

the Arts, "Selling ICT to Government: A guide for SMEs" (2003) at 65

Management- Issues Paper: AIIA's Response" (2005) at 3- 4

Management Issues Paper" (2005) at paragraph 21

⁵⁷ Australian Information Industry Association, "A Whole of Government Approach to IP

⁵⁸ See Attorney-General's Department, "A Whole of Government Approach to IP

⁵⁹ Senator Coonan, "Connecting an Innovative Australia ICT Policy Launch" (2004) available at www.dcita.gov.au/newsroom

iPod Therefore I Infringe... And Therefore Should Be Taxed?

Catherine Bond

Catherine Bond recently completed a double degree in Media and Law (Hons 1) at Macquarie University. Catherine has a particular interest in IP and IT law and she recently took part in the John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law, Chicago, where she and her team mate, Eli Ball won the Ambassador Round.

It is undeniable that modern Australians have the capacity to infringe copyright in a number of ways, whether by photocopying books, copying a CD from a friend, or downloading the latest episode of a favourite television show from a website on the Internet. Over the last few years, the success of one white, light, and small object has caused a re-think of the way academics, businesses, consumers and the government think about copyright infringement: the Apple iPod.

It is becoming increasingly rare for a day to pass without one seeing iPod related goods, an iPod competition, or an iPod advertisement. According to *The Age*, the iPod accounts for more than 70% of the global market for MP3 players,¹ although there have been higher estimates. The iPod explosion occurred in Australia between 2004 and 2005: in the first quarter of 2004 23,000 units were sold, jumping to more than 330,000 units in the same quarter of 2005.² The introduction of the video iPod and the sleek iPod nano will ensure its continuing popularity.

There is, however, a dark side to the iPod – the increasing problem of copyright infringement of musical works.

Digital Music Players and Copyright Infringement

The development and global distribution of increasingly sophisticated technologies are allowing a variety of works and subject matter other than works to be converted into digital forms and be

stored on computers and the Internet. The problem is not limited to iPods and it would be unfair to place the blame entirely on this tiny MP3 player. However, when a person purchases an iPod, with a 20GB memory that can hold up to 10,000 songs, the question must be asked where are those songs coming from. The iTunes Music Store, where users can purchase songs and obtain the legal right to use that song in a number of different formats, was not available in Australia until October 2005. Certainly, a person could produce his or her own original music or obtain the legal right to copy music onto his or her iPod, but the reality is that most of the songs on iPods and other MP3 players are from regular compact discs.³

This is known as "format-shifting" or "space-shifting" – the practice of "copying material from one format to another."⁴ This should not come as a huge surprise to anyone – even Apple has admitted that it has "no doubt" most music on iPods is "placed there through format-shifting."⁵ This practice is also an act of copyright infringement and there is currently no defence or exception in the *Copyright Act 1968* (Cth) that legitimises this type of copying. The Australian Federal Government is definitely aware of this issue,⁶ however, rather than condemning the practice, the Attorney-General, Philip Ruddock, has commented that "individuals who acquire legitimate copyright products should be able to reasonably use them for their own purposes without infringing the law,"⁷ and he includes

format-shifting as a reasonable use that does not harm copyright owners.⁸

The issue then becomes both about how users can obtain the legal right to copy tracks and how the copyright owners should be remunerated for this use. Copyright is granted as an incentive,⁹ both economic and creative, for creators to make, among other types, musical works. It is both an unfair and unsatisfying response that this and future generations of musicians should be deprived of their economic right to reproduction because technology has developed so as to allow mainstream society to indulge in private copying – meaning copying for a non-commercial use¹⁰ – on a massive scale. The question then becomes how we can ensure artists and record companies receive the remuneration their rights dictate they should receive. The answer, in a number of countries, has been the "iPod tax".

The "iPod Tax"

The "iPod tax" is a levy aimed at compensating recording artists and the music industry for any lost revenue resulting from the increasing production and use of digital music players and other technological devices.¹¹ Despite the name, as the money collected goes to artists, recording companies and composers, it is "technically not a tax."¹² In a number of countries, for example, Canada, this levy has been introduced to coincide with a relaxation of copyright laws that now allow for individuals to legally copy music for private purposes.¹³ The levy is usually

attached to the sale price of an iPod or similar MP3 player and the amount of the levy often depends on the storage capacity of the iPod. Holland was one of the first European countries to consider implementing the "iPod tax" and the introduction had the effect of adding about 180 euros (approximately A\$300) to some iPod models.¹⁴

As with any proposal, there are a number of advantages and a number of disadvantages to introducing an "iPod tax" in Australia. The first is that the "tax" could be introduced as a licence fee under a statutory licensing scheme that would make private copying legal, or, alternatively, to compensate artists if a specific exception was introduced into the *Copyright Act* excluding this conduct as an infringement of copyright.¹⁵ This in turn leads to the second advantage, that if a levy was imposed at least recording artists would be receiving compensation for the revenue that has been lost with the creation of the new technology.¹⁶

It is arguable, however, that the disadvantages of the 'iPod tax' outweigh any advantages. First, even if a tax were imposed on iPods, copyright owners could still attach technological protection measures to songs, restricting the copying of the material and thus the iPod purchaser would have wasted his or her money.¹⁷ Second, attaching a tax to iPods now may be a little redundant, following the opening of the Australian iTunes Music Store.

When a user purchases an iPod, he or she receives a CD containing both iPod and iTunes software. It is this iTunes software that stores and organises the music of the user and, on connection to the Internet, launches the iTunes Music Store, an online "store" where both the individual songs and albums of artists can be purchased.¹⁸ In addition to music, an iTunes Music Store user can also purchase videos and Podcasts. The iTunes Music Store is the major seller of legal music on the Internet and globally has sold over 1 billion songs.¹⁹ Thus, with the introduction of the iTunes Music Store, it is now perfectly possible to purchase an iPod and never need to engage in private

copying, by filling an iPod with this legally purchased music.

It could be suggested that introducing an iPod tax now, following the opening of this online Music Store, is a little redundant, when private copying, over the next few years may decrease given an iPod user now has a perfectly legal way to fill his or her iPod. It would also be unfair if a levy was introduced, for iPod users may only ever play music legally acquired from the iTunes Music Store, for only \$1.69 a song.²⁰ Thus, as has been noted in a Canadian context, the price for private copying is "arguably borne, in part, by persons who do not private copy."²¹

Feedback in the global context

Globally, the "iPod tax" has received as much criticism as it has praise. In the United Kingdom major music labels Sony and EMI refused to support the tax, whereas the former head of BMG, Doug D'Arcy openly supported it.²² D'Arcy placed particular reliance on the argument that, as there is no way to "effectively police" music piracy, "charging consumers up front for something they are going to do anyway" may be the best solution.²³ In Japan, where levies have already been introduced on a number of recording devices, a Cultural Affairs Agency subcommittee refused to introduce the tax on iPods and other MP3 players after failing to reach agreement as to its implementation.²⁴

In Canada, the introduction of an "iPod tax" received judicial attention. Under Part VIII of the Canadian *Copyright Act*,²⁵ an individual can legally copy recorded music for private use.²⁶ Part VIII also provides that copyright owners are entitled to remuneration for the economic loss incurred by this practice and the Act imposes levy on media used to record music.²⁷ In the 2003-2004 period, the Canadian Copyright Board considered whether the *memories* in digital audio recorders, and not the digital audio recorders themselves, should be subject to levy.²⁸ The Board found that the memories contained in these devices satisfied the statutory definition of a "blank audio recording medium" and a levy should be imposed on this memory.²⁹ This meant

that the *memory* in Canadian iPods was now subject to a levy.

Not surprisingly, a number of parties chose to appeal this levy decision of the Copyright Board, culminating in the case *Canadian Private Copying Collective v. Canadian Storage Media Alliance*.³⁰ Three different applications were eventually brought before the Canadian Federal Court of Appeal, with Apple Canada Inc. appearing as one of the applicants in two of the appeals. The levy was objected to on a number of grounds, including claims that it and Part VIII generally were unconstitutional and that, in any event, Part VIII did not extend to the *memory* embedded in MP3 players.

In his judgement Noël JA rejected the first argument that the levy and Part VIII were unconstitutional.³¹ However, His Honour did find in favour of joint applicants Apple Canada Inc, Dell Computer, Hewlett Packard and Intel Corporation on the memory issue, accepting their argument that "the embedded memory becomes integrated in, and inseparable from this device and thus loses its separate identity."³² Noël JA stated that it was impossible to impose a levy on the memory of these devices if the devices themselves did not meet the statutory definition.³³

His Honour, however, did note:

"One can readily understand why the Board wanted to go as far as it could to bring MP3 players within the ambit of Part VIII. The evidence establishes that these recorders allow for extensive private copying by individuals. Their use can potentially inflict on rights holders harm beyond any 'blank audio recording medium' as this phrase has been understood to date. However, as desirable as bringing such devices within the ambit of Part VIII might seem, the authority for doing so still has to be found in the Act."³⁴

In light of these arguments and the international response to the "iPod tax" it appears that it would be unwise for the Australian government to introduce an "iPod tax" at this point in time. However, the issue still remains that Australian copyright law is out of touch with the reality of private

copying and a solution must be found. According to the Attorney-General's Department, this solution may lie in the introduction of a number of exceptions to the *Copyright Act*.

Other Possibilities: The Introduction of a 'Fair Use' Exception or Defence

The Attorney General's department is currently undertaking a review of the copyright exceptions and has identified a number of options that would legitimise private copying. The review was welcome given the current exceptions in the *Copyright Act* are limited in both their number and nature. The relevant exceptions in the *Copyright Act* are termed "fair dealing" exceptions and allow the use of copyright works for the specific purposes of research or study, criticism or review, reporting news and giving professional advice.³⁵ This is similar to the legislation in a number of countries, including New Zealand, India and South Africa.³⁶ Several exceptions exist, but none would cover the actions of the private copying of an individual.

One of the purposes of the Attorney General's review is to determine the best means of introducing such an exception, or whether a general "fair use" provision, similar to the fair use exception existing in section 107 of the United States *Copyright Act 1976*, should be introduced.³⁷ In its Issues Paper, the Attorney General's Department identified four options for implementing reform to the *Copyright Act* that would all legalise private copying. These four options are:

- Consolidate the fair dealing exceptions in a single, open-ended provision; or
- Retain the current fair dealing provisions and add an open-ended fair use exception; or
- Retain current fair dealing exceptions and add further specific exceptions; or
- Retain current fair dealing exceptions and add a statutory licence that permits private copying of copyright material.³⁸

The Attorney General also noted it was open to any other options that it had not suggested.³⁹ A number of

interested parties, including the Australian Copyright Council, the Australian Record Industry Association (ARIA), and Apple Computer Inc. and Apple Computer Australia Pty Ltd made submissions in response to the Issues Paper. In its submission, Apple supports the introduction of a general fair use defence proposed in the past in recommendations of the Copyright Law Review Committee, but with reservations.⁴⁰ Further, Apple also "presses for a specific defence permitting private and domestic copying of lawfully acquired copyright material."⁴¹

While a full analysis of the various advantages and disadvantages of the introduction of a fair use defence or specific exception are beyond the scope of this paper, a number of points must be considered. In both cases, there are strong arguments proposed by both advocates and critics. Commentators who support the introduction of a fair use defence state that its main advantage is that it "remains a highly flexible instrument."⁴² Flexibility is certainly an attractive feature, given the defence could be used for both private copying and other copyright issues. It would also ensure technology neutrality. However, critics of the regime point out, that such flexibility in turn can mean "pervasive unpredictability."⁴³ This is an equally strong argument and one identified by the Attorney General's Department in its Issues Paper.⁴⁴ We cannot be sure that a court would be as forgiving of private copying as other parties tend to be. The introduction of a fair use, or similar style defence, however, does seem to be the preferred route for the Attorney General on this issue.⁴⁵

Conclusion

The Attorney-General Department's review is still in early stages but it is clear that before the year is out there may be some notable changes introduced to the *Copyright Act*. It is the opinion of this author that changes to Australian copyright laws, rather than the introduction of an "iPod tax", is the best method of dealing with the problem of private copying. On this issue, it seems that the Attorney General, the music industry, Apple and consumers are united: copying

done for personal use should be legal. It is the means to this end that must be determined, and that process is well under way.

¹ "Japan Abandons 'iPod Tax' Idea" *The Age* (Melbourne), 2nd December 2005 <<http://www.theage.com.au/news/breaking/japan-abandons-ipod-tax-idea/2005/12/01/1133311151953.html>> at 25 February 2006.

² Kimberlee Weatherall, "A Comment on the Copyright Exceptions Review and Private Copying" (Working Paper No. 14/05, Intellectual Property Research Institute of Australia, The University of Melbourne, 2005) 5.

³ Id.

⁴ 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) [11.8]

⁵ Apple Computer Inc. and Apple Computer Australia Pty Ltd, *Submission to the Attorney-General's Department In Response to the Fair Use and Other Copyright Exceptions Issues Paper Dated May 2005*, June 2005, accessible at the Attorney-General's Department website, <http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_2005_Copyright_-_Review_of_Fair_Use_exception> last accessed 15 February 2006 [2].

⁶ Attorney General's Department, above note 4, Foreword.

⁷ The Attorney-General Philip Ruddock, 'Opening Address - Copyright Law and Practice Symposium' (Speech delivered at the Copyright Law and Practice Symposium, Sydney, 17 November 2005).

⁸ Id.

⁹ Adeep Segkar, "Is A General Fair Use Defence Required In The Digital Age?" (2005) 8(6) *Internet Law Bulletin* 77.

¹⁰ Katerina Gaita and Andrew F. Christie, "Principle or Compromise? Understanding the Original Thinking Behind Statutory Licence and Levy Schemes for Private Copying" (2004) 4 *Intellectual Property Quarterly* 422, 423.

¹¹ Louisa Hearn, "iPod Tax Plan On The Backburner" *The Sydney Morning Herald* (Sydney), 10th January 2005 <www.smh.com.au/news/breaking/ipod-tax-plan-on-the-backburner/2006/01/10/1136851195434.html> at 25 February 2006.

¹² Above note 1.

¹³ Id.

¹⁴ Iain S Bruce, "Pressure Mounts For 'iPod Tax' To Pay For Pirate Tunes", *Sunday Herald* (Scotland), 15th May 2005 <<http://www.sundayherald.com/49768>> at 25 February 2006.

¹⁵ Attorney-General's Department, above note 4, [12.6].

¹⁶ Id.

- ¹⁷ Id.
- ¹⁸ iTunes Overview, <www.apple.com.au/itunes/overview> at 25 February 2006.
- ¹⁹ Daniel Ziffer, "Sounds Like Success, iTunes Sells 1bn Songs" *The Sydney Morning Herald* (Sydney), 25 February 2006 <<http://www.smh.com.au/articles/2006/02/24/1140670269361.html>> at 26 February 2006.
- ²⁰ Purchasing a song from the online iTunes Music Store gives the buyer both the right to play the song on his or her iPod, but create playlists using that song, burning that playlist to a CD seven times, and the ability to play the song on five different authorised computers. See iTunes Overview, above note 18.
- ²¹ *Canadian Private Copying Collective v. Canadian Storage Media Alliance* (2004) FCA 424, 460.
- ²² Bruce, above note 14.
- ²³ Id.
- ²⁴ 'Plan for iPod Tax Unravels', *The New York Times* (New York), 2 December 2005, <<http://www.nytimes.com/2005/12/02/technology/02ipod.html?ex=1291179600&en=97c916b221cc2fc1&ej=5090>> at 25 February 2006.
- ²⁵ *Copyright Act R.S.C 1985 c. C-42*
- ²⁶ Ibid, s 80(1)
- ²⁷ Ibid, ss 81, 82
- ²⁸ (2004) FCA 424, 432.
- ²⁹ Ibid, 433.
- ³⁰ (2004) FCA 424.
- ³¹ Ibid, 496.
- ³² Ibid, 567.
- ³³ Ibid, 572.
- ³⁴ Ibid, 577.
- ³⁵ See ss 40, 41, 42, 43(2), 103C, 103A and 103B *Copyright Act 1968* (Cth)
- ³⁶ Alison Coleman & Robert Burrell, *Copyright Exceptions: The Digital Impact* (2005, Cambridge University Press, New York) 249.
- ³⁷ Attorney-General's Department, above note 4, [7.12].
- ³⁸ Attorney-General's Department, above note 4, generally Chapter 14.
- ³⁹ Id.
- ⁴⁰ Apple Computer Inc. and Apple Computer Australia Pty Ltd, above note 5, [1.3].
- ⁴¹ Id.
- ⁴² Coleman and Burrell, above note 36, 249 – 250.
- ⁴³ Ibid, 250.
- ⁴⁴ Attorney-General's Department, above note 4, [13.2].
- ⁴⁵ Hearn, above note 11.

MELBOURNE LAW SCHOOL

Communications Law

Melbourne Law School is at the forefront of providing innovative and exciting opportunities for studying law relating to the media, communications and technology industries.

Forthcoming subjects include:

- **Privacy, Celebrity and the Media:** 5 - 11 April (excluding weekend) - rare chance to study with a leading international expert on the development of privacy law as it affects the media.
- **Film and Television Law: Production Distribution and Financing:** 15 - 19 May

Specialist subjects are available for credit to masters degrees and the Graduate Diploma in Communications Law, and may also be taken as single subjects (on an audit basis or with assessment).

Master of e-Law and Graduate Diploma in e-Business Law also offered. Courses are open to graduates in law and other disciplines.

For further information

Graduate Administration Office

Tel: +61 3 8344 6190

Email: law-postgrad@unimelb.edu.au

<http://graduate.law.unimelb.edu.au>

