ The Hon Paul Neville MP, Second Reading Speech, *House of Representatives Hansard*, 1 November 2006, p. 38; the Hon. Philip Ruddock MP, Second Reading Speech, *House of Representatives Hansard*, 1 November 2006, p. 48.

²⁷ Supplementary Report by the Australian Labor Party, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Copyright Amendment Bill 2006 [Provisions]* (2006) [1.11].

²⁸ Section 111(1), as it appears in the *Copyright Amendment Act 2006* (Cth).

²⁹ Section 111(3)(e), as it appears in the *Copyright Amendment Act 2006* (Cth).

³⁰ Section 111(3)(f), as it appears in the *Copyright Amendment Act 2006* (Cth).

³¹ Attorney General's Department, "Copyright Amendment Bill – Frequently Asked Questions", <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWPC7B0742318EF6A58CA25723B008145FC> at 31 December 2006.

³² Id.

³³ Section 43C, as it appears in the *Copyright Amendment Act 2006* (Cth).

³⁴ Section 47J, as it appears in the *Copyright Amendment Act 2006* (Cth).

³⁵ Section 109A, as it appears in the *Copyright Amendment Act 2006* (Cth).

³⁶ Section 110AA, as it appears in the *Copyright Amendment Act 2006* (Cth).

³⁷ Proposed section 109A(1)(a) as it appeared in the Copyright Amendment Bill 2006 (Cth).

³⁸ Proposed subsections 109A(1)(b) and (c) as they appeared in the *Copyright Amendment Bill 2006*.

³⁹ Proposed subsections 109A(1)(d) and (e) as they appeared in the Copyright Amendment Bill 2006 (Cth).

⁴⁰ Proposed section 109A(2) as it appeared in the Copyright Amendment Bill 2006 (Cth).

⁴¹ Kim Weatherall, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Copyright Amendment Bill 2006*, Submission 54, http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sublist.htm at 20 November 2006, at [2].

⁴² Ruddock, above note 16, at p. 1 -2.

⁴³ Senate Standing Committee on Legal and Constitutional Affairs, above note 6, at [3.57].

⁴⁴ *Ibid.*, Recommendation 5 at [3.148].

⁴⁵ Section 109A(1)(a) as it appears in the *Copyright Amendment Act 2006* (Cth).

⁴⁶ Section 109A(1)(b) as it appears in the *Copyright Amendment Act 2006* (Cth).

⁴⁷ Sections 109(c) and (d) as they appear in the *Copyright Amendment Act 2006* (Cth).

⁴⁸ See section 109A(2) as it appears in the *Copyright Amendment Act 2006* (Cth).

⁴⁹ See sections 109A(3) and (4), as they appear in the *Copyright Amendment Act 2006* (Cth).

⁵⁰ Roxon, above note 25, p. 29.

⁵¹ See Nicole Birman, "The New 'Private Use' Exceptions to Copyright: Will the Government's Proposed Exceptions Have Their Intended Effect?" (2006) 19(4) *Australian Intellectual Property Law Bulletin* 56.

⁵² *Ibid.*, 58.

⁵³ Fitzgerald, above note 10.

⁵⁴ Recommendation 1, Senate Standing Committee on Legal and Constitutional Affairs, above note 6, at [3.144].