

Our Ref: HM;ADP

Direct Line: 9926 0215

3 March 2008

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

Dear Ms Daniels

Re: Copying Photographs and Films in a Different Format for Private Use - Review of sections 47J and 110AA of the Copyright Act 1968

The Law Society of New South Wales welcomes the opportunity to make a submission regarding the Attorney-General's Department Issues Paper, 'Copying Photographs and Films in a Different Format for Private Use', dated January 2008 ("the Issues Paper").

The Issues Paper has been reviewed by the Law Society's Business Law Committee ("the Committee") and the views expressed are those of the Committee alone.

The Committee appreciates the extension of time granted to lodge the submission with the Attorney General's Department and thanks you for giving it the opportunity to provide comments.

The Committee is of the view that sections 47J and 110AA of the *Copyright Act 1968* ("the Act") should be extended to permit digital-to-digital copying for private and domestic use.

In addressing the issues raised by the Attorney-General's Department, the submission will firstly offer more general policy comments on copyright in the digital era. Secondly, it will respond to the specific questions included.

The following is the Committee's submission.

1. REVIEW OF OPERATION OF SECTIONS 47J and 110AA

1.1 Amidst the rapid emergence of digital products, consumer demand and expectations, cyber-markets, and the evolution of the 'e-world', copyright law and policy is struggling to maintain its tangibility. Legislation, now pushed to the

brink, is being forced to respond. A careful balance between the legal interests of copyright protection and today's evolving digital culture must be maintained.

- 1.2 The speed and reach of the digital information age poses new threats to copyright law, which Governments, regulators and society alike are having to accept, or challenge. True of most markets however, the digital market does not function free from the reach of regulatory intervention. The Committee shares the view that regulation intentionally acts as a protection mechanism for the property rights of authors and owners alike. It is of the opinion that sections 47J and 110AA of the Act should be extended to permit digital-to-digital copying for private and domestic use. This is to be achieved without causing significant harm to copyright owners.
- 1.3 In the year 2000, the Act was amended by the *Copyright Amendment (Digital Agenda) Act 2000*. The purpose of introducing those amendments was, to a large extent, to overcome uncertainty in relation to the protection of copyright over the Internet. In the present situation, we are again considering a similar issue as it relates to the protection of copyright in the digital era. It seems therefore, with regard to the operation of the law of copyright, that copyright doesn't strictly protect ideas or information, rather the way in which an idea or information is expressed in a material form (see, eg, *Autodesk Inc v Dyason (No 1)* (1992) 173 CLR 330). For example, digital-to-digital copying.
- 1.4 Because intellectual property law policy serves to structure the use and distribution of information, copyright law faces a challenging yet crucial role in the information age. Whether copyright law survives the digital era is dependant on how the intellectual property framework is structured. This in turn will determine not only which individuals (and groups) benefit from new opportunities afforded by the digital era, but also in what ways, and the extent to which, society actually derives a benefit from them.

Turning to the specific issues raised, the Committee provides the following brief comments.

2. SECTION 47J - PHOTOGRAPHS

Issue 1: Current operation of section 47J

- (a) In light of the Committee's comments in part 1 above, it is of the view that the current operation of s 47J does not provide an appropriate balance of interests. Section 47J should be amended to specifically include digital-to-digital copying.

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

- (a) Yes. Section 47J should be amended to permit additional digital-to-digital copying;
- (c) The Committee is of the opinion that the advancement of technology, and concurrent technological protection measures, will be forever shadowed by circumvention. As technological innovation advances so will the innovativeness of technological protection measure circumvention.

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

- (a) No. However, to the extent that s 47J is amended to permit digital-to-digital copying, then this is also to serve as its limitation. The Committee is cognisant that the operation of s 47J, as amended, must comply with article 9(2) of the Berne Convention, and article 13 of the TRIPS Agreement.

3. SECTION 110AA - FILMS

Issue 4: Current operation of section 110AA

- (a) In light of the Committee's comments in part 1 above, it is of the view that the current operation of s 110AA does not provide an appropriate balance of interests. Section 110AA should be amended to specifically include digital-to-digital copying.

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

Please refer to the Committee's above comments in Issue 2 as having regard to the construction of s 110AA.

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

Please refer to the Committee's above comments in Issue 3 as having regard to s 110AA.

Issue 7: Visual images embodied in a computer program

- (a) Yes. To the extent that proposed changes to S110AA would extend to cinematograph film embodied in a computer game, it is the Committee's view that the making of a reproduction of that game or program be permitted under the Act.
- (b) Please refer to the Committee's above comments in Issue 2 (c) as having regard to the operating of S110AA.

4. ADDITIONAL COMMENTS

- 4.1 Ultimately, economic demand and supply affect the use and price of goods and services. Underlying this equation is the concept of fair use, of which fairness is a key economic rationale of market activity. It is difficult to define the information (digital) age according to traditional economic rationale. Once legislation is either enacted or amended to adapt to new issues it can only regulate what is defined in its construction. It cannot regulate the intellectual creativity of the digital age. Innovation, in this context, will prevail.
- 4.2 Subject to the above comments, a copyright owner's economic rights must be upheld. The Committee does not condone technological piracy of any form, or any form of profit gained from dishonestly breaching a copyright owner's rights.
- 4.3 The Committee observes however the role that digital creativity has and will continue to have in shaping market forces. Because the space in which the digital age operates is a fluid dynamic, regulation will need to take its unique characteristics into account and adapt accordingly.

FURTHER SUBMISSION

The Committee is happy to provide further comments to the Attorney-General's Department on the issues raised in the Issues Paper. If any further information is required in relation to this submission, please contact Anthony Parbery, Acting Executive Member, Business Law Committee on (02) 9926 0256 or by email to adp@lawsocnsw.asn.au

Yours faithfully

Hugh Macken
President