



**Submission by
Free TV Australia Limited**

The Attorney-General's Department

Copying Photographs and Films in a
Different Format for Private Use

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

29 February 2008



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| TABLE OF CONTENTS |
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| | | |
|----------|--|----------|
| 1 | EXECUTIVE SUMMARY..... | 1 |
| 2 | INTRODUCTION | 2 |
| 3 | REASONABLE CONSUMER INTERESTS | 2 |
| 4 | LEGITIMATE INTERESTS OF COPYRIGHT OWNERS..... | 2 |
| 5 | SECTION 110AA AND SECTION 109A OF THE ACT | 3 |
| 6 | SECTION 110AA AND SECTION 111 OF THE ACT | 3 |
| 7 | SUGGESTED AMENDMENTS | 4 |



1 Executive Summary

- Free TV Australia supports the broadening of section 110AA of the *Copyright Act 1968* (“the Act”) to recognise the modern realities of consumer behaviour in the home and the developments and capabilities of consumer electronic devices.
- In particular, section 110AA should be drafted in comparable terms to section 109A of the Act.
- However, some modification to the wording of section 109A should be considered to allow more than one copy to be legitimately made and to address some apparent anomalies in the drafting.
- Further, section 110AA should apply to all legitimate private copies of cinematograph films (and any underlying works incorporated in them) including those legitimately made pursuant to section 111 of the Act.
- The proposed amendments should be extended to visual images embodied in a computer program.
- Free TV has no comment on the provisions of section 47J.

2 Introduction

Free TV Australia is the peak industry body representing all of Australia's commercial free-to-air television licensees.

Free TV welcomes the Attorney General's review of sections 47J and 110AA of the *Copyright Act 1968* ("the Act").

3 Reasonable Consumer Interests

The capabilities of consumer electronic devices are rapidly expanding. Modern technology makes it possible to integrate previously separate capabilities within the home and also to consume privately owned copyright material outside the home.

As these capabilities change, so too do the legitimate expectations of consumers who use them. For example consumers have had a long standing expectation that they should be able to record broadcast programs on their home recording device (typically a VCR) and watch that program at a more convenient time.

The advent of personal video recorders (PVRs) and wireless home networks has modernised this expectation. For example, in the past a consumer might take a tape containing a recorded broadcast program from the VCR in one room within the home and watch that tape in another room on a different machine. Or they might take a legitimately purchased DVD from one room and watch it on a player in a different room. These days, consumers expect to be able to view a program recorded on one device in the home on any of the other devices in the home without the need to physically take a single copy from room to room.

The act of viewing cinematograph films is no longer confined to the living room. All devices in the home can be linked via a home network and a copy of a program or DVD can be viewed on any or all of them, including personal and mobile devices such as iPods. Consumers expect to be able to view video material on a number of different devices.

Sometimes a number of family members will also want to access the same material in different rooms and in different formats and home networking has made this possible. Copyright law will continue to gain credibility and respect amongst consumers if these kinds of existing behaviour are legitimised.

4 Legitimate interests of copyright owners

Free TV has developed a suggested amendment to section 110AA (see section 7 of this submission) which will enhance consumer demand for video material and encourage innovative sales and licensing practices by copyright owners, to extract true value for the use of that material.

Free TV does not believe the proposed amendment to section 110AA will adversely impact the legitimate interests of copyright owners. Much of the behaviour that would be legitimised by Free TV's suggested amendment is already occurring.

As significant owners of copyright, free-to-air television broadcasters do not consider that facilitating greater flexibility in personal use of legitimate copies of cinematograph films will have an adverse impact on the emerging market for paid downloads or the existing market for purchased DVDs.

Free TV is not advocating indiscriminate copying and distribution of such material on the Internet – the copying to be legitimised is that which occurs for private and domestic use within a home network (and Free TV's proposed amendment reflects this). Free TV supports the existing provisions relating to Technological Protection Measures on various devices to block unlicensed copying.

5 Section 110AA and section 109A of the Act

Section 110AA should be drafted in comparable terms to section 109A of the Act. However, the drafting of section 109A should be reviewed and broadened. As currently drafted, section 109A does not reflect the realities of existing technology and consumer practice and suffers from the following limitations:

- section 109A only allows the owner of a sound recording to make a single copy of the recording, whereas the ordinary use of the relevant technology is to make more than one copy *within* the household *or* for private purposes;
- section 109A only allows a copy to be made on a device belonging to the person who 'owns' the sound recording. This is a curiously limiting concept as it would be quite a common and reasonable for a copy to be made on a device belonging to a member of the owner's family within the owner's household; and
- section 109A contains some wording concerning downloads, namely "the earlier copy was not made by downloading over the Internet a digital recording of a radio broadcast or similar program". This was presumably intended to deal with podcasts and other digital recordings which are licensed (but does not explain what "or other similar program" might mean). However, the provision could equally be read as referring to listening to a radio broadcast on a computer by means of streaming or other technologies, which should not be distinguished from any other form of broadcast.

As a result, whilst section 109A should be adopted as a model for amendments to section 110AA, very careful attention should be paid to the form of any redrafting, so as to properly balance the interests of copyright owners and consumers.

6 Section 110AA and section 111 of the Act

If section 110AA were to be amended as proposed, consideration would need to be given to the connection between the provisions in the Act which allow for the

recording of broadcasts, including cinematograph films, in limited circumstances, and the time shifting exception contained in section 111.

A key issue will be whether a copy made under section 111 of the Act should be regarded as a legitimate copy of a film for the purposes of section 110AA of the Act.

A consumer who records a broadcast may wish to make a copy on another device within the household, such as a personal computer or iPod, for viewing at a more convenient time. Indeed, the consumer may make more than one copy for the purpose of viewing by one or more family members within the household. That seems only reasonable and consistent with modern expectations. Many modern families have multiple television sets or other personal video devices within the home. Where previously a family may have watched a program together, these days it is more likely that each will do so in their own room or even as they are travelling to work or study.

This reveals some issues with the current drafting of section 111 of the Act. Even with current technology, one possible scenario would involve a person who wishes to watch a program but must leave for work so he decides to record an item on his personal video recording device to watch later. On arriving home, the person may make another copy of the program to watch on his computer in another room as the rest of the family is watching something else on the main television set. He may not finish watching his recording and may wish to upload the program from the hard drive on his computer to a portable device so that he can watch it on his way to work.

This behaviour in changing the form of the broadcast into the most convenient and appropriate form for the consumer should be acceptable under copyright law and there should be no differentiation between the recording of live and pre-recorded programs. Accordingly, section 110AA should apply to copies made under section 111 of all content broadcast, including live broadcasts and pre-recorded (eg feature film and program content), on free-to-air, digital and cable.

7 Suggested amendments

Free TV makes the following suggestions for amendments to section 110AA consistent with our comments above:

110AA Copying cinematograph films ~~in different format~~ for private and domestic use

- (1) This section applies if:
 - (a) the owner of a copy (the **earlier copy**) videotape embodying of a cinematograph film ~~in analog form~~ makes a copy (the **main later** copy) of the film ~~in electronic form~~ from the earlier copy; and
 - (b) the sole purpose of making the later copy was for his or her private and domestic use instead of the videotape of the later copy with a device that enable films to be seen and heard that belongs to the owner's household; and

- ~~(c)~~ the earlier copy~~videotape~~ itself is not an infringing copy of the film or of a broadcast, sound recording, or a literary, dramatic or musical work, ~~work or published edition of a work embodied in the film;~~ and
- ~~(d)~~ the earlier copy was not made by downloading over the Internet a digital recording of a film. 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 later 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 an earlier or later main copy may make the later copy an infringing copy

- (3) Subsection (2) is taken never to have applied if the earlier copy or the later 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 earlier copy or the later 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 later main copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the earlier copy or the later 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.~~