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Issue 1: Current operation of section 47J

a) Does section 47J provide an appropriate balance between the rights of copyright owners and other interests?

No. This section is drafted too narrowly and provides unwarranted restrictions on the rights of consumers. In comparison to the fair use rights enjoyed by citizens in other jurisdictions this section fails to reflect current practices and unduly benefits copyright owners.

b) If section 47J is not appropriate, what are the options for achieving a better policy outcome?

The primary course of action which needs to be taken is the redrafting of the section to ensure that the restrictions placed on copying are reduced.

c) What are the benefits and costs of those options?

The benefits are the enactment of laws that are respected and easily understood by the general public. There is no cost as the law would be merely reflecting what common practice is already.

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?

There should be a removal of the limitations which prevent digital to digital and hard copy to hard copy copies. There should also be a removal of the restrictions on serial copying. Provided copying takes place for private or domestic use – ie. as a non commercial use – there should be no limitation as to the number of copies or nature of the copies permitted.

Similar provisions have been drafted with respect to s109A which meet Australia's obligations under the TRIPS Agreement. Furthermore, other jurisdictions that are also signatories to the TRIPS Agreement provide for the fair use of photographs on a non commercial, private basis and therefore are evidence of the fact that such provisions could be drafted in a way that is sufficiently narrow in scope, and would not deprive copyright owners the ability to generate economic value or cause the unreasonable loss of income.

b) What are the kinds and sources of photographs that are likely to be reproduced under any proposed changes?

I would suggest that primarily photographs of family members and of family events may be the most commonly reproduced photographs. Putting aside photographs taken by family members themselves, the sources of such pictures would most likely be professional photographers such as wedding or events photographers, employees of theme parks, restaurants, schools or the like. In most circumstances there would have already been some payment for these services and the reproduction taking place would be only of a personal benefit.

There may also be some reproduction of other photographs such as landscape or artistic photography. Again the sources would be primarily private individuals engaged as

professionals. There may also be some desire to reproduce photographs contained in publications such as newspapers and magazines which would have also been taken primarily by professional photographers and such publications purchased prior to reproduction.

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 copyright?

It is my belief that it would very rarely be the case that photographs in these categories would be the subject of TPMs.

d) How would any proposed changes affect the normal market exploitation of photographs and their legitimate interest of copyright owners?

It is my understanding that most citizens feel comfortable with reproduction of photographs for personal, non commercial uses and that the law simply fails to reflect current practices. In this light there would be no difference to the normal market exploitation of photographs and the interests of copyright holders. As the majority of photographs identified to be the subject of this section would have initially been taken by professional photographers there may be an opportunity for a small increase in contractual costs to offset any perceived detriment.

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

To begin with the government should openly acknowledge the changes in economic and social circumstances brought about by digital technologies and note that there is a far lesser need to provide economic incentives for the creation and distribution of photographs. Indeed one need only look briefly at a website such as Flickr¹ to see that the production and exchange of photographs is wide spread without the need to provide the same degree of financial incentive that was once socially optimal.

With respect to professional photographers engaged by family members, in the course of family events, in employment or on a private contractual basis there would be sufficient opportunity for the negotiation of an increase in price for the initial services to cover any perceived shortfall from these changes. However I would argue that this would be unnecessary given that this level of copying is already taking place and changes to the law would therefore have no impact on the current economic situation of photographers.

In short, these changes would not detract from the creation of economic incentives or harm any emerging market; instead such changes would reflect current consumer behaviour, would provide equity and reasonable enjoyment to consumers in comparison to those in similar jurisdictions and would create no further risks with respect to copyright piracy.

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?

There should be no additional limitations placed on the private copying of photographs.

b) How would any proposed changes affect the normal market exploitation of photographs and other legitimate interests of copyright owners?

¹ Flickr. <<http://www.flickr.com/>>

Any additional limitations would dissuade consumers from engaging professional photographers therefore reducing the ability of professionals in this field to sustain themselves financially.

c) How would any proposed changes affect the government's policy objectives, including fair and balanced copyright law?

Any further limitations would prevent the achievement of the central purpose of copyright law which is to benefit the public. Additional restrictions of any kind would create further imbalance in the regulatory measures and offer creators undue protections at the expense of the legitimate enjoyment of the consumer.

Issue 4: Current operation of section 110AA

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

No. This section provides undue protection to copyright owners and therefore fails to achieve the objectives of allowing consumers to legitimately enjoy purchased goods and creates inequity given that citizens in similar jurisdictions have much wider rights than Australians.

b) If section 110AA is not appropriate, what are the options for achieving a better policy outcome?

The best option is to redraft the section to allow for fewer limitations on private copying for non commercial use.

Similar provisions have been drafted with respect to s109A which meet Australia's obligations under the TRIPS Agreement. Furthermore, other jurisdictions that are also signatories to the TRIPS Agreement provide for the fair use of film on a non commercial, private basis and therefore are evidence of the fact that such provisions could be drafted in a way that is sufficiently narrow in scope, and would not deprive copyright owners the ability to generate economic value or cause the unreasonable loss of income.

c) What are the benefits and costs of these options?

The benefits are firstly the creation of incentives for consumers to purchase legitimate material. There has been a significant change in perception of the film industry since the advent of digital technology with many consumers perceiving the lobbying for undue limitations on private use as being unfair and greedy, furthering a lack of respect and a sense of justification in failing to obtain legitimate goods. The provision of reasonable private copying rights would restore some of the lost confidence created by the restrictions currently in place. There would be no additional cost to the industry as such measures would serve to increase the favourability of purchasing legitimate goods.

Secondly the benefits would be to consumers on an individual level and to society as a whole. On an individual level consumers would be entitled to make back up copies, to have copies on more than one device and to make copies in the same format. This would reflect what is, in some cases already current practice and in many others, is very much the desired practice.

The increase usability and availability of culture serves society as a whole by producing an informed citizenship, educated and aware of issues, exposed to a diverse range of material and thus ultimately producing progress within society.

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?

All private copying for non commercial purposes should be permitted. There should be no restriction on the number of copies or format of the copies that can be made.

b) What are the kinds and sources of films that are likely to be reproduced under any proposed changes?

Primarily the kinds of films would include entertainment and documentary style features. The sources would be most commonly professional productions although some amateur productions may also be reproduced.

c) To what extent are films likely to be reproduced under any proposed changes subject to TPMs (such as anti-copying measures) to block unlicensed copying?

There is a reasonably high chance that films of an entertainment nature would be the subject of anti-copying measures. Arguably this is less likely for other forms of film such as documentaries, art house and amateur film. I note that this inquiry does not specifically concern the application of TPMs however feel it necessary to state that the current provisions as well as any changes could only ever be enjoyed in real terms if the government changed the law with respect to TPMs. Similarly, legislative provisions are needed to ensure that contractual provisions cannot be used to override any offers of fair dealing made under copyright legislation.

d) How would any proposed changes affect the normal market exploitation of films and other legitimate interest of copyright owners?

Provided reproduction is for private, non commercial uses, there is likely to be no, or a limited impact on the normal exploitation of films or other interests of copyright holders. If anything it would create greater incentives for consumers to purchase legitimate works as they will consider themselves to have more opportunities to use and enjoy the products.

e) How would any proposed changes improve achievement of the Government's policy objectives, including economic incentives for the creation and distribution of films.

Such a change would dramatically increase the policy objectives of enabling consumers to make legitimate uses of their purchases. It would also provide equity between citizens with other similar jurisdictions already allowing for the unlimited private, non commercial copying of films. There would be no loss in economic incentives to create and distribute films, no risk of an increase in piracy, nor any negative impact on emerging digital markets. Consumers would more likely see more value in purchasing legitimate goods given their ability to lawfully use the product in multiple ways.

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?

None. There should be no increase in the limitations on the private copying of film.

b) How would any proposed changes affect the normal market exploitation of films and other legitimate interests of copyright owners?

Any increase in restrictions on consumers rights to deal fairly with film would act as a further disincentive to purchase legitimate product and would therefore detract from the ability of the creator to receive financial rewards for their creations.

c) How would any proposed changes affect the government's policy objectives, including fair and balanced copyright law?

Any increase in limitations on the consumer would further detract from the achievement of the policy objectives of encouraging the legitimate use of purchased goods by consumers therefore creating further imbalance in copyright law. It would also prevent the realisation of laws providing consumer rights on par with other similar jurisdictions. In discouraging the purchase of legitimate products it would also harm emerging markets, increase the risk of piracy and impact on the ability of creators to receive reasonable financial rewards.

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 making a reproduction of that game or program be permitted – and if so how would this be implemented?

I think that the law should extend private copying provisions to film embodied in a computer game or program. This could be implemented by the inclusion of this form of subject matter specifically within s110AA or in another unique section of the Act. It would be optimal to expressly state its inclusion rather than leave it open for interpretation.

b) How would the issue of TPMs (such as anti-copying measures) be dealt with?

As this review does not allow for the detail analysis of the negative impacts of TPMs on consumer rights in general I shall attempt to limit my comments in this area. All TPMs are incompatible with consumer rights and with respect to any formulation of fair dealing. Without legitimate access to circumvention devices and the ability to use these to access material, any law purporting to offer private copying rights will be easily avoided by creators. Similarly, legislative provisions are needed to ensure that contractual provisions can not be used to override any offers of fair dealing made under legislation. The government should take steps to prevent the wholesale abrogation of consumer rights through the use of this technology and completely change the law in this area.