

Submission by The Nine Network and The Seven Network

In response to the Attorney-General's Department

Fair Use and Other Copyright Exceptions

An examination of fair use, fair dealing and other exceptions

in the Digital Age Issues Paper

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EXECUTIVE SUMMARY

The rapid uptake of digital broadcast recording devices and the capacity of the internet to be used as an unauthorised distribution channel for programs has created an environment in which the prevention of copyright infringement is both increasingly difficult and increasingly essential.

The Networks understand there is widespread private copying which is somewhat out of step with the existing legal position. However, in particular at this time, where there are rapid developments in the technology of copyright infringement and copyright protection, the Networks are strongly opposed to any changes to the Act which could weaken the legal rights afforded to those who have made significant investments in copyright material.

It is fundamental to the free-to-air business model that broadcasters are able to protect their ability to attract quality programming and their ability to aggregate audiences. A weakening of those rights will have a negative commercial impact on the Networks and other copyright owners.

The Networks believe that the existing fair dealing exceptions in the Copyright Act represent an appropriate balance between the interests of copyright owners and those who have a legitimate basis for using copyright material without consent and to the extent possible give a degree of certainty about what uses are permitted.

The introduction of a broad US style fair use provision to replace (or supplement) the existing fair dealing provisions would have very serious negative consequences for copyright owners in Australia.

Further, the Networks believe that the US fair use doctrine and the concept of time shifting is misunderstood by proponents of their introduction in Australia (who generally rely on the US decision in the *Sany* case).

Indeed, after the *Grakster* decision, it is clear that even in the US it cannot be said that people have an unqualified right to copy programs broadcast on free-to-air television for private use.

The introduction of a new open-ended provision or the expansion of rights to make copies for private use ('time-shifting' and/or 'format shifting') will make copyright enforcement more difficult and more costly at a time when broadcasters are having to deal with an online TV piracy epidemic. In addition, the introduction of any such provision will inevitably lead to great uncertainty in the short and medium terms.

The Networks are also concerned that any shift towards permitting home copying of programs, especially in the digital context will only encourage the culture of infringement to the detriment of the Networks and other copyright owners.

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1. INTRODUCTION

The Nine Network and The Seven Network appreciate the opportunity to provide this submission in response to the Fair Use Issues Paper.

Both networks produce substantial Australian content for broadcast in Australia and for licence to other territories. The Networks' primary market is the free-to-air broadcast audience through which the Networks obtain revenue from advertising associated with broadcasts of commercials. Increasingly there are secondary markets for programs either developed by the Networks or licensed from overseas copyright owners. Program distribution through DVD or licensing rights in program material to overseas broadcasters represent important secondary markets for free-to-air broadcasters to recoup investment in programs.

Broadcasters are owners of content and copyright in broadcasts and have interests in the use of that content by other broadcasters and the reciprocal interest in using material from other broadcasters and other information providers.

1.1 Threats faced by broadcasters

Free-to-air television broadcasters face increasing challenges brought about by the rapid uptake of digital broadcast recording devices and the capacity of the internet to be used as an unauthorised distribution channel for programs.

Digital broadcasting combined with digital recording equipment raises the real concern that consumers will have unlimited access to programs following their initial broadcast - thereby eroding the secondary market for retail sales and the commercial value of 'repeat' broadcast rights.

In 2005, countries such as Australia, the UK and the USA find themselves in an environment which is experiencing a TV piracy explosion due to improved technology and rising demand¹. Australia is the second largest downloader of online pirate TV programs.²

Central to this explosion is the increase in use of file-sharing software applications such as BitTorrent³, Kazaa, Gnutella and eDonkey. It is difficult to overstate the impact of BitTorrent on

¹ 2005 Release by Envisional Ltd, a leading internet monitoring company based in Cambridge, UK.

² Australia accounts for between 15% and 16% of all downloading of online pirate TV programs according to the Envisional Release referred to above.

³ BitTorrent is a third generation peer to peer software protocol which allows users to download fragments of very large digital files (rather than the whole file) such as movies and video clips.

digital asset piracy particularly in connection with film and television piracy with 70% of all television piracy occurring through BitTorrent⁴ and with BitTorrent accounting for approximately one third of all internet traffic.⁵ There are other infringing systems employed on the internet that represent an additional threat to copyright owners.

The internet raises additional issues including the availability of programs stripped of their advertising associations and out of scheduled broadcast sequence. It is fundamental to the free-to-air business model that broadcasters can protect their ability to attract quality programming and their ability to aggregate audiences. A weakening of those rights is likely to have a negative commercial impact on that revenue base.

1.2 Fair Dealing Review

The Networks are of the view there is no evidence that there is a need to change the fair use doctrine in Australia in order to protect consumers. Although there are new technologies and devices in the market that more readily permit consumer copying, this should not be a reason to wind back the rights of copyright owners.

The existing framework for treatment of fair dealings under Australian copyright law is well established. Unlike the open-ended US fair use provisions⁶ that permit a fair use defence in any circumstances of the reproduction of copyright works, the Australian law only recognises fair dealing where it is for specific purposes such as reporting the news etc.

The existing fair dealing exceptions in the Copyright Act represent an appropriate balance between the interests of copyright owners and those who have a legitimate basis for accessing copyright material without the authority of copyright owners (see Issue 1). These provisions have long been a part of Australian copyright law and have the advantage of being generally understood and providing clear guidance in the majority of cases as to the circumstances and extent to which copyright material can be used without permission.

Changing the current Australian approach to an open-ended provision potentially paves the way for potential users of material to take the broadcasts (in some cases, including underlying works) and use them with the expectation that they will be able to run a fair use defence in circumstances that would not now be open under Australian law.

⁴ Envisional Ltd.

⁵ Envisional Ltd.

⁶ Section 107 of the US Copyright Act refers to 4 factors: (a) the purpose and character of the use, including whether use is of commercial nature or for non-profit/educational purpose; (b) the nature of the copyrighted work; (c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (d) the effect upon the potential market for or value of the work. The last of these factors is traditionally regarded as the most important.

Some of the options raised in the issues Paper have the potential to cut across the more recent copyright reforms including the Digital Agenda Act, the US Australia Free Trade Agreement⁸ and even the amendments made to the Act in the last several years that were intended to assist copyright owners in the enforcement of copyright.

The high-water mark in the US fair use doctrine was reached in a pre-digital environment involving very different markets for the exploitation of content⁹. The assumptions underpinning the fair use doctrine in the pre-digital market no longer should apply and arguably no longer apply¹⁰. There are no guarantees that the doctrine would be interpreted in Australia in the same way as it has been in the United States. This is a factor that caused the government to reject the same proposal in the context of amendments relating to software in 1999.

On 27 June 2005, the United States Supreme Court delivered its decision in *Grokster*¹¹ and, in providing its interpretation of *Sony*, cast serious doubt on whether copying 'favourite programs', the dominant purpose of taping free to air programs was a 'fair use'. After *Grokster* it can no longer be claimed (in an unqualified way) that US citizens have the right to copy any broadcast of a free to air program. The position is now far less clear and this has important ramifications for a number of the options raised in the Issues Paper.

There is such rapid change in the technology used to access content that a policy change at this point risks becoming irrelevant or an obstacle in only a matter of a couple of years as the technological issues develop further. Similarly, the technologies used by consumers to receive and enjoy their products are in such rapid change that changes to the legal position at this stage could have significant and unforeseeable adverse consequences to the rights of copyright owners in the future.

The introduction of a new set of provisions into an environment of almost annual shift in consumer behaviour and almost monthly uptake of new technologies may well not lead to greater certainty .

⁷ Particularly Technological Protection Measures (TPMs) that were introduced as a means of enabling copyright owners to use technical self-help measures to protect content from copying. The existence of TPMs would limit the practical rights of consumers to make any fair use copies of copyright works, should such a doctrine be introduced. The timing of the Fair Use Review ahead of the review of TPMs and any government policy on TPMs following the Phillips Fox review of the Digital Agenda regime gives an indication about the order in which these interrelated concepts are viewed by the government.

⁸ Such as the requirement that the Australian government criminalise circumvention of a TPM.

⁹ A good example of this is the secondary market for the supply of television series, previously broadcast free-to-air. At the time that the *Sony* case was decided, there was virtually no market. Today this market represents a substantial proportion of the consumer video retail market.

¹⁰ A variant of this argument was run in the US *Napster* case in order to counter the defendant's argument that file sharing of content on the internet amounted to a fair use. The 9th Circuit appeals court rejected the attempts to expand the scope of the fair use doctrine, instead placing emphasis on the impact of the file sharing technology.

¹¹ *Metro-Goldwyn-Mayer Studios Inc., et al., Petitioners v. Grokster, Ltd., et al.*, 545 U.S. (2005).

2. ISSUE 1 - EXISTING FAIR DEALING PROVISIONS

The Networks believe that there should be no change to the existing fair dealing provisions.

2.1 Existing provisions work well

Those provisions have generally worked well and have the general support of the copyright community, business and legal commentators in Australia. Other than expansion of the right to make private copies of certain material, the Issue Paper does not point to any specific complaints about the application of the existing fair dealing regime or suggest that cases decided under that regime have generated anomalous results.

Many of the examples of the application of the US fair use provisions described in the Issues Paper would be recognised as fair dealings under Australian copyright law¹². Others would (rightly) depend on the level of commercial use of the work and purpose whether they would currently constitute fair dealing under Australian law¹³.

2.2 Rationale for change is flawed

The rationale advanced for a change in Australia's fair use provisions is flawed. It has been suggested that the introduction of a US style fair use provision is necessary in order to balance the interests of users as against copyright owners as a consequence of term extension of copyright and the introduction of other provisions into Australian copyright law resulting from the US/Australian Free Trade Agreement¹⁴.

This does not provide a sound basis for changing the fair dealing environment in Australia. Much of the evidence given before the JSCOT committee and the Select Senate Committee in support of the introduction of a broader "fair use" doctrine in Australia consisted of exaggerated claims about the impact of Australia's adoption of the FTA and the effect on consumers. None of those consequences have materialised since the implementation of the FT A.

2.3 The policy behind the existing section 111 is sound

It has been suggested that one of the short-comings of the existing copyright framework is that it does not permit the unrestricted copying of free-to-air TV broadcasts¹⁵. It has been suggested

¹² Quotation of excerpts in a review or criticism or summaries of an article in a news report. Also incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.

¹³ For instance, in the case of use in a parody, the use of the work parodied may well fall into the criticism or review purpose, with fair dealing to be determined by the commercial impact of the use.

¹⁴ Some proponents also called for the introduction of US style First Amendment rights.

¹⁵ See Issues Paper at 11.3.

that the policy behind s111 of the Copyright Act, the existing provision that permits copying of the broadcasts (rather than the underlying works being broadcast), is flawed. However, section 111 has been a part of the Australian copyright law for over 30 years and there is good reason why it is limited to the broadcast and not the underlying work. The intention of s111 was to allow home viewers to record or film live broadcasts rather than programs, such as films and TV dramas, which are broadcast by the network.

The Networks acknowledge that the practice of making temporary recordings of TV drama shows by home viewers is widespread and, in the pre-digital environment, this practice has generally not been of any significant harm to copyright owners, ie. where the activity goes no further than temporary copying for private use.

The position is extremely different in the digital environment and there is some implicit support for this observation in the *Grokster* decision. In the digital environment illegal distribution of digital files over the internet using software such as BitTorrent is becoming increasingly problematic. In this environment, any exception allowing copying of underlying works will result in further copying using current digital quality recording and storage equipment and, once made, more copies will be available for distribution online and in the form of optical discs.

If s111 went further, it would legitimise the creation of copies of programs and film that would directly harm the secondary market for those products. Once the copy is made (legally by reason of a fair use/private copying provision) the copy could be stored or distributed to others in digital form. Such activity should be discouraged rather than encouraged by changes in fair dealing laws.

3. ISSUE 2 - THE CLRC MODEL

The Networks do not support the recommendation of the CLRC in 1998, that the existing fair dealing exceptions should be consolidated into a single model that incorporates a broad US-style fair use provision.

3.1 The recommendation is not appropriate

That recommendation is open to serious criticism, has been rejected by the government previously and is no longer appropriate in the digital environment following the implementation of the Digital Agenda provisions.

The CLRC model for reform has to be seen in the context of reforms of the whole of the Copyright Act, most of which never proceeded. It was contemplated that there would be a substantial re-writing of the whole Copyright Act. Taking one recommendation out of the two part report in isolation would be an inappropriate foundation for introduction of an open-ended

fair use provision, particularly with the serious consequences that are likely to flow from its introduction.

For the reasons outlined below, the assumptions made about US fair use law that underpinned the CLRC recommendation are open to serious challenge. It is not apparent that there was a detailed study of the operation of the fair use provisions or any enquiries with US attorneys who had experience of them. Criticisms of the US doctrine are not difficult to find, particularly amongst judges of cases in which the doctrine was raised as a defence¹⁶.

3.2 US law not likely to be replicated

Even the CLRC accepted that the introduction of the provision would not necessarily replicate the experience of the US fair use provisions. It is likely that the introduction of such a provision would result in "a distinct Australian jurisprudence" that might bear little relationship to the US doctrine. It might in fact lead to very different results in exactly the circumstances that supporters of a fair use provision would hope would generate identical results.

3.3 Government previously rejected the recommendation

The government rejected the recommendation in the context of amendments to the computer software provisions of the Act, recognising that the broader fair dealing provision proposed by the CLRC "would also leave Australian businesses uncertain about its scope until it was tested in the courts, and expose them to the potential burden of legal expenses of the court proceedings"¹⁷. That was the correct approach then. There is nothing in the Issues Paper to suggest that the circumstances have changed some 6 years later.

4. ISSUE 3 - THE FAIR USE DOCTRINE IN THE UNITED STATES

The Networks believe that the US fair use doctrine should not be introduced to replace (or supplement) the existing fair dealing provisions and that there would be very serious negative consequences for businesses in Australia, including free-to-air broadcasters of doing so.

4.1 The US doctrine is misunderstood

Powerful arguments have already been advanced in Australia for not introducing a US-style fair use provision. There would be serious uncertainty for business and copyright owners, as the government recognised when rejecting a proposal to introduce a US-style provision in the context of amendments to the computer software provisions of the Act in 1999, referred to above. These

¹⁶ The minority Supreme Court judges in the *Sony* case described it as "*one of the most troublesome in the whole of copyright law*".

¹⁷ The Explanatory Memorandum to the *Copyright Amendment (Computer Programs) Bill 1999 Part 3.2*.

uncertainties will be exacerbated if the existing fair dealing provisions were to be entirely replaced by a provision similar to s107. Even the CLRC rejected this approach on the basis that it would lack precision 18.

The Networks believe that the US fair use doctrine is misunderstood by many proponents of its introduction into Australia. This misunderstanding is as apparent from the recommendations of the JSCOT committee as it is from a number of commentators and proponents of the US doctrine. If the doctrine was properly understood, the rationale for introduction of a US-style fair use provision is substantially weakened.

4.2 Sony

Proponents rely on the decision of the US Supreme Court in the *Sony* case¹⁹. Although the Court found that the recording of free-to-air television broadcasts by consumers on video-recording equipment constituted a fair use, that finding was extremely limited and should be approached with caution. Even at the time of the *Sony* decision US fair use doctrine was far from settled in its scope or application. The minority judges in the case described the fair use doctrine as "one of the most troublesome in the whole of copyright law". It was routinely raised coupled with First Amendment as a defence to all manner of copyright actions, leading to greater uncertainty.

4.3 Subsequent application of US doctrine

Subsequent application of the principle in *Sony* suggest that it is a highly contestable proposition that continues to confound US Courts. A good example of the different way in which an appeal Court in the US approached fair use when there was evidence of harm to the copyright owners was the Napster case²⁰. The Ninth Circuit Court of Appeals rejected the argument that the copying of sound recordings by users of the file-sharing software was protected by fair use²¹. The Court of Appeals agreed with the findings of the trial judge that the distribution of the files between users amounted to commercial use of the copyright material, even if there were not direct economic benefit to either the users or the operators of the system, because "repeated and exploitative copying of copyright works, even if the copies are not offered for sale, may constitute a commercial use".

Sony was reconsidered by the US Supreme Court in the *Grokster* case. The judgment delivered on 27 June 2005 contained not less than three different groups of decisions on the effect and scope of the *Sony* case²². The debate as to the meaning of *Sony* and its relevance in the age of

¹⁸ At p 59.

¹⁹ *Sony Corporation v Universal City Studios* 1983 464 use 417. ²⁰ *A&M Records v Napster, Inc*

²¹ At page 12.

²² See detail below in the context of time-shifting in section 5 below.

digital and internet copyright infringement is as fierce today as it was at the time of the decision in 1982. At best that doctrine is highly contestable and it may take many years before that doctrine is authoritatively settled under US copyright law. This is discussed further at 5.3 below.

This lack of certainty can be contrasted with the systems in place in Australia, the United Kingdom, Canada and New Zealand²³.

4.4 Other consequences of US doctrine

The introduction of a US-style provision is likely to make copyright enforcement more difficult and more costly at a time when broadcasters are having to deal with piracy in their programs on the internet. There is already evidence of the mass copying and storage of unauthorised copies of films and TV programs. To date there is relatively restrained availability of those copies, limited to those who are able to use specialised file sharing programs. However this is changing with the introduction and take up of 3rd generation file sharing programs such as BitTorrent⁴. These are expanded below in the section on Issue 5 - Format Shifting.

There is also a prospect that just as fair use defences are routinely raised in US copyright cases, they would also begin to be raised in Australian cases. Each one offers the opportunity for delay, cost and the possible involvement of amicus (interested) parties that seek to introduce a range of issues not usually part of the case. This is one of the reasons why copyright enforcement litigation in the US is prohibitively expensive.

The introduction of a new open-ended element will inevitably lead to great uncertainty in the short and medium terms. All of the past authorities on fair dealing would be immediately open to reinterpretation, thereby affecting numerous industries. A new provision following the CLRC recommendation would become a default defence in copyright infringement cases. This is likely to increase the costs to Australian businesses while cases are run to scope out the boundaries of the provision. The government acknowledged the force of these same arguments when it rejected the opportunity to introduce a fair use in the context of computer software²⁵. No change in circumstances warrants this approach to be revised.

²³ And was contrasted by the CLRC when it conducted its brief comparison of international fair dealing/fair use regimes.

²⁴ BitTorrent is a program that permits internet users to very easily receive copies of large files such as films and TV programs by splitting up each of the files amongst a number of users, copying small parts from each user across parallel network paths simultaneously and reassembling the large file at the user computer. This technology has the capacity to enable the mass infringement of film and TV program copyright in a way that has to date only affect the music industry with music files.

²⁵ Explanatory Memorandum to the *Copyright Amendment (Computer Programs) Bill 1999*: "A broader fair dealing provision as recommended by the CLRC would also leave Australian businesses uncertain about its scope until it was tested in the courts, and expose them to the potential burden of legal expenses of the court proceedings. "

Finally there are, in any event, serious questions about the utility of an attempt to import such a developed concept from another legal system into Australia. It assumes that even an equivalent provision to the US provision would instantly bring with it identical or even similar outcomes. Contrary to this, there is every reason to expect that Australian Courts would take a different view of many of the issues, particularly as *Sony* is a US decision that has never been expressly adopted in Australian copyright law.

It may be that even after the concept was imported into Australia dramatically different decisions would follow leading to a failure to meet the policy objectives of such a provision.

5. ISSUE 4 - TIME SHIFTING

The Networks strongly oppose the modification of s111 or the introduction of a new right in Australia for viewers of free-to-air television to make copies of broadcasts and the underlying copyright works.

5.1 Policy of s 111 is sound

As already mentioned, section 111 has been a part of the Australian copyright law for over 30 years. The policy behind the section is sound. It permits the copying of free-to-air broadcasts but not the underlying copyright works because to permit the copying of those works would be to take away the rights of those copyright owners to protect their material from copying and further distribution.

Otherwise, it would sanction the creation of copies of works that would directly harm the secondary markets for the supply of legitimate product embodying those works. In the scenario of taping a free-to-air TV broadcast once the copy is made (legally by reason of a fair use/private copying provision) the copy could be stored or distributed to others.

5.2 Foundation for "time-shifting" is misunderstood

"Time-shifting" is the language that was adopted by the US Supreme court in *Sony* to describe the recording of free-to-air broadcasts in order to permit the programs to be viewed after the scheduled broadcast time. At the outset, the *Sony* case needs to be understood in more detail in order to identify the principle on which the case rests.

Firstly, it solely concerned the lawfulness of copying free-to-air broadcasts. Taping from pay-TV broadcasts and the subsequent distribution of copies made from free-to-air were excluded from the decision.

Secondly, the decision was delivered by a bare majority (5:4). Powerful statements were made by the minority about the potential impact of copying free-to-air broadcasts, particularly on secondary markets for the programs should they exist.

Thirdly, the (majority) decision depended on a finding that the activity of taping a free-to-air program was unlikely to cause commercial loss to the copyright owners because the overwhelming majority of users did not keep (library) copies of the programs but continually overwrote them and there was no evidence that this practice had a negative commercial impact on the copyright owners²⁶. Had there been evidence of actual commercial loss to the rights owner²⁷, such as damage to a secondary market for the sale of programs (as there is now), that rather than tape and re-tape over programs, the consumers made permanent copies ("librariated") copies of recorded programs (as they do now) and that the copies were subject to abuse through widespread distribution, such as on the internet(as there is now), the approach of the majority of the Court is likely to have delivered a different result.

5.3 Sony after Grokster

As mentioned at 1.2 above, on 27 June 2005 (21 years after the *Sony* decision) the Supreme Court delivered its interpretation of *Sony* in the course of its decision in the *Metro-Goldwyn-Mayer Studios Inc. v Grokster LtJ28*.

The Court identified a critical distinction within *Sony* between authorized taping and unauthorized taping⁹. Authorised taping was taping of sporting programs, religious programs and other programs with the express consent of the copyright holders. Unauthorised taping was taping of all other programs that contained content in relation to which the copyright holder did not permit copying and building libraries of programs taped. In other words, the Court recognised the fundamental distinction between copying programs where there is no infringement and copying programs where there is. This is the same rationale that underpins s111 of the Australian Copyright Act as referred to above.

In some, but not all cases, unauthorised taping might be a fair use under US law. However this could not be said for all taping and whether or not it did, depended on the nature of the copy involved³⁰. The Court cast some doubt on whether copying "favourite programs", the dominant

²⁶ The Court found that the copying in these circumstances increased the viewing audience and was therefore beneficial to the commercial interests of the copyright owners.

²⁷ Such as through the loss of a market for commercially supplied products or even a secondary market for episodes of films initially screened on free-to-air television.

²⁸ *Metro-Goldwyn-Mayer Studios Inc., et al., Petitioners v. Grokster, Ltd., et al.*, 545 D.S. (2005).

²⁹ Breyer J (Stevens, O'Connor 11 concurring) at p 2; Ginsburg J (Rehnquist, Kennedy 11 concurring) at p 7 fu 3.

³⁰ Breyer J (Stevens, O'Connor 11 concurring) at p 2.

purpose of taping free-to-air programs, was a fair use³¹. On the other hand "library building" was not likely to be a fair use. Further, making permanent copies of programs broadcast free-to-air was infringing³² (permanent copies have a commercial impact on the legitimate work and are likely to fall outside the last condition of sI 07).

After *Grokster*, it cannot be said that US citizens have the right to copy any broadcast of a free-to-air program. Fair use may or may not apply depending on the nature of the use and will not apply where a permanent copy is made. The Court did not consider it relevant whether the consumer taping activity was widespread or not. As a consequence the use of copying technologies such as personal video recorders (PVRs) for creating libraries of copies of broadcasts or copying broadcasts to facilitate ad-skipping are likely to be no more defensible under US copyright law than under Australian copyright law.

5.4 Time-shifting is even less appropriate in the digital environment

The "time-shifting" argument breaks down even further in the digital environment. Time-shifting in an analogue context is very different to time-shifting in a digital context and there is no comparison between the speed, convenience, permanence and quality of digital recording and the old VHS tapes³³. The nature of the product is so different that there is an obvious potential impact of this technology on the secondary market for the supply of television programs in DVD format. The impact of the piracy of copies of programs, described in greater detail below, confirms that this is not a hypothetical risk but one that is very real for broadcasters today.

Australia has been identified as having the second highest level of online piracy in TV programs and steps need to be taken to prevent this infringement and educate consumers not to infringe copyright in this way. The introduction of a right of "time-shifting" is likely to reinforce and exacerbate the culture of copyright infringement that already exists in this country.

6. ISSUE 5 - FORMAT SHIFTING

The Networks also strongly oppose the introduction of a right to make private copies of copyright material, sometimes referred to as "format-shifting". It is difficult in the case of broadcasts to separate time-shifting from format-shifting, since every time the broadcast is recorded there is necessarily a shift in format. The issues raised above in the case of "time-shifting" therefore also apply to "format-shifting". There are further reasons why the Networks oppose the introduction of a format shifting right.

³¹ Souter J (Thomas, Scalia JJ concurring) at p 14. ³²

Breyer J (Stevens, O'Connor JJ concurring) at p 2.

³³ Copies of program made in permanent digital format or in the form of digital movie files are easier and more attractive to distribute and, similarly, more difficult to prosecute. This has particular significance as consumers will increasingly connect computer equipment to their television equipment or blur the line between reception and copying.

6.1 There is no recognised equivalent doctrine under US copyright law

The doctrine claimed to constitute "space-shifting" under US copyright law is not universally accepted and has been the subject of considerable criticism. It finds no support in *Sony*. The only case that is cited in support of the enigmatic doctrine is *RIAA v Diamond Multimedia*, a case in which the US recording industry attempted to obtain a declaration that the audio statutory scheme applied to a personal MP3 player³⁴. The Court was not required to rule on the claim of "space-shifting", although there was a reference to it.

Subsequent US cases have cast doubt on "space-shifting". In *Napster* the trial judge expressed the view that⁵:

The court is also unconvinced that Sony applies to space-shifting. Defendant erroneously relies on the Ninth Circuit's assertion, in a case involving an inapplicable statute, that space-shifting constitutes non-commercial personal use. See *Recording Indus. Ass'n of Am. v. Diamond Multimedia Sys., Inc.*, 180 F.3d 1072, 1079 (9th Cir.1999) (discussing the applicability of the Audio Home Recording Act of 1992 to the Rio MP3 player). Defendant also implies that space-shifting music is sufficiently analogous to time-shifting television broadcasts to merit the protection of Sony ... the instant matter is distinguishable from Sony because the Supreme Court determined in Sony that time-shifting represented the principal, rather than an occasional use of VCRs. See *Sony*, 464 U.S. at 421, 104 S.Ct. 774.

The Court of Appeals expressed similar doubts about the principle.

The *Napster* decision also makes it clear that under US law that format-shifting would never apply where the copied item is exposed or made available to other users, such as where it is available for download by other internet users. Copying a copyright work to a computer connected to the internet could not, therefore, be a fair use.

Under US law, where consumers have a limited right to copy a product (a CD), that right is provided under statute not fair use laws and is governed by a regime that mandates the use of technology that limits the opportunity for further copying⁶. It applies no more widely than that³⁷.

³⁴ The manufacturer of the device denied that the scheme applied ie. argued that copying from physical disc to computer to MP3 player was not within the statutory defence. The equipment manufacturer succeeded, with the Court ruling that an MP3 player did not have the benefit of the defence to infringement. The result is that it cannot be said that the use of an MP3 player has the benefit of a fair use defence under US copyright law, let

alone any other form of copyright work.

³⁵ 114 F.Supp.2d 896 at 16.

³⁶ The *Audio Home Recording Act* 1992 was introduced to protect equipment manufacturers and consumers from copyright actions brought in relation to private copying. This Act provides a defence to infringement for private copying from an article (eg CD or record) to Digital Audio Tape, provides a defence to the

6.2 Private copying threatens secondary dealing provisions

Copyright enforcement generally relies on proving a breach of the secondary dealing provisions because in practice it is easier to prove infringement by proving a dealing in the infringing material rather than proving its manufacture or purpose of the dealing³⁷.

The secondary dealing provisions operate when an infringing copy is distributed, but not otherwise. The provisions have no operation in relation to the distribution of a copy lawfully made³⁹. A private copying right, therefore, provides an avenue of supply of copies that are not unlawful and could be distributed without fear of secondary infringement or commission of an offence⁴⁰. This is a way in which the average consumer could make a copy of a film and then distribute that copy with impunity. These copies would sit entirely outside the enforcement regime and could then be distributed in a manner that impacts the markets for legitimate works and other commercial opportunities⁴¹.

6.3 Private copying makes proof of infringement much more difficult

Currently, possession of unauthorised copies of copyright works is an important evidentiary element in any copyright prosecution in Australia, even one that alleges infringement by distribution. In particular, in relation to on line piracy, more often than not prosecutions rely on evidence of the storage of copyright material on computers (and the availability of that material⁴²) rather than the actual transmission (because proof of actual transmission may be more difficult)⁴³.

If a private copying right were introduced, every consumer found with one or more copies of films and programs on their computer would be likely to claim that they are private copies

manufacturers of those devices and establishes a levy based on the blank media used to compensate the copyright owners. There is no equivalent in the case of a private copy of a film or of a TV program.

³⁷ In the case of sound recordings, by virtue of the specific statutory framework, a first generate copy can be made as long as the copying equipment precludes second generation copying. In the case of recording of free-to-air TV, the evidence during the *Sony* case was of temporary copies, watched once that were over-recorded by subsequent programs.

³⁸ In the case of criminal offences if manufacture is relied on, proof of purpose for secondary dealing is also required. ie for the purpose of sale or distribution under s132. An example of the difficulties in proving a purpose to distribute an item is the recording of films in theatres - although the recording (presumably) takes place for distribution, each recorder claims when caught that the copy is only being made for personal use. For example this was recently the case at the Sydney Film Festival where two patrons were ejected when caught video recording films including *Age of Consent*.

³⁹ There must be an article which is an infringing copy and the proof of knowledge depends on actual or constructive knowledge that the making was or would be infringing.

⁴⁰ An offence is only committed if there is a dealing proscribed by s 132 in relation to "an infringing copy", as that term is defined in s 10.

⁴¹ Such as the distribution of the work ahead of broadcast.

⁴² For the purpose of the right of communication to the public.

⁴³ In order to view or record the transmission itself, there is a need to be either at point of the origin computer or at an intermediate point, such as an ISP, or at the other computer at the ultimate end of the transmission.

lawfully made and to challenge prosecutors to prove that any transmission took place. That is the experience overseas and has already led to setbacks for copyright owners in internet enforcement in Europe and in Canada⁴⁴. In those cases, Courts have struggled to differentiate between a private copying right and proof of infringement where the files in question exist on private computers that are invariably located in private residences. The problem is accentuated when each successive user claims that their copy of the file is also a copy that they made lawfully under their fair use rights. Consequently, from an evidentiary and practical perspective, enforcement becomes increasingly difficult.

6.4 Applying a private/public copy dichotomy is highly problematic

The Copyright Act does not currently distinguish between personal digital copies and public digital copies. The right of communication to the public involves consideration of whether material such as a file (however designated by the user) is made available to the public. It is the accessibility that gives rise to liability, not the designation of the material itself as being public or private when made. For example, a file made for private purposes would still carry liability for infringement if it was available to other internet users⁴⁵.

In the digital environment it is increasingly difficult to maintain any distinction between what is a personal copy and what is public. There is significant evidence of the growth of film based internet infringement, even in Australia, through the adoption of services such as BitTorrent.⁴⁶ The number one threat to the copyright industries is currently the peer-to-peer software that permits massive infringement of copyright⁴⁷. That software is the best example of the increasingly blurred distinction between private and public files, since any copy of a file that is made on a user computer is automatically made available for download by other users of the same system even if the copy first made was made for personal reasons⁴⁸.

⁴⁴ This occurred most recently in Canada in *BMG Canada v John Doe* where a trial judge rejected attempts by rights owners (in that case, the music industry) to obtain the names and addresses of alleged internet infringers for the purpose of individual proceedings, assuming that the possession of each file (even marked for sharing) could be excused on the basis of fair use rights absent actual evidence of distribution. The position has only been clarified by the Canadian Federal Appeals Court in the last month with an indication that the assumption of the trial judge was unwarranted.

⁴⁵ This is the point that was raised in the *Napster* case leading to the rejection of a fair use defence being raised by the operator of the service.

⁴⁶ In the first case to be brought specifically against the operators of an Australian BitTorrent hub it is alleged that there were hundreds of TV programs available to internet users in Australia, including very high rating programs such as *Lost*, *CSI*, *Desperate Housewives* and *Law and Order*.

⁴⁷ See the judgement of the US Supreme Court released last week, finding against the P2P operators: [http://www.supremecourtus.gov/opinions/04s\[ipopinion.htm\]](http://www.supremecourtus.gov/opinions/04s[ipopinion.htm]).

⁴⁸ This is true of all internet based systems that permit widespread copying, including as *Kazaa* and *BitTorrent*, which all exploit the fact that an apparently privately made copy on a user's computer is automatically made available for distribution to other internet users without positive action on their behalf.

6.5 Likely abuse by consumers/fuelling of consumer copying activity

The US copyright framework does not, for the reasons set out above, permit widespread private copying. Where private copying is permitted it is very limited. Any private copy right that permits wholesale copying of TV programs - without other limitation - goes far beyond even the legal environment in the US.

Providing a new private copying right is likely to lead to more not less copying by consumers. If the US situation is any guide, consumers who believe (even mistakenly) that they have a right to make a private copy make more copies. The more copies of works that are made, the more likely that those copies will be distributed or available to other consumers, including via the internet. This can only have a significant adverse impact on the Networks' secondary markets.

7. ISSUES 6 - BACK UP COPIES

Beyond the issue of time-shifting which is comprehensively dealt with above, there is no legitimate reasons for a person to make a back up copy of a program which has been broadcast on free to air television or which has been purchased in DVD form.

The only copyright material that is subject to a right to make a back-up is computer software. There are no parallels between computer programs and TV programs/films. The computer software back-up regime is limited and defined and cannot easily be applied, even by analogy, to the case of TV programs/films.

If consumer disobedience of copyright law is advanced as a rationale for amendment to the Act, albeit an inappropriate one, there is no reason why consumers would comply with the requirements of a back-up copy right. It is likely to be abused and result in both a reinforcement of the culture of copying and a dramatic increase in the numbers of copies of programs and films available to be distributed.

A regime for permitting back-up copies is also likely to cut across the protections against copying that already exist in the Act in the case of technological protection measures. The policy of protecting copyright owners from the circumvention of TPMs is directly inconsistent with a policy of permitting back-ups of any description and, to the extent of inconsistency, should have precedence.

8. ISSUES 7 TO 12 - OTHER ISSUES

The Networks will not deal with the last issues raised by the Issues Paper.

Consistently with the arguments already advanced above against a change in the fair dealing regime in Australia, the Networks do not support the introduction of additional measures as these will seriously erode the protection of copyright, will negatively impact the commercial position of the Networks and other copyright owners and represent a poor policy response to a situation that currently raises no serious risks for members of the public.