

# **COPYING PHOTOGRAPHS AND FILMS IN A DIFFERENT FORMAT FOR PRIVATE USE**

**Review of sections 47J and 110AA of the *Copyright Act 1968***

**Issues Paper**

**January 2008**

## Overview

The Government is reviewing the operation of two new copyright exceptions that permit 'format-shifting'. These exceptions are sections 47J and 110AA of the *Copyright Act 1968* (the Act) which permit photographs and cinematograph films to be reproduced in a different format for private use, subject to certain conditions.

Sections 47J and 110AA were introduced by the *Copyright Amendment Act 2006* and commenced on 11 December 2006. The Act also requires that a review of the operation of these provisions be carried out by 31 March 2008. The Attorney-General will table the report of the review in Parliament within 15 sitting days after the completion of the report of the review.

The purpose of this paper is to invite submissions on whether sections 47J and 110AA are operating satisfactorily or whether either provision should be modified in some way. No particular view or course of action is endorsed. This paper provides interested persons with the opportunity to ensure that the Government is aware of all relevant views and information.

Submissions should be made by **29 February 2008**, and should be addressed to:

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

Email: [copyrightlawbranch@ag.gov.au](mailto:copyrightlawbranch@ag.gov.au).

Questions concerning this review may be directed to Mr Norman Bowman by email at [norman.bowman@ag.gov.au](mailto:norman.bowman@ag.gov.au) or by telephone 02/6250 6324, or facsimile 02/6250 5929.

Submissions will be placed on the Attorney-General's Department website unless marked confidential. Where confidentiality is requested, submitters are

encouraged to provide a public version that can be made publicly available. Copies of all submissions may be made available to other Australian Government agencies with an interest in this review.

## **Introduction**

### ***Copyright policy objectives***

1. Copyright is a form of intellectual property that protects the rights of creators in certain original forms of expression, including photographs and cinematograph films. It rewards creative effort, and economic investment in creative effort, by granting a number of exclusive economic rights. These rights provide an incentive to encourage the generation and flow of new material to the public. One of the core rights granted by copyright is the right to prevent other persons from copying a work. While copyright does not guarantee a proportionate return for the work involved, the ability to require other persons to pay for copying can give creators and investors some security for the skill, time and resources necessary to produce new works.
2. The Act also provides many exceptions which limit the scope of copyright. These exceptions are an integral part of copyright recognising that in some circumstances the usual rights of copyright owners should not apply. Exceptions may be adopted for various reasons; such as to permit incidental uses that do not cause significant harm to copyright owners or because a particular limitation of copyright serves the broader public interest. The nature and scope of exceptions reflect decisions by Parliament on balancing public and private interests.

### ***Key Issues***

3. In this Issues Paper, the Government seeks your views on key issues, as well as more specific issues (See paragraphs 52-55). The key issues are:
  - is the new exception for reproducing a photograph in a different form (section 47J) achieving its objectives – or are there policy reasons for change, and

- is the new exception for making a copy of a film in a different form (section 110AA) achieving its objectives – or are there policy reasons for change.

## **The Copyright Act**

4. This paper assumes that the reader has a general understanding of copyright. A reader who is unfamiliar with this subject may wish to read the general information on copyright available at the Attorney-General's Department website - <http://www.ag.gov.au/www/agd/agd.nsf/Page/Copyright>

### ***Copyright in photographs and cinematograph films***

5. Part III of the Act provides for copyright in certain traditional forms of original expression termed 'works'. One category of works protected by copyright is 'artistic works' which encompasses photographs.

6. Under section 31(1)(b), the copyright in a photograph, subject to a contrary intention, is the exclusive right to do all or any of the following acts:

- to reproduce the photograph in a material form,
- to publish the photograph, and
- to communicate the photograph to the public.

7. Part IV of the Act, concerns copyright protection for 'other subject matter', including cinematograph films. Section 86 provides that, unless the contrary intention appears, the owner of the copyright in a cinematograph film has the following exclusive rights:

- to make a copy of the film;
- to cause the film to be heard or seen in public; and
- to communicate the film to the public.

8. Sections 47J and 110AA set out a 'contrary intention' by describing particular situations where a copyright owner's usual right to control reproduction of a photograph or copying of a film does not apply.

## ***Reasons for this review***

9. New exceptions to provide a better balance between the legitimate interests of copyright owners and consumers in the digital environment were enacted in the *Copyright Amendment Act 2006* which commenced on 11 December 2006.

10. Included in the new exceptions were sections 47J and 110AA which allow for 'format-shifting' or the right of a consumer in certain circumstances to copy a photograph or film into a different format for private use. Some common reasons for format-shifting might be to store a photograph collection in a portable playing device or to take advantage of newer technology.

11. Sections 47J and 110AA were intended to recognise reasonable consumer behaviour without causing harm to copyright owners. However, the new exceptions were also innovative and controversial. Some interests considered the new provisions could unfairly restrict copyright while other interests believed that wider exceptions could be adopted.

12. In particular, some interests believed the present scope of sections 47J and 110AA may be unnecessarily limited in comparison to the wider exception (section 109A) also introduced in the *Copyright Amendment Act 2006* for copying sound recordings for private use. Those with this view have proposed that consumers should have generally similar exceptions for copying audio and audio-visual material.

13. In response to these different views, the amending legislation included a requirement that the Attorney-General is to have a review of the operation of sections 47J and 110AA carried out by the end of 31 March 2008. The report of this review is to be tabled in Parliament within 15 sitting days after the report is completed. (See reference to Schedule 6 in Table A at Notes to the *Copyright Act 1968*).

## ***Reproducing photographs in a different format***

(See [Attachment 1](#) for a copy of section 47J.)

14. Under section 47J it is not an infringement of copyright if the owner of a photograph makes a reproduction of it for his or her private and domestic use instead of the original photograph. This exception allows a photograph in hardcopy form to be reproduced in electronic form or a photograph in electronic form to be reproduced in hardcopy form.

15. One example of a reproduction permitted by section 47J is printing a paper copy from a digital photograph. Other copying envisaged by this exception is scanning a hard copy photograph in digital form in the memory of a personal computer or of a portable playing device. In the latter example, section 47J allows for the technical process of making an intermediate or temporary copy in a personal computer as part of the technical process of copying a photograph to a portable digital player (provided the intermediate or temporary copy is not retained). Except with respect to temporary copies, section 47J does not allow digital-to-digital copying nor does it permit hardcopy to hardcopy copying (eg photocopying).

16. Section 47J contains a number of other conditions. One is that the original photograph must not be an infringing copy. This prevents an infringing copy being used to make a reproduction which does not infringe copyright because of the operation of section 47J.

17. Another important condition is that at the time of making a reproduction of the original photograph the owner must not have made, or be making, another reproduction of the original photograph in a form substantially identical in form to the earlier reproduction. This condition essentially prevents the owner from using the original photograph to make multiple reproductions in substantially the same form. There is a further condition which prevents 'serial copying' ie a reproduction made from the original photograph may not be used to make further reproductions.

18. Section 47J prohibits specified dealings with a reproduction made under this exception. Sale, hire, trading in or distribution of a reproduction has the effect that the exception is taken never to have applied to the making of the reproduction (though the owner may lend a reproduction to a family or household member).

19. Finally the exception is taken never to have applied if the owner of the original photograph disposes of it to another person. The purpose of this condition is to prevent a person acquiring a photograph, reproducing it in a different form for future use and then passing ownership of the original to another person who can repeat the process.

### ***Copying a film in a different format***

(See Attachment 2 for a copy of section 110AA.)

20. Section 110AA which allows for the copying of a cinematograph film is narrow and specific in scope. It simply permits the owner of a videotape embodying a cinematograph film in analogue form to copy the film in electronic form for his or her private and domestic use.

21. Section 110AA contains a number of conditions that are broadly similar to those in section 47J outlined above.

22. The primary application of this exception is to allow the owner of a VHS video cassette to make a digital copy of the film content eg on a DVD or a computer hard drive. This exception allows consumers to continue to be able to view films purchased on video cassette without the need to maintain a video cassette player which are increasingly obsolescent.

23. This exception does not allow any form of digital-to-digital copying. It is not possible to copy a film that is embodied in a DVD and even where a film is copied from a videotape in an electronic form it is not permitted to make a further electronic copy, such as to a portable audio-visual player.

24. One reason for the limited scope of section 110AA is that unrestricted digital-to-digital copying could allow consumers to reproduce the full picture

quality and features provided in commercially produced digital film content. When the new exceptions were introduced into Parliament, the possible implications of private copying exceptions on new digital markets for feature films and television programs were unclear. A purpose of this review is to ascertain whether further information is available concerning the nature of markets for films and the implications of copyright exceptions.

### ***Comparison to s 109A***

(See [Attachment 3](#) for a copy of section 109A.)

25. Much of the concern about the conditions imposed in sections 47J and 110AA arises from comparison with the wider copying permitted under section 109A.

26. Section 109A applies to copying sound recordings for private use. It is a 'space' or 'device' shifting exception that allows the owner of a non-infringing copy of a sound recording to copy it for his or her use with another playing device that the person owns. An obvious difference is that section 109A allows for digital-to-digital copying. For example, a person who purchases a music album embodied in a CD may make several copies for playing on their personal computer, their portable MP3 player or their car's sound system.

## **Issues to be considered**

### ***Policy considerations***

27. The policy considerations in relation to this review include:
- ensuring copyright continues to provide adequate economic incentives for the creation and distribution of original material to the public (ie photographs and cinematograph films),
  - ensuring copyright law reflects developments in technology and changing consumer behaviour,

- recognising reasonable consumer use of technology to enjoy copyright material - Australian consumers should not be in a worse position than consumers in similar countries,
- ensuring any changes do not unreasonably harm or discourage the development of new digital markets, and
- minimising the risk of promoting copyright piracy.

28. Achieving these objectives in the digital environment is challenging due to the different expectations of stakeholders. On the one hand, digital technologies give consumers great freedom over when and how to use copyright material. For example, photographs and films can be stored in a home electronics system to be viewed in different rooms or further copied on DVDs or in the memory of a portable player.

29. Copyright owners have an incentive to meet user expectations. Digital technologies create potential new revenue sources for copyright owners by allowing protected material to be sold, licensed and distributed in ways not previously possible. However, creative works in digital form can be flawlessly and inexpensively reproduced and distributed worldwide through the Internet. This has caused copyright owners to fear that commercial piracy and free sharing over the Internet will destroy the value of a work. In short, the digitisation of creative content has become the source of tension between copyright owners who for commercial necessity seek to exercise close control over access to, and distribution of, their material and consumers who have become accustomed to being relatively free of constraints in exploiting new technology.

30. Sections 47J and 110AA attempt to balance these interests, within the limits of Australia's international obligations. The exceptions make allowance for consumer expectations that, in particular circumstances, an individual should be permitted to make a copy of a photograph or film in a different format for personal enjoyment. Under section 110AA, the owner of a videotape of a film may copy it for use with a digital home entertainment system, a DVD player in a car or a hand-held audio-visual player.

31. However, the limited scope of these exceptions also seek to recognise reasonable concerns by copyright owners to control when and in what forms photographs and films are made available to the public. At the end of the day, new material will not be made for the public unless creators, investors and distributors can sustain their business.

### ***International copyright treaties – the three-step test***

32. A further important consideration is the requirement that sections 47A and 110AA comply with Australia's international treaty obligations.

33. Australia is a party to a number of international treaties that collectively contain detailed minimum standards for the copyright laws of member states. These treaties are an important aspect of international trade in copyright materials.

34. The key international agreements include the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention) and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (TRIPS). Australia is a party to both these agreements.

35. The international standard for copyright exceptions and limitations is referred to as the 'three-step test'. Article 9(2) of the Berne Convention and article 13 of the TRIPS Agreement set out a three-step test for exceptions to the exclusive rights of copyright owners. Under this test, exceptions and limitations to the rights of copyright owners must be confined: to certain special cases, which do not conflict with a normal exploitation of the work, and do not unreasonably prejudice the legitimate interests of the right holder.

36. Any proposal to change sections 47J or 110AA must be consistent with the above three-step test.

37. Submissions proposing the extension of either exception should consider whether the changes would:

- be clearly defined and narrow in scope,

- permit uses that conflict with the ways copyright owners normally generate economic value from their copyright and thereby deprive them of significant or tangible commercial gains, or
- potentially cause an unreasonable loss of income to copyright owners.

38. It is desirable that these issues should be considered in relation to present markets, or reasonably foreseeable future markets, for photographs and films – rather than a simple ‘in principle’ comparison with exceptions for other material.

### ***Technological Protection Measures***

39. In addition to copyright protection, many films licensed for sale as DVDs or digital downloads will also use technological protection measures (TPMs) to stop the film content being illegally copied or accessed. TPMs include encryption software, passwords and access codes. Digital photographs could also employ TPMs.

40. TPMs are an important tool for copyright owners against commercial piracy as well as against free sharing over the Internet.

41. Consequently TPMs have separate legal protection. The Act provides civil and criminal remedies against a person who circumvents TPMs. There are also penalties for manufacturing, importing or distributing devices that circumvent TPMs, and for providing circumvention services. There are a limited number of permitted defences to these penalties. None of these defences allow a TPM to be circumvented for the act of copying for personal use.

42. The acts for which TPMs may be circumvented can be extended. Section 249(2) permits regulations to be made prescribing the doing of additional acts. However section 249(4) imposes a number of conditions on the Attorney-General in recommending such regulations, including that the regulations must not impair the adequacy of the protection and the effectiveness of the remedies provided to protect TPMs. These conditions were added to the Act to comply with obligations in the Australia - United

States Free Trade Agreement. It seems questionable whether section 249(4) would allow regulations to be made permitting the circumvention of TPMs for broad private copying purposes.

43. This issues paper deals only with sections 47J and 110AA as exceptions to the copyright in photographs and cinematograph films. It does not address, or invite submissions on, the circumvention of TPMs.

44. Any changes to sections 47J and 110AA would have no effect on the separate legal protection of TPMs. Essentially this means that, even if either sections 47J and 110AA were to be extended to permit digital-to-digital copying, such copying might be allowed only where TPMs were not applied to photographs and films by copyright owners to block copying.

45. The Government is interested to ascertain the extent to which photographs and films are distributed by or with the consent of copyright owners without TPMs (see issues 2(c) and 5(c) below).

### ***Images embodied in computer programs***

46. Visual images embodied in an interactive computer game may also be a 'cinematograph film' for the purpose of the Act. Such images could be embodied in a CR-ROM, DVD or in integrated circuits. This is separate to copyright in computer program instructions capable of generating visual images. A computer program is a 'literary work' in the meaning of section 31(1)(a) of the Act. A question therefore arises if making a copy of a cinematograph film embodied in a computer program may also involve copying a substantial part of that computer program.

47. Division 4A of Part III of the Act contains a number of exceptions in relation to making a copy of a computer program. These exceptions allow reproductions to be made of a computer program in the same format as the original as a back-up copy. These exceptions also allow a reproduction for the purpose of obtaining information to make independently a new program or article that is interoperable with the original or another program. However there is no exception for making a 'format-shift' copy of a computer program.

48. Computer games and other programs that embody visual images also may be protected by TPMs.

49. The Government is interested to receive views from persons who propose that section 110AA should be extended to allow copying of a film from one digital form to another whether this would include a film embodied in a computer game or program (see Issue 7).

### ***Other permitted copying of photographs and films***

50. Sections 47J and 110AA permit photographs and films to be reproduced in a different format for the owner's private use. The Act also contains a number of other exceptions and statutory licences that allow reproductions of photographs and films to be made for other purposes.

51. These other purposes include copying for:

- research or study,
- criticism or review,
- parody or satire,
- educational use,
- libraries or archives,
- assisting people with a disability, and
- government use.

This issues paper only examines copying for private and domestic use by a legitimate owner.

### **Review of operation of section 47J – Photographs**

52. A particular concern of this review is whether the extent of copying permitted by section 47J might be extended, such as to permit digital-to-digital copying, without causing significant harm to copyright owners. The

Government is particularly interested to receive information on the circumstances in which additional copying that might be permitted, the nature and sources of the photographs that could be copied under a changed exception and the implications for professional photographers and copyright owners.

53. The Government is also interested in receiving any information that might indicate the present operation of section 47J is causing difficulties for photographers, copyright owners or other interested parties.

**Issue 1: Current operation of section 47J**

- (a) Does section 47J provide an appropriate balance between the rights of copyright owners and other interests?**
- (b) If section 47J is not appropriate, what are the options for achieving a better policy outcome?**
- (c) What are the benefits and costs of those options?**

**Issue 2: Should section 47J be changed to permit additional copying**

- (a) Under what additional circumstances should section 47J permit a reproduction to be made of a photograph for private and domestic use?**
- (b) What are the kinds and sources of photographs that are likely to be reproduced under any proposed changes?**
- (c) To what extent are photographs likely to be reproduced under any proposed changes subject to TPMs (such as anti-copying measures) to block unlicensed copying?**
- (d) How would any proposed changes affect the normal market exploitation of photographs and other legitimate interests of copyright owners?**

- (e) How would any proposed changes improve achievement of the Government's policy objectives, including economic incentives for the creation and distribution of photographs?**

**Issue 3: Should section 47J be changed to limit permitted copying**

- (a) What changes should be made to section 47J to limit making reproductions of photographs?**
- (b) How would any proposed changes affect the normal market exploitation of photographs and other legitimate interests of copyright owners?**
- (c) How would any proposed changes affect the Government's policy objectives, including fair and balanced copyright law?**

## **Review of operation of section 110AA - Films**

54. A particular concern of this review is whether the extent of copying permitted by section 110AA might be extended, such as to permit digital-to-digital copying, without causing significant harm to copyright owners. The Government is particularly interested to receive information on the circumstances in which additional copying that might be permitted, the nature and sources of the films that would be copied under a changed exception and the implications for film makers, copyright owners and distributors.

55. The Government is also interested in receiving any information that might indicate the present operation of section 110AA is causing difficulties for film makers, copyright owners and distributors.

**Issue 4: Current operation of section 110AA**

- (a) Does section 110AA provide an appropriate balance between the rights of copyright owners and other interests?**

- (b) If section 110AA is not appropriate, what are the options for achieving a better policy outcome?**
- (c) What are the benefits and costs of those options?**

**Issue 5: Should section 110AA be changed to permit additional copying**

- (a) Under what additional circumstances should section 110AA permit a copy to be made of a cinematograph film for private and domestic use?**
- (b) What are the kinds and sources of films that are likely to be reproduced under any proposed changes?**
- (c) To what extent are films likely to be reproduced under any proposed changes subject to TPMs (such as anti-copy measures) to block unlicensed copying?**
- (d) How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?**
- (e) How would any proposed changes improve achievement of the Government's policy objectives, including economic incentives for the creation and distribution of films?**

**Issue 6: Should section 110AA be changed to limit permitted copying**

- (a) What changes should be made to section 110AA to limit making copies of cinematograph films?**
- (b) How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?**
- (c) How would any proposed changes affect the government's policy objectives, including fair and balanced copyright law?**

**Issue: 7      Visual images embodied in a computer program**

- (a)    In the event that proposed changes to section 110AA would extend to a cinematograph film embodied in a computer game or program, should the making of a reproduction of that game or program be permitted – and if so how would this be implemented?**
  
- (b)    How would the issue of TPMs (such as anti-copy measures) be dealt with?**

**COPYRIGHT ACT 1968 - SECT 47J**

**Reproducing photograph in different format for private use**

- (1) This section applies if:
- (a) the owner of a photograph (the original photograph ) makes a reproduction (the main copy ) of it for his or her private and domestic use instead of the original photograph, and
  - (b) the original photograph itself is not an infringing copy of a work or published edition of a work, and
  - (c) either:
    - (i) the original photograph is in hardcopy form and the main copy is in electronic form, or
    - (ii) the original photograph is in electronic form and the main copy is in hardcopy form, and
  - (d) at the time the owner makes the main copy, he or she has not made, and is not making, another reproduction of the original photograph that embodies the original photograph in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the original photograph incidentally made as a necessary part of the technical process of making the main copy.

- (2) The making of the main copy is not an infringement of copyright:
- (a) in the original photograph, or
  - (b) in a work, or published edition of a work, included in the original photograph.

*Dealing with main copy may make it an infringing copy*

- (3) Subsection (2) is taken never to have applied if the main copy is:
- (a) sold, or
  - (b) let for hire, or
  - (c) by way of trade offered or exposed for sale or hire, or
  - (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

*Reproducing main copy may infringe copyright*

- (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of a reproduction of the main copy.

*Disposal of original may make the main copy an infringing copy*

- (6) Subsection (2) is taken never to have applied if the owner of the original photograph disposes of it to another person.

*Status of temporary reproduction*

- (7) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary reproduction of the original photograph as a necessary part of the technical process of making the main copy, then:
  - (a) if the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy--the making of the temporary reproduction does not infringe copyright in the original photograph or a work, or published edition of a work, included in the original photograph, or
  - (b) if the temporary reproduction is not destroyed at that time--the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the original photograph or a work, or published edition of a work, included in the original photograph.

**COPYRIGHT ACT 1968 - SECT 110AA**

**Copying cinematograph film in different format for private use**

(1) This section applies if:

- (a) the owner of videotape embodying a cinematograph film in analog form makes a copy (the main copy) of the film in electronic form for his or her private and domestic use instead of the videotape, and
- (b) the videotape itself is not an infringing copy of the film or of a broadcast, sound recording, work or published edition of a work, and
- (c) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the film in an electronic form substantially identical to the electronic form in which the film is embodied in the main copy.

For this purpose, disregard a temporary copy of the film incidentally made as a necessary part of the technical process of making the main copy.

- (2) The making of the main copy is not an infringement of copyright in the cinematograph film or in a work or other subject-matter included in the film.

*Dealing with main copy may make it an infringing copy*

- (3) Subsection (2) is taken never to have applied if the main copy is:
  - (a) sold, or
  - (b) let for hire, or
  - (c) by way of trade offered or exposed for sale or hire, or
  - (d) distributed for the purpose of trade or otherwise.

Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use.

*Disposal of videotape may make the main copy an infringing copy*

- (5) Subsection (2) is taken never to have applied if the owner of the videotape disposes of it to another person.

*Status of temporary copy*

- (6) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary copy of the film as a necessary part of the technical process of making the main copy, then:
- (a) if the temporary copy is destroyed at the first practicable time during or after the making of the main copy--the making of the temporary copy does not infringe copyright in the film or in any work or other subject-matter included in the film, or
  - (b) if the temporary copy is not destroyed at that time--the making of the temporary copy is taken always to have infringed copyright (if any) subsisting in the film and in any work or other subject-matter included in the film.

**COPYRIGHT ACT 1968 - SECT 109A**

**Copying sound recordings for private and domestic use**

- (1) This section applies if:
  - (a) the owner of a copy (the earlier copy) of a sound recording makes another copy (the later copy) of the sound recording using the earlier copy; and
  - (b) the sole purpose of making the later copy is the owner's private and domestic use of the later copy with a device that:
    - (i) is a device that can be used to cause sound recordings to be heard; and
    - (ii) he or she owns; and
  - (c) the earlier copy was not made by downloading over the Internet a digital recording of a radio broadcast or similar program; and
  - (d) the earlier copy is not an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording.
- (2) The making of the later copy does not infringe copyright in the sound recording, or in a literary, dramatic or musical work or other subject-matter included in the sound recording.
- (3) Subsection (2) is taken never to have applied if the earlier copy or the later copy is:
  - (a) sold; or
  - (b) let for hire; or
  - (c) by way of trade offered or exposed for sale or hire; or
  - (d) distributed for the purpose of trade or otherwise; or
  - (e) used for causing the sound recording to be heard in public; or
  - (f) used for broadcasting the sound recording.

Note: If the earlier or later copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the later copy but also by a dealing with the later copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the earlier copy or the later copy by the lender to a member of the lender's family or household for the member's private and domestic use.