



Senate Select Committee on the Free Trade Agreement between Australia and the United States of America

SCREENRIGHTS' SUBMISSION

SCREENRIGHTS – THE AUDIO VISUAL COPYRIGHT SOCIETY

SCREENRIGHTS

The Audio-Visual Copyright Society Ltd, trading as Screenrights, was established in 1990 and operates on a non-profit basis as a copyright collecting society for copyright holders in audio and audio-visual works including film producers, film distributors, script writers, visual artists and music publishers and composers.

Screenrights, as the declared collecting society for the purposes of section 135P of the *Copyright Act* 1968 ("the Act"), administers the educational copying scheme under Part VA of the Act ("the Part VA Scheme"). The Part VA Scheme creates a statutory licence which enables educational institutions to copy radio and television broadcasts and communicate such copies for their educational purposes upon payment of equitable remuneration to Screenrights.

Screenrights has been declared the collecting society for the purposes of Division 4 of Part VC of the Act ("the Part VC Scheme"). The Part VC Scheme creates a statutory licence which enables cable operators to retransmit free-to-air broadcasts upon payment of equitable remuneration to the declared collecting society.

Screenrights is the declared collecting society under the Part VC Scheme under Section 135 ZZT of the Act for categories of copyright holders in works, sound recordings and cinematograph films included in free-to air broadcasts.

Screenrights is also the declared collecting society under Division 2 of Part VII of the Act in relation to government copies of television and sound broadcasts and works included in television and sound broadcasts.

BACKGROUND TO THIS SUBMISSION

Certain evidence given before the Senate Select Committee on the Free Trade Agreement Between Australian and the United States of America ('Senate FTA Committee') has sparked Screenrights to make this submission. That evidence related to the issue of private (or 'home') copying. For example, at the request of the Committee by Dr Matthew Rimmer of the ANU offered this evidence:

I talked about time shifting before and the case of Sony against Universal Studios in which the Supreme Court of the United States held that it was a fair use to engage in time shifting. That would essentially mean that a consumer in the United States could make a copy of a show while they were out and then watch that when they came home, and they would not be breaching copyright. It seems ludicrous to me that in Australia engaging in that activity, such as copying *Queer Eye for the Straight Guy* and then coming back later in the day and watching that, would amount to copyright infringement in Australia.¹

Screenrights would like to take this opportunity place the issue of private copying into some context in the Senate FTA Committee's deliberations,

¹ Senate FTA Committee Hansard, Monday 17 May 2004, 13. Also the discussion transcribed at Senate FTA Committee Hansard, Tuesday 18 May 2004, 85-101.

given the recent work that has been undertaken by copyright interests in this area.

The primary submission of Screenrights is that the issue of private copying is too broad to be dealt with at this juncture. The Copyright Law Review Committee should be given the brief to conduct an inquiry into the area and to make recommendations to Government.

EXISTING TREATY OBLIGATIONS

While much of the focus of recent submission-making has been centered on the terms of the FTA, it is useful to place the issue of private copying into its existing legal context.

Article 9 of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention") provides:

- (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.
- (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.
- (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.

The main committee report accompanying the final drafting of article 9 explained how the article 9(2) exception to the reproduction right should be implemented in national law:

If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal

exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment.²

This represents one of the earliest explanations of what is known today as the “three-step test” in international intellectual property law.

Since 1994 article 9 of the Berne Convention has operated as an obligation within TRIPS³, being incorporated (along with most other Berne articles) within that WTO agreement by reference.⁴ TRIPS also provides its own overarching three-step test worded in similar terms to Berne article 9(2).⁵

Australian law has confined exceptions to the right of reproduction to quite specifically. In relation to the broadest exceptions of those exceptions, fair dealing, Australia has settled upon four exhaustive purposes: research and study, criticism and review, reporting the news and professional legal advice. Even within these existing provisions Professor Sam Ricketson, a leading international copyright expert, has concluded that the exception for research and study exception fails in certain respects to comply with the three-step test.⁶

The general equivalent to Australia’s fair dealing provision in US law is the fair use exception. Fair use in US copyright law is influenced somewhat by First Amendment Constitutional protections, and is not confined to an exhaustive list of purposes. Broadly speaking, courts in the US enter into a ‘balancing of interests’ exercise in many copyright infringement actions in which fair use is pleaded as a defense.

² *Records of the Intellectual Property Conference of Stockholm* (1967) volume II, 1145.

³ ‘TRIPS’ is well-known acronym for the Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C.

⁴ TRIPS article 9(1).

⁵ TRIPS article 13.

⁶ Sam Ricketson, *The three-step test, deemed quantities, libraries and closed exceptions*, chapter 4 (Centre for Copyright Studies, 2002).

There is nothing in chapters 16 or 17 of the FTA which suggests that any of the primary international copyright norms pertaining to the reproduction right are to be modified. On the contrary, those existing norms are positively affirmed.⁷

SONY V UNIVERSAL

Dr Rimmer in his evidence referred to the 1984 US Supreme Court decision of *Sony Corp v Universal City Studios Inc* ('Sony')⁸. The action was brought by two film studios, Universal and Disney, against Sony. The claim, in essence, was that Sony's manufacture and sale of video cassette recorders constituted contributory infringement of the film studios' copyright. The opinion of the majority in *Sony* can be summarised by these three related propositions:

- 1 Recording without permission a broadcast program for the purpose of 'time-shifting' so that it is watched only once at a later time constitutes fair use;
- 2 Evidence was tendered at trial that VCRs are often used for time-shifting; and
- 3 Because Sony's VCRs were capable of this commercially significant non-infringing use, the manufacturer of those VCRs could not constitute contributory copyright infringement.⁹

Thus, the key aspect of the case on which all else rests was that copying broadcast audio visual works for time-shifting constituted fair use.

⁷ Article 17.1. The FTA relevantly extends existing international norms in relation to technological protection measures; in particular the imposition of liability for actual circumvention: article 17.4.

⁸ 464 US 417 (1984).

⁹ See generally William Fisher III, "Reconstructing the Fair Use Doctrine" (1988) 101 *Harvard Law Review* 1661. See also *Copyright, Designs and Patents Act* 1988 (UK), section 70. Note that section 111 of the *Copyright Act* 1968 (Cth) pertains to broadcast signal copyright only.

The expressions 'time-shifting' and 'library building' were deployed extensively in the *Sony* litigation. 'Time-shifting' was understood in the case to be where a user records a program in order to watch it at a later time, and then records over it, and thereby erases the program, after a single viewing. 'Library building' was understood to be where the user records a program in order to keep it for repeated viewing over a longer term.

In *Sony* evidence tendered was that on average Sony VCR users had between 25 to 32 blank tapes, of which 40% of users had more than ten tapes in a "library".¹⁰ In 1995, Screenrights engaged the survey firm A C Nielsen to conduct a similar survey within Australia.¹¹ The A C Nielsen survey of over 2,000 households revealed that 82% of Australian households owned VCRs. Of those households, the average number of recordable tapes in a household's possession was 29, 25 of which contained television broadcast recordings. Of those 25 tapes, applying the definitions used in the *Sony* litigation, 19 would be library holdings and 6 would be as time-shift holdings.

This increased tendency to library build in Australia in 1995 compared to the data from the *Sony* litigation for the US in the early 1980s might be explained in part by enhanced copy quality afforded by advanced technology. For example, between the early 1980s and the mid 1990s, stereo hi fi was added to television broadcast signals and VCRs correspondingly evolved to copy this hi fi signal. The ability of consumers to make more perfect copies might help explain the increased desirability of library building.

As digital broadcasting becomes more popular, and digital broadcast recording devices and media become better and cheaper, with vastly increased capacity, it is possible to deduce that the tendency to 'library build' will grow. It may be noted that the trial judge in *Sony*, whose findings were ultimately upheld by the Supreme Court majority, dismissed the possibility that library building would cause undue harm to copyright owners for the reason that because a blank video tape then cost 'approximately \$20, an extensive library will be very expensive and it has not been proven that many

¹⁰ *Universal City Studios Inc v Sony Corp* 480 F. Supp. 429 (1979).

¹¹ Survey Report *Private Copying On Videotape*, 26 October 1995.

persons will library to any significant extent.¹² There is obvious policy danger in applying a decision so premised, in an environment where some digital recording media is approaching an almost nominal price.

PRIVATE COPYING LEVY SCHEMES

At least twelve EU Member States have instituted some form of private royalty scheme or similar fiscal measure.¹³ Notably the solutions arrived at in these countries transcend merely 'time shifting' exceptions, but provide a remunerated exception to other acts of private copying such as the recording of pre-recorded music for domestic use. The three typical features of such schemes (first enacted in Germany in 1965) are (i) a copyright exception for acts of private copying; (ii) an obligation on the manufacturers of equipment suitable for private copying to pay a levy to a copyright collecting society; (iii) distribution of those funds to copyright owners by the collecting society on the basis of sampling data.

In Belgium, for example, the private copying scheme permits reproduction of sound and audiovisual works made within the family circle and intended for that circle. A levy is applied upon mediums that may be used to reproduce sound and audiovisual works and appliances permitting such reproduction. The levy is paid by the manufacturer or importer. The actual levy comprises: 3% of selling price of appliances; 2 francs per hour for analog mediums and 5 francs per hour for digital mediums. Private copying schemes are also in place in Japan, and a Canadian scheme was introduced in 1997.

This State practice suggests the three-step test requirements set down by Article 9(2) of the Berne Convention is translating into an international norm of effective remuneration for the reproduction right in the private copying context.

¹² *Universal City Studios Inc v Sony Corp* 480 F. Supp. 429 at 467 (1979).

¹³ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Netherlands, Portugal, Spain and Sweden.

TECHNICAL MEASURES AND PRIVATE COPYING

An issue in this area has been the impact of technological protection measures used by copyright owners, or as part of technical standards.

The approach taken to private copying and digitization in the US has had a technical focus. There, the Copy Protection Technical Working Group has been in existence for several years. It is a non-government consortium comprising content providers (including the Motion Picture Association of America), consumer electronics manufacturers and representatives from the information technology industry ('MPAA/5C').¹⁴

The consortium's aim has been to develop workable standards to protect digitised audio-visual works from widespread unauthorised dissemination. It was this group which devised and continues to revise the copy protection standards for digital versatile discs ('DVDs').

A sub-group of this working group was formed to deal exclusively with digital broadcasting. This MPAA/5C proposal was adopted in the US Federal Communication Commission's *Digital Broadcast Content Protection 2003* Rulemaking which mandates this proposal, coined the 'broadcast flag' standard.¹⁵ This technological standard is primarily directed to limiting the ability to communicate digitally broadcast content to the public using the digital networks, in particular the Internet. The standard does not affect the ability to make digital private copies on compliant devices.

In the EU, after a lengthy deliberative process involving the Council of the European Union, the European Parliament and the European Commission, a

¹⁴ '5C' are five companies: Hitachi Ltd., Intel Corporation, Matsushita Electric Industrial Co. Ltd., Sony Corporation, and Toshiba Corporation.

¹⁵ FCC 03-273, 4 November 2003.

common position was arrived at in 2001 the European Directive harmonising 'certain aspects of copyright and related rights in the information society'.¹⁶

Article 5(2)(b) allows Member States to provide for an exception to the reproduction right 'in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, *on condition that the rightholders receive fair compensation*'.¹⁷ A recital to the Directive indicates that as digital copying is likely to be more widespread and have greater economic effect upon copyright owners, remuneration schemes that provide fair compensation should take "due account of the differences between digital and analogue private copying".¹⁸ Further, any exception under the Directive must comply with the three-step test.¹⁹

Under the Directive, fair compensation for private copying should take account of "the application or non-application of technological measures".²⁰ A recital to the proposed Directive provides that:

When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.²¹

This is reflected in article 6(4). That article provides that:

¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

¹⁷ Emphasis added.

¹⁸ Recital 38.

¹⁹ Article 5(5).

²⁰ Article 5(2)(b).

²¹ Recital 39.

A Member State may also take such measures in respect of a beneficiary of [the private copying exception], unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions [the private copying exception], without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The effect of this is to permit the joint existence in national law of laws protecting technological measures and a home copying statutory licence. When enacting laws that protect technological measures, a national legislature may ensure that private copying can occur on the payment of fair compensation. Such a private copying exception should not, however, inhibit the law's general protection of technological measures.

Significantly, in all cases of private copying, the Directive provides as a minimum for the possibility of copyright owners receiving fair compensation for the use.

AUSTRALIAN LAW REFORM

Australia once attempted to introduce a private copying scheme into Australian law in the context of home audio copying. This came out of a recommendation from a 1986 Commonwealth inquiry into the Arts.²² The levy was to apply to audio tapes with playing times in excess of 30 minutes and was calculated by reference to the length of the playing tape. Consumers were to be able to home-tape either directly from pre-recorded media or from broadcasts so long as the copy was for their private and domestic use without infringing copyright.

²² *Patronage, Power and the Muse: Inquiry into Commonwealth Assistance to the Arts*, House of Representatives Standing Committee on Expenditure, September 1986 (Recommendation 24).

The blank tape levy was characterised by the High Court as a tax and ruled unconstitutional.²³ Alternatively, if not a tax the High Court would have found the levy to be an acquisition of property not on just terms and therefore unconstitutional on that basis. In both respects this was because the drafting of the scheme failed to link the levy as a payment for the statutory licence to make private copies. This was a mere drafting flaw; a statutory copyright licence could be drafted in Australia without any likelihood of characterisation as a tax.

In 2002 to argue the case for further public debate on the issue of private copying, the Australian Performing Right Association, the Australasian Music Publishers Association, Screenrights, the Screen Producers Association of Australia, the Australian Screen Directors Association and the Australian Writers Guild made to the Attorney-General and the Minister for Communications, Information Technology and the Arts an extensive written submission dedicated exclusively to the issue of private copying. That submission is here annexed.

An aspect of that submission was a proposed private copying scheme jointly drafted (in legislative form) by Mr Denis Rose QC (Special Counsel, Blake Dawson Waldron) and Dr David Brennan (Faculty of Law, University of Melbourne). Key features of the proposed scheme are:

- A licence to purchasers (that is, consumers) of levied recordable media to reproduce works on that media for private use without infringing copyright.
- Private use is defined as reproduction or copying by a person for that person's own private and non-commercial use, or such use within that person's domestic circle. Accordingly, the exception to infringement of copyright does not apply where the reproduction or copy is: (a) sold or

²³ *Australian Tape Manufacturers Association Ltd v Commonwealth of Australia* (1993) 176 CLR 480 which declared Part VC invalid by reason of non-compliance with section 55 of the Constitution. See Johnston, 'Taxing Time: The High Court & the Tax Provisions of the Constitution' (1993) 23 *University of Western Australia Law Review* 362. Part VC was formally repealed by Act 107 of 1993, section 13.

let for hire; (b) used so as to cause a work to be performed, seen or heard in public (whichever is applicable); (c) used so as to communicate to the public the work; or (d) used otherwise than for a private use.

- The royalty is imposed on recordable media, a term defined to mean 'any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use'.
- The licence allows for both on-line and off-line copying. However, the exception to copyright infringement will not apply where the reproduction or copying is made using a circumvention device or service.
- It is possible for a purchaser of recordable media to 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.
- The purpose of the royalty is to provide equitable remuneration to copyright owners for the reproduction and/or copying of their works by consumers for private use. The Copyright Tribunal determines the appropriate amount of equitable remuneration for private copying.

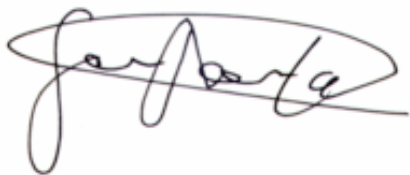
Mr Dennis Rose QC provided an opinion (which formed part of the submission) that an enactment in accordance with the proposal would comprise a valid exercise of Commonwealth powers.

The essential request to Government in the submission was for a public inquiry (such as one conducted by the Copyright Law Review Committee) into the issue of private copying. No response to the submission was made by either Department.

CONCLUSION

By this submission it is hoped that Screenrights has been able to put into better context the issue of private copying. In particular, it is hoped that this Senate FTA Committee is persuaded that:

- (a) The issue is too broad to properly fall within the scope of FTA considerations, given that agreement barely affects the *status quo* in any relevant respect;
- (b) The issue of remuneration for private copying is an important one to Australia's cultural industries;
- (c) The existing law is brought into disrepute by the millions of breaches of copyright law committed in Australia every year through private copying;
- (d) The treatment of private copying in the law, and in particular the role of technology protection measures and the role of a private copying levy scheme, should be referred to the specialist advisory body, the Copyright Law Review Committee.

A handwritten signature in dark ink, appearing to read 'Simon Lake', written in a cursive, flowing style.

Simon Lake
Chief Executive

22 June 2004

COPY

22 January 2003

Senator the Hon Richard Alston
Minister for Communications, Information Technology and the Arts
Parliament House
CANBERRA ACT 2600

Dear Minister,

CLRC reference - Royalty Compensation Scheme for Private Copying of Copyright Material

We write as a follow-up to our letter of 30 October 2002. We have not as yet received a reply to our request that an inquiry be conducted into the proposal to establish a private copy levy.

If our proposal has raised any questions which you wish to have addressed, Brett Cottle (APRA) and Simon Lake (Screenrights) are available to meet with you at your earliest convenience.

We seek your active support in establishing an inquiry. We would expect this can most effectively and easily be done through the Copyright Law Review Committee (CLRC).

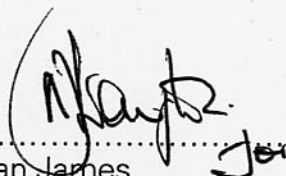
The introduction of a Royalty Compensation Scheme for Private Copying of Copyright Material would be a positive initiative for the audio-visual production sector and for Australian consumers, who would not be placed in the legally vulnerable position that they are currently in every time they use their video recorder or cd burner.

We again strongly urge the Government to take positive action in relation to this issue - which is by far the most important issue facing copyright owners generally.

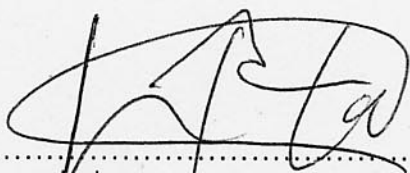
With best wishes for the New Year,



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Brett Cottle
Chief Executive
*Australasian Performing Right Association
Australasian Mechanical Copyright
Owners Society Limited*



.....
Ian James
Chairman
*Australasian Music Publishers
Association Limited*



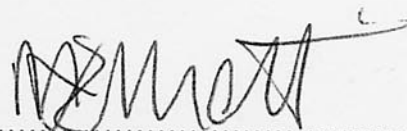
.....
Simon Lake
Chief Executive
*Audio Visual Copyright
Society Limited (Screenrights)*



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Geoff Brown
Executive Director
*Screen Producers Association
of Australia*



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Richard Harris
Executive Director
Australian Screen Directors Association



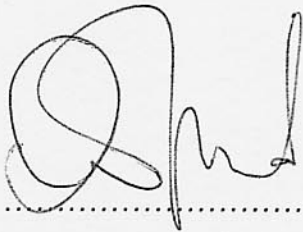
.....
Megan Elliott
Acting Executive Director
Australian Writers Guild



Marshall Cullen
Chairman
Music Managers' Forum (Aust)

Unavailable for Signature

Julie Owens
Executive Officer
*Association of Independent
Record Labels*



Anna Ward
Executive Director
Viscopy

The case for a private copying levy

Australian Mechanical Copyright Owners Society (AMCOS) & Screenrights

October 2001

1: Background

Most private copying of recorded music and television programs infringes copyright, but copyright owners are unable, in practice, to prevent it or license it, partly because of concerns about privacy. Much private copying of other material – including text and images – also infringes copyright and is similarly unenforceable.

A solution – adopted in many other countries – is to allow private copying as an exception to infringement, but at the same time remunerate copyright owners from levies payable on blank recording media and recording devices.

Such a scheme was introduced in Australia in 1989, but declared unconstitutional by the High Court in 1992. A similar scheme – but which would have avoided the constitutional difficulties of the 1989 scheme – was proposed by the Government in 1993 but never introduced.

2: Why now?

There is a renewed urgency to introduce a private copying levy, for the following reasons:

2.1 Digital Agenda amendments now in force

Until earlier this year, the major concern of copyright owners has been the passage and implementation of the Digital Agenda Act. While this was in progress, there was little opportunity for consideration of other reform issues such as private copying.

2.2 Increasing opportunities for private copying

Technological developments are providing increasing opportunities for private copying – including new types of copying media, new types of copying devices, and new sources of access to copyright material. In addition, sales of digital recording media and devices in Australia rapidly increasing.

2.3 International developments

International experience has shown that there is a continued role for private copying schemes, and that private copying has not been controlled by technological means. This position is reflected in the recently adopted EU Information Society Directive. Countries with private copying levies have recently begun extending their schemes to digital media and devices. As a result, private copying levies – which were declining due to decreasing use of analogue media and devices – are now increasing.

3: Arguments in favour of a private copying levy

- Failure to respond to widespread infringement encourages disrespect for, and misunderstanding of, copyright law. It is also inconsistent with government policies of increasing awareness and acceptance of copyright;
- Copyright owners are adversely affected by private copying because of lost sales and licensing opportunities;
- Providing an exemption for private copying without remuneration would be inconsistent with international treaty obligations and the practice in other countries;
- Private copying remuneration schemes have been introduced in more than 40 countries, including the United States, Canada, Japan and many European countries;
- Overseas schemes have adapted to technological developments such as digital recording media and devices;
- Overseas surveys have indicated consumer acceptance of a private copying levy as a fair method of remunerating copyright owners;¹
- The introduction of a scheme in Australia would entitle Australian rights holders to a share of income from private copying schemes in countries which only distribute to rights holders from countries which have a similar scheme.

4: Arguments against a private copying levy

4.1 Time-shift

Many people record television programs to view at a more convenient time – referred to as “time-shifting”. It is sometimes argued that copying to time-shift should not be subject to remuneration.

In response:

- The consumer benefits from the opportunity to watch the program at a more convenient time. This is similar to the benefit from hiring or purchasing a video for more convenient watching, both of which may result in payment to copyright owners.
- Although there is always some benefit to a person who tapes a program, the degree of benefit may vary depending on the period of time the person has access to it. Where there is a levy on blank recording media, the consumer only pays one levy for each tape, irrespective of the number of programs or films which are copied onto it. If, for example, the levy is \$1, a person who copies only one program onto the tape pays \$1 in respect of that program. On the other hand, a person who does not retain taped programs but uses the same tape to tape a series of programs, erasing the previously taped program each time, pays a much smaller amount per program. If, for example, the tape is used to record 25 programs successively, the consumer pays a levy of 4 cents per program.
- A substantial proportion of recorded programs are retained as part of a collection.²

¹ Gillian Davies and Michele Hung *Music and Video Private Copying* (Sweet & Maxwell London 1993) at p64

4.2 LACA Committee: “Cracking Down on Copycats”

As part of its inquiry into enforcement of copyright, the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee) briefly considered private copying. In its report “Cracking down on copycats: enforcement of copyright in Australia” (but not as part of its formal recommendations) the Committee recommended against the introduction of a blank media levy scheme, for the following reasons::

- In the Committee’s view, many people are not aware that home taping is an infringement of copyright, or regard its effect as trivial. The change in public attitudes intended to result from the Committee’s recommendations relating to public education “should lead to a decrease in the amount of private copying”.³
 - *Response:* It may be the case that many people are not aware that home taping is an infringement of copyright, or regard its effect as trivial. However, even if more people become aware that their home-taping infringes copyright, and accept their copying harms copyright owners, it is unlikely that they will stop copying if they believe they will not be penalised.
- In the Committee’s view, private copying would in the future predominantly take place in the electronic environment, where the use of “traditional media” such as blank video and audio cassettes would be minor in comparison.
 - *Response:* In the future, copyright owners may be able to prevent or inhibit unauthorised private copying by use of technological protection measures. However, there is, and will continue to be for some time, vast amounts of copyright material available without such protection measures, including the reportedly millions of digital music files copied using services such as Napster.
- In addition, countries with private copying schemes are already adapting their schemes to the digital environment – for example, by imposing levies on CD burners and blank CDs.
- The Committee referred to the submission of the Australian Consumer Association that “the digital economy not be used for increasing pursuit of consumers”.
 - *Response:* It is unclear whether the ACA’s comments were intended to apply to a possible remuneration scheme for private copying of audio and audiovisual material. In any event, the ACA’s proposed solution to unauthorised private copying – better business models and better customer relationships – do not address the fact that the copyright owner may have no customer relationship with the person making private copies.
- The Committee referred to the submission of the Australian Digital Alliance that “there is in any case a public policy debate over whether private copying constitutes infringement”.⁴
 - *Response:* As with the ACA submission, it is unclear whether the ADA’s comments were intended to apply to remuneration for private copying.
 - There have been debates about private copying in the European Union (particularly in the lead up to the adoption of the Information Society Directive),⁵ and in the United States (particularly in connection with the Napster litigation). The issue has Information

² Survey Report: Private Copying on Videotape, prepared for Audio-visual Copyright Society (now trading as Screenrights), October 1995. The survey found that more than half of the videotape holdings surveyed were to be kept, and that less than 20% of households had tapes used exclusively to time-shift.

³ para 2.43

⁴ para 2.44

⁵ Directive on harmonisation of certain aspects of copyright and related rights in the information society

Society Copyright Harmonisation Directive, and in the United States with the Supreme Court decision in the Napster case that users of Napster software were not covered by the fair use exception.⁶

- There is less room for debate in Australia, as there is no exception for private copying (as there is in some European countries), and the Australian fair dealing exceptions only apply to certain specific uses (unlike the fair use defence in the US Copyright Act). As noted above, most private copying of audio and audiovisual recordings does infringe copyright. Whilst copying for research or study does not infringe if the copying is a fair dealing, private copying to time-shift, archive, store in a more convenient medium, “place-shift”, or to give to a friend is not copying for research or study.

5: Proposed model for private copying remuneration scheme

5.1 Exception to infringement for private copying

A new exception to infringement would allow the copying:

- for the private and domestic use of the person who made it;
- on private premises;
- of a sound recording or cinematograph film;
- from an article embodying the recording or film or from a non-infringing broadcast of the recording or film;
- onto a medium ordinarily used to copy or record sound recordings or films for private and domestic use on which the levy has been paid;
- provided:
 - the record of the sound recording or the copy of the cinematograph film from which the private copy is made, and any reproductions of works or performances embodied in the recording or film, are non-infringing;
 - the record of the sound recording, and/or the copy of the cinematograph film has been made in a country which is a member of the World Trade Organization;
 - the material has been published;
 - the source copy has not been made accessible by circumvention of a technological protection measure, by the copier or anyone else;
 - the copier has not given a contractual obligation not to copy the recording or film for his or her private and domestic use; and
 - the private copy is not subsequently used for any other purpose.

⁶ *A&M Records v Napster* (2001) 50 IPR 232

5.2 Means of remuneration

Having regard to the decision of the High Court in relation the 1989 scheme, and the subsequent 1993 Blank Audio Recording Media Levy (BARML) proposal, there are two options:

1. a royalty initially payable to an “umbrella” copyright collecting society such as the Private Audio Copyright Collecting Society (PACCS) established to collect royalties under the 1989 scheme, or
2. a new tax payable to the Government.

In either case, the levy would be payable by importers and manufacturers of:

- blank audio recording media ordinarily used by individual customers for copying recorded audio and/or audiovisual material, and
- any machine or device that is sold to individuals, the recording function (or part of which) is designed and marketed for the purpose of making copies of audio and/or audiovisual copyright material

For a royalty – the Copyright Act would set the rate for the first two years and provide for review by the Copyright Tribunal thereafter. For a tax – the rate would be set by legislation

There would be provision for exemptions from payment of the levy for certain non-infringing uses of blank media and devices.

5.3 Distribution of remuneration

Remuneration would be distributed according to the following principles:

- existing collecting societies would distribute to the classes of rights owners they represent;
- the umbrella collecting society (if the levy is a royalty) or the Government (if the levy is a tax) would allocate a percentage of the total remuneration to each collecting society for distribution to the class of rights owners it represents;
- it is anticipated that the societies will be able to agree on the allocation (and some agreement has already been reached) – but in the event of a disagreement, alternative dispute resolution would be used;
- distribution by each of the collecting societies to its members would be determined, as it is for other distributions, according to its distribution policies, constitution and Code of Conduct
- entitlement to distribution could be determined according to existing data (such as broadcasting schedules and sales data) and/or new data (such as from a sample).

[NEW PART [] OF THE *COPYRIGHT ACT* 1968]

PRIVATE USE OF RECORDABLE MEDIA

Division 1 - Interpretation

1 In this Part:

collecting society means the body that is, for the time being, declared to be the collecting society under section 10;

distributor means a person (such as a manufacturer, wholesaler or importer) who distributes to a seller an item of recordable media for the purpose of retail sale;

private use royalty records means those records created by sellers and distributors referred to in section 15.

purchaser means a person who purchases by way of retail purchase an item of recordable media;

quarter means a quarter of a calendar year, being a quarter beginning on 1 January, 1 April, 1 July or 1 October;

recordable media means any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use;

relevant copyright owner means the owner of the copyright in a sound recording which comprises a musical work, or in that musical work, any dramatic work associated with that musical work (such as lyrics), a cinematograph film, or any work or sound recording included within that cinematograph film;

rules, in relation to the collecting society, means the provisions of the memorandum and articles of association of the society;

seller means a person who sells by way of retail sale an item of recordable media.

2 Without affecting the meanings of the expressions “in public” or “to the public” in this Act, “private use ” wherever used in this Part means an exercise of the reproduction right under subparagraph 31(1)(a)(i), or the copying right under paragraph 85(1)(a) or 86(a), by a natural person for that person’s own private and non-commercial use, or for the private and non-commercial use of persons bound to that person by domestic ties.

3 This Part applies to the collecting society despite anything in the rules of the society but nothing in this Part affects those rules so far as they can operate consistently with this Part.

Division 2 - Copying with recordable media

Remunerated exception to infringement

4(1) Copyright subsisting in a sound recording which comprises a musical work, or in that musical work, any dramatic work associated with that musical work (such as lyrics), a cinematograph film, or any work or sound recording included within that cinematograph film is not infringed by a private use made with an item of recordable media where a purchaser has paid a private use royalty in respect of that item in accordance with subsection 5(1).

4(2) Where a reproduction of a work, a copy of a sound recording, a copy of a cinematograph film, or a facsimile copy of a published edition made in reliance on subsection (1) is:

- (a) sold or let for hire by way of trade, or offered or exposed in trade for sale or hire;
- (b) used so as to cause a work reproduced to be performed in public, or a sound recording copied to be heard in public, or a cinematograph film copied to be seen or heard in public;
- (c) used so as to communicate to the public a work reproduced, a sound recording copied or cinematograph film copied; or
- (d) used otherwise than for a private use,

then subsection (1) does not apply, and shall be taken never to have applied, to the making of the reproduction or the copy.

4(3) Subsection (1) does not apply to the reproduction of works, or the copying of subject-matter other than works, where the reproduction or copy is made, or made possible, by the use of a circumvention device or a circumvention service where that device or service has been supplied contrary to this Act.

Division 3 - Private use royalty and exemptions

Imposition on retail purchasers, and collection by retailers

5(1) Subject to, and in accordance with, this Part, at the time of retail purchase of an item of recordable media the purchaser must pay to the seller a private use royalty in respect of the item, and the seller must receive that royalty.

5(2) The amount of the private use royalty is an amount determined by the Copyright Tribunal under paragraph 100X(7)(a).

5(3) A purchaser that fails to pay the full amount of a private use royalty to a seller in accordance with subsection (1) incurs a private use royalty debt to the collecting society of an amount equal to the royalty or the amount by which the royalty exceeds the amount paid by the purchaser as royalty, whichever is the lesser amount.

Remittance to the collecting society

6(1) Subject to section 7, a seller that has received an amount of private use royalty under subsection 5(1) must, within 21 days after the end of the quarter in which that royalty was received, pay the received amount, less the amount determined by the Copyright Tribunal under paragraph 100X(7)(b), to the distributor from whom the seller acquired the item of recordable media to which the royalty relates, and the distributor must receive that payment.

6(2) A distributor that has received a payment pursuant to subsection (1) must, within 21 days after the end of the quarter in which the payment was received, pay to the collecting society an amount equal to the received amount, less the amount determined by the Copyright Tribunal under paragraph 100X(7)(c).

Advance payments

7(1) Within three calendar months from the date a distributor has distributed an item of recordable media to a seller, the seller must pay to the distributor, an amount in respect of the item equal to the private use royalty that would be payable by a purchaser under subsection 5(1) in respect of the item, less the amount determined by the Copyright Tribunal under paragraph 100X(7)(b), and the distributor must receive that amount.

7(2) Within 21 days from the end of any quarter in which an amount has been received under subsection (1) in respect of an item, the distributor must pay the amount to the collecting society less the amount determined by the Copyright Tribunal under paragraph 100X(7) (c).

7(3) If a seller has made a payment under subsection (1) in respect of an item, subsection 6(1) does not require payment by the seller except to the extent that the amount paid by the seller under subsection (1) is less than the amount that, but for this subsection, would have been payable under subsection 6(1) in respect of the item.

7(4) If a seller has made a payment under subsection (1) in respect of an item but, for any reason, has not sold the item and no longer retains it for sale, the seller may give to the collecting society a written declaration stating the circumstances, and the amount of the payment under subsection (1) is payable by the collecting society to the seller within 21 days after receipt of the declaration.

Offences

8(1) A seller that fails to receive a private use royalty from a purchaser in accordance with section 5 is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

8(2) A seller that fails to make a payment as required by subsection 6(1) or subsection 7(1) is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

8(3) A distributor that fails to make a payment as required by subsection 6(2) or subsection 7(2) is guilty of an offence punishable, on conviction, by a fine not exceeding 50 penalty units.

Recovery of moneys

9(1) An amount payable under subsection 6(2) or subsection 7(2) is recoverable by the collecting society in the Federal Court of Australia or any other court of competent jurisdiction as a debt due to the society.

9(2) An amount payable under subsection 7(4) is recoverable from the collecting society in the Federal Court of Australia or any other court of competent jurisdiction as a debt due to the seller.

9(3) Jurisdiction is conferred on the Federal Court of Australia with respect to an action under subsection (1) or subsection (2)..

Exemptions

10(1) Where a person or body:

- (a) purchases an item of recordable media from a seller;
- (b) pays the private use royalty; and
- (c) gives to the collecting society a receipt for the purchase of the item together with a statutory declaration made by the person, or by an officer or member of the body, as the case may be, containing:
 - (i) the prescribed particulars; and
 - (ii) a statement that the person or body will not use the item, or cause or permit it to be used, or make it available to any person for use, for the purpose of making a reproduction of a work, a copy of a sound recording, or a copy of a cinematograph film in which copyright subsists, unless the person or body is the owner or licensee of the relevant right;

the collecting society must pay to the person or body an amount equal to the amount of the royalty paid.

10(2) Subsection 5(1) does not apply to the purchase of second-hand recordable media.

Division 4 - The collecting society

The collecting society

11(1) Subject to this section, the Attorney-General may, by notice in the *Gazette*, declare the body named in the notice to be the collecting society.

11(2) The Attorney-General shall not name more than one body in a declaration and shall not make a declaration while an earlier declaration is in force.

11(3) The Attorney-General shall not declare a body to be the collecting society unless:

- (a) it is a company limited by guarantee and incorporated under a law in force in a State or Territory relating to companies;
- (b) all relevant copyright owners, or their agents, are entitled to become its members;
- (c) its rules prohibit the payment of dividends to its members; and
- (d) its rules contain such other provisions as are prescribed, being provisions necessary to ensure that the interests of the collecting society's members who are relevant copyright owners or their agents are protected adequately, including, in particular, provisions about:
 - (i) the collection of sums in discharge of private use royalty debts;
 - (ii) the payment of the administrative costs of the society out of amounts collected by it;
 - (iii) the distribution of amounts collected by it;
 - (iv) the holding on trust of amounts for relevant copyright owners who are not its members; and
 - (v) access to records of the society by its members.

Revocation of declaration

12. The Attorney-General may, by notice in the *Gazette*, revoke the declaration of a body as the collecting society if satisfied that the body:

- (a) is not functioning adequately as the collecting society;

- (b) is not acting in accordance with its rules or in the best interests of those of its members who are relevant copyright owners or their agents;
- (c) has altered its rules so that they no longer comply with paragraphs 11(3)(c) and (d); or
- (d) has refused or failed, without reasonable excuse, to comply with section 13 or 14.

Annual report and accounts

13(1) The collecting society shall, as soon as practicable after the end of each financial year, prepare a report of its operations during that financial year and send a copy of the report to the Attorney-General.

13(2) The Attorney-General shall cause a copy of the report sent to the Attorney-General under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after the receipt of the report by the Attorney-General.

13(3) The society shall keep accounting records correctly recording and explaining the transactions of the society (including any transactions as trustee) and the financial position of the society.

13(4) The accounting records shall be kept in such a manner as will enable true and fair accounts of the society to be prepared from time to time and those accounts to be conveniently and properly audited.

13(5) The society shall, as soon as practicable after the end of each financial year, cause its accounts to be audited by an auditor who is not a member of the society, and shall send to the Attorney-General a copy of its accounts as so audited.

13(6) The society shall give its members reasonable access to copies of all reports and audited accounts prepared under this section.

13(7) This section does not affect any obligations of the society relating to the preparation and lodging of annual returns or accounts under the law under which it is incorporated.

Amendment of rules

14. The collecting society shall, within 21 days after it alters its rules, send a copy of the rules as so altered to the Attorney-General, together with a statement setting out the effect of the alteration and the reasons why it was made.

Division 5 - Private use royalty records

Private use royalty records

15(1) In relation to a purchase to which section 5 applies, the seller must ensure that a record in the prescribed form appears on or is affixed to either the item of recordable media the subject of the purchase, or the item's container.

15(2) On or before the time of making the payment to the distributor referred to in subsection 6(1), the seller must create a record setting out the prescribed particulars and give to the distributor a copy of that record at the time of payment.

15(3) On or before the time of making the payment to the collecting society referred to in subsection 6(2), the distributor must create a record setting out the prescribed particulars and give to the society a copy of that record at the time of payment.

15(4) On or before the time of making the payment to the collecting society referred to in subsection 7(1), the distributor must create a record setting out the prescribed particulars and give to the society a copy of that record at the time of payment.

15(5) Records created in compliance with this Part must be retained by the party creating the record for a period of seven years from the date of creation.

Inspection of records by the collecting society

16(1) The collecting society may, in writing, notify any person that the society has reason to believe has failed to make a payment as required by subsection 5(1), 6(1), 6(2), 7(1) or 7(2) that the society wishes, on a day specified in the notice, being an ordinary working day not earlier than 7 days after the day on which the notice is given, to inspect all records held by the person at the premises specified in the notice, being records that relate to the purchase, sale or distribution of items of recordable by the person, and such other records held at those premises that are relevant to compliance with this Part.

16(2) Subject to section 16, if a collecting society gives a notice under subsection (1), a person authorised in writing by the society may, on the day specified in the notice and during the ordinary working hours of the notified person (but not before 10 am or after 3 pm), carry out the assessment, or inspect the records, to which the notice relates and, for that purpose, may enter the premises of the seller or distributor.

16(3) A seller or distributor must take all reasonable precautions, and exercise reasonable diligence, to ensure that a person referred to in subsection (2) who attends the premises of the seller or distributor for the purpose of exercising the powers conferred by that subsection is provided with all reasonable and necessary facilities and assistance for the effective exercise of those powers.

16(4) A seller or distributor who contravenes subsection (3) is guilty of an offence punishable, on conviction, by a fine not exceeding 10 penalty units.

Identity cards

17(1) The chief executive officer (however described) of a collecting society must issue an identity card in the prescribed form to each person authorised by the society for the purposes of subsection 16(2). The identity card must contain a recent photograph of the authorised person.

17(2) If an authorised person who attends or enters premises for the purpose of exercising powers conferred by subsection 16(2) fails to produce his or her identity card when asked to do so by a person apparently in charge of the premises, the authorised person must not enter or remain on the premises or exercise any other powers under subsection 16(2) at the premises.

17(3) A person is guilty of an offence punishable on conviction by a fine not exceeding 1 penalty unit if:

- (a) the person has been issued with an identity card;
- (b) the person stops being an authorised person; and
- (c) the person does not, immediately after he or she stops being an authorised person, return the identity card to the relevant collecting society.

17(4) An authorised person must carry his or her identity card at all times when exercising powers under subsection 16(2).

Confidentiality of records

18 A person who, whether directly or indirectly, makes a record of, or discloses or communicates to a person any information obtained under the operation of section 15 or 16, except for the purposes of the administration of this Part, is guilty of an offence punishable, on conviction, by a fine not exceeding 10 penalty units.

Division 6 - Miscellaneous

Copyright owners may authorise copying

19 Nothing in this Part affects the right of the owner of the copyright in a work or other subject-matter to grant a licence authorising a person to make or cause to be made, a sound recording, or a copy of a sound recording, of the work or other subject-matter without infringing that copyright.

20 If -

- (a) a copyright owner brings a copyright infringement action against a person in respect of an alleged infringement by use of an item of recordable media; and
 - (b) a private use royalty has been paid in respect of that item,
- a court may take the payment into consideration in the quantification of any monetary award.

** ** ** ** ** ** **

[CORRESPONDING DRAFT JURISDICTION OF COPYRIGHT TRIBUNAL PROVISIONS – TO BE ADDED TO THE COPYRIGHT ACT]

Determination of amount of private use royalty and related compensation

100X(1) Expressions used in this section that are also used in Part [] have the same meanings as they have in that Part.

100X(2) An application may be made to the Tribunal for an order determining the amount per item of recordable media that is payable under Part [] by way of private use royalty.

100X(3) An application may be made by any person or body that the Tribunal considers has an interest in the matter that is the subject of the application, including the collecting society, a seller, a distributor, a purchaser or a relevant copyright owner.

100X(4) On an application made under subsection (3), the Tribunal may, if the Tribunal considers it convenient, require the applicant to advertise the fact of the application to persons who might apply to the Tribunal under subsection (6).

100X(5) The parties to an application are:

- (a) the applicant; and
- (b) such persons or organisations as are made parties to the application under subsection (6).

100X(6) Where a person or an organisation applies to the Tribunal to be made party to an application and the Tribunal is satisfied that the person or organisation has an interest in the matter that is the subject of the application, the Tribunal may, if it thinks fit, make that person or organisation a party to the application.

100X(7) Subject to subsections (8) and (9), the Tribunal shall consider an application under subsection (2) and, after giving the parties to the application an opportunity of presenting their cases, shall make an order determining:

- (a) the amount of a private use royalty that is payable under subsection 5(1);
- (b) an amount of compensation for a seller, in respect of compliance with Part [], expressed as a percentage of the private use royalty; and
- (c) an amount of compensation for a distributor, in respect of compliance with Part [], expressed as a percentage of the private use royalty.

100X(8) In making an order under paragraph (7)(a), the Tribunal:

- (a) must take into account all relevant matters including the value, or likely value, of the statutory licence contained in section 4 in respect of items of recordable media; and
- (b) may determine, or make provision for determining, amounts of a private use royalty which vary according to the type or variety of recordable media in respect of which the royalty is to be paid.

100X(9) In making an order under paragraph (7)(b) the Tribunal must take into account all relevant matters, including the actual or likely costs and expenses incurred, and labour undertaken, by a seller in complying with sections 5, 6 and 7, including any actual or likely financial costs for a seller of temporarily outlaying funds in order to comply with section 7.

100X(10) In making an order under paragraph (7)(c), the Tribunal must take into account all relevant matters, including the actual or likely costs and expenses incurred, and labour undertaken, by a distributor in complying with sections 6 and 7, and also including any actual or likely financial benefits for a distributor of temporarily holding amounts received from sellers under subsection 7(1).

100X(11) An order under subsection (7) shall remain in force until the earlier of the order's revocation or, where the order specifies a period during which it is to remain in force, the expiry of that period.

100X(12) The Tribunal may refuse to consider an application under this section made less than 5 years after the making of the last order under this section in relation to the same class of items unless the Tribunal is satisfied that there has been a substantial change in any of the matters relevant to the determination of the amount of the royalty or the amount allowed by way of seller or distributor compensation.

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The Proposed Statutory Copyright Licence for Private Use of Recordable Media

Explanatory Note

Introduction

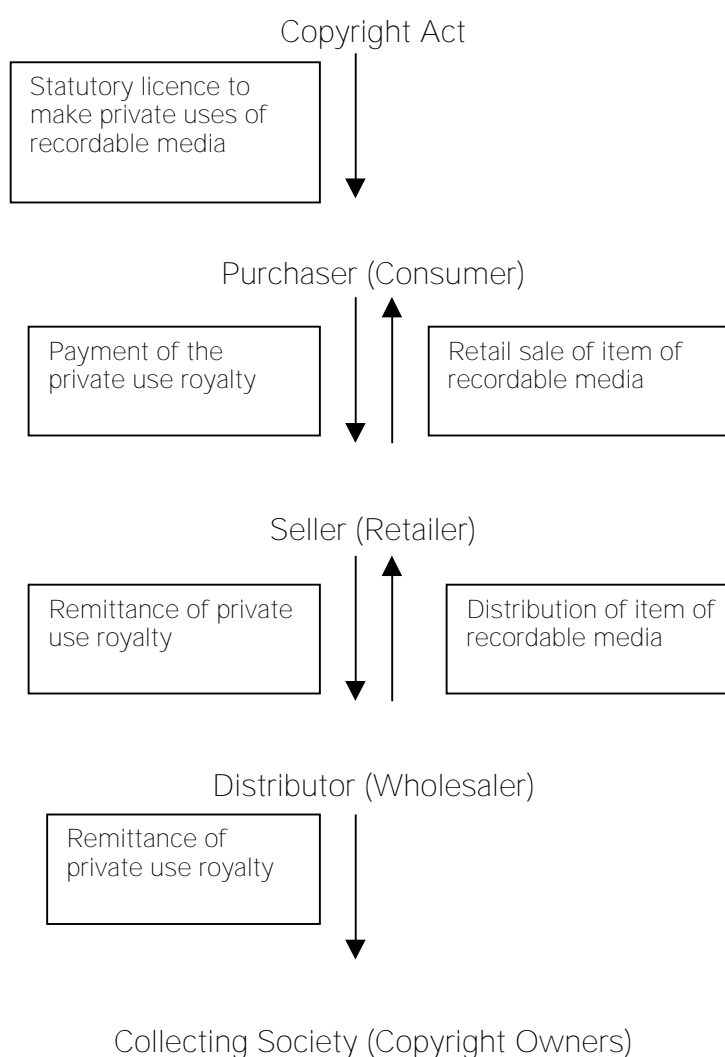
This explanatory note provides an explanation of how the proposed statutory licence for the private use of recordable media will operate in practice, includes the terms of the proposed drafting and contains an opinion from Dennis Rose QC as to the drafting's constitutional validity.

Part One comprises a ten point summary of the scope and application of the royalty. Part Two considers in some detail the operation of the royalty from the perspective of each of the relevant stakeholders.

Part One: Outline of operation

1. The royalty provides a licence to purchasers (that is, consumers) of recordable media to reproduce works for private purposes without infringing copyright.
2. Private use means reproduction or copying by a person for that person's own private and non-commercial use, or such use within that person's domestic circle. Accordingly, the exception to infringement of copyright does not apply where the reproduction or copy is: (a) sold or let for hire; (b) used so as to cause a work to be performed, seen or heard in public (whichever is applicable); (c) used so as to communicate to the public the work; or (d) used otherwise than for a private use.
3. The royalty is imposed on recordable media, a term defined to mean "any removable and portable item of electronic storage (such as a blank audio or video cassette containing magnetic tape, recordable compact disc or recordable DVD) of a kind ordinarily supplied for private use or uses that include private use". Computer hard drives are to be excluded from the operation of the royalty by this definition.
4. The licence allows for both on-line and off-line copying. However, the exception to copyright infringement will not apply where the reproduction or copying is made using a circumvention device or service.
5. It is possible for a purchaser of recordable media to 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.

6. The royalty is added to the retail price of recordable media and collected by the seller (the entity who sells by way of retail sale such as an item) from purchasers of that media. The seller is under an obligation to account for those monies to the distributor (whether a manufacturer, wholesaler or importer), who, in turn, must remit those monies to the relevant Collecting Society. Both sellers and distributors are compensated for the costs they incur in collecting and accounting for the royalty to the relevant Collecting Society. The operation of the licence and its collection regime may be summarised diagrammatically:



7. To simplify collecting the royalty, the proposed legislation provides for the royalty to be paid in advance by the seller to the distributor, who must then remit to the relevant Collecting Society within 21 days of the end of the quarter in which the funds are received. The advance payment by the seller is stipulated to occur three months from the date a seller obtained an item of recordable media from its distributor. However, it is intended that in practice this payment will occur at that time the seller pays its distributor for the items.
8. It is an offence for the seller or the distributor to fail to collect the royalty. The failure to discharge any obligation to pay the royalty also creates a debt recoverable by the Collecting Society.
9. The purpose of the royalty is to provide equitable remuneration to copyright owners for the reproduction and/or copying of their works by consumers for private use. The Copyright Tribunal determines what is the appropriate amount of equitable remuneration for private copying.
10. The Copyright Tribunal also determines the appropriate amount of compensation to be paid to the sellers and distributors for collecting the royalty.

Part Two: Perspectives on the Impact of Proposed Reform

Purchasers (Consumers)

Consumers are one of the principal beneficiaries of the royalty. The payment of the royalty enlivens the operation of the licence for consumers of recordable media to reproduce works for private purposes without infringing copyright.¹ The licence is limited by not only the private use stipulation² but also by the requirement that a consumer cannot rely on the licence where the private use had been made through the agency of a circumvention device or circumvention service.³

A consumer could, for example, purchase a recordable compact disc to which the licence applies by payment of the royalty. The consumer could with that item lawfully copy for private use any sound recording and the copyright works included therein so long as this involved no use of a circumvention device or service.

A consumer may not wish to avail himself of the licence. For example, a consumer may not wish to use the recordable media to reproduce third-party copyright material. In such cases consumers may 'opt-out' from the payment of the royalty by providing a declaration to the Collecting Society that the item will not be used to infringe copyright.⁴ By so doing, the consumer is entitled to a royalty refund from the Collecting Society.

From the consumer's perspective, the royalty (which reflects the equitable remuneration remitted to copyright owners) is paid as part of the price of the good at the time of purchase.⁵ The exact amount of the royalty will be determined by the Copyright Tribunal.⁶ To serve as a record of the consumer's payment and to clarify the existence of the licence, recordable media will have attached to it a prescribed notice stating that the private use royalty has been paid in relation to the item.⁷

The statutory licence attaches to the item in respect of which the royalty is paid, not the consumer making the payment.⁸ Thus, the consumer can

¹ Subsection 4(1)

² Subsection 4(2)

³ Subsection 4(3)

⁴ Subsection 10(1).

⁵ Subsection 5(1)

⁶ Subsection 100X(7)

⁷ Subsection 15(1)

⁸ Subsection 4(1)

transfer the media to another person, who is then entitled to use it to copy for their private purposes without infringing copyright.

Sellers (Retailers)

The retailer is obliged to collect the royalty from the purchaser when the good is sold.⁹ The royalty will effectively comprise part of the purchase price, and the retailer must remit the amount of the royalty to the distributor less an amount of compensation for the cost of so doing.¹⁰ The retailer has an obligation to ensure that a prescribed notice is affixed to the media item or its container (such as an adhesive label) which gives notice as to applicability of the private use licence.¹¹

To streamline the administration of the licence, and in place of the primary obligation to remit private use royalties actually collected, an obligation is placed upon the retailer to make an advance payment to its distributor.¹² This advance payment is made to the distributor in anticipation of receipt of private use royalties at the time of future retail sale.¹³ The advance payment by the seller must occur three months from the date a seller obtained the relevant item of recordable media from its distributor. This time period is intended to be the maximum period likely to be allowed for payment in any terms of trade between distributors and retailers. It is expected that in practice this advance payment will occur at the time when the retailer pays its distributor for the item.

The seller is entitled to keep part of the royalty as compensation for their role in collecting the royalty.¹⁴ The amount of compensation is determined by the Copyright Tribunal, and takes into account any actual or likely financial costs for a seller of temporarily outlaying funds in order to make an advance payment.¹⁵ The compensation amount is expressed as a percentage of the private use royalty.

If a retailer has made an advance payment in respect of goods ultimately not the subject of a retail purchase (for example stolen, destroyed, returned or unsold goods), then the seller is entitled to be refunded that payment by the collecting society.¹⁶

⁹ Subsection 5(1)

¹⁰ Subsection 6(1), paragraph 100X(7)(b) and subsection 100X(9)

¹¹ Subsection 15(1)

¹² Subsection 7(3)

¹³ Subsection 7(1)

¹⁴ Subsections 6(1) and 7(1)

¹⁵ Paragraph 100X(7)(b) and subsection 100X(9)

¹⁶ Subsection 7(4)

Distributors (Wholesalers, Importers, Manufacturers)

Distributors are the intermediaries between retailers and the collecting society (which represents copyright owners). Distributors must remit any private use royalties received to the collecting society within 21 days of the end of the quarter in which the funds are received. This time limit applies irrespective of whether or not the funds are received pursuant to an advance payment.¹⁷ Like retailers, distributors are compensated for their part in collecting the royalty.¹⁸ However, this compensation will take into account any actual or likely financial benefits for a distributor of temporarily retaining funds holding amounts received from sellers under subsection 7(1).¹⁹ The Copyright Tribunal determines the compensation amount which is expressed as a percentage of the private use royalty.²⁰

Collecting Society & Copyright Owners

The payment of the royalty enlivens the operation of the statutory licence, which grants to consumers a copyright licence in relation to private uses of recordable media. Copyright owners can not refuse permission for private uses within the terms of the licence provided the royalty for the statutory licence is paid. They are, under the proposal, entitled to receive equitable remuneration (derived from the royalty) payable in accordance with the distribution policy of the collecting society. Copyright owners may continue to directly license the private uses and may continue to rely on technical protection mechanisms in so doing.²¹ If a copyright owner brings an infringement action against a person who has paid the royalty but has subsequently breached copyright, then the payment of the royalty may be considered by the court in determining damages for infringement.²² For example, the court may determine to reduce the damages by an amount equivalent to the royalty paid.

The collecting society is the copyright owners' non-profit, intermediary receiver of the private use royalty (less the compensations deducted for collection of the royalty) from the distributors. The society distributes the collected royalty to the relevant copyright owners, less the society's administrative expenses. The collecting society is appointed by the Commonwealth Attorney-General²³ and the Attorney may revoke that

¹⁷ Subsections 6(2) and 7(2)

¹⁸ Subsections 6(2) and 7(2), paragraph 100x(7)(c) and subsection 100X(10)

¹⁹ subsection 100X(10)

²⁰ Subsections 100X(7)(c),(d)

²¹ Section 19

²² Section 20

²³ Subsection 11(1)

declaration, if the society fails in its duties.²⁴ The collecting society must have a particular corporate structure consistent with its role in administering the statutory licence.²⁵ For example, the society is non-profit. The society must present its accounts to the Attorney who tables them in Parliament.²⁶

The society also has a role in ensuring the royalty is collected properly. After providing written notice, the collecting society may inspect the records of distributors and sellers that the society believes has failed to make a payment provided for under the royalty.²⁷ In carrying out that inspection, which the distributor or seller must reasonably assist²⁸, the society must provide identity cards to personnel authorised to conduct the inspection²⁹ and that person must display that card.³⁰

²⁴ Section 12

²⁵ Subsection 11(3)

²⁶ Section 13

²⁷ Subsection 16(1)

²⁸ Subsection 16(2)

²⁹ Subsection 17(1)

³⁰ Subsection 17(2)

BLAKE DAWSON WALDRON

L A W Y E R S

DRAFT LEGISLATION FOR COLLECTION OF ROYALTIES ON RECORDABLE MEDIA FOR PRIVATE USE

Memorandum of Advice

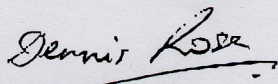
1. Legislation substantially in terms of the attached draft (the "**proposed legislation**") would, in my view, be held valid by the High Court.
2. Such legislation would lack the features that caused a majority of the High Court, in *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 176 CLR 480, to hold –
 - that the private use royalty provisions purportedly inserted in 1989 in the *Copyright Act 1968* (the "**1989 legislation**") were invalid as a purported imposition of "taxation" not complying with section 55 of the Constitution; and
 - that, if the 1989 legislation had not purported to impose a form of "taxation", it would have been invalid as a purported "acquisition of property" otherwise than on "just terms", within the meaning of section 51(xxxi) of the Constitution.

The proposed royalty payable only by retail purchasers

3. By contrast with the 1989 legislation, the proposed legislation would –
 - (a) give copyright protection only for items on which the "private use royalty" ("**royalty**") had been paid (clause 4(1)); and
 - (b) impose the primary liability to pay royalty only on the retail purchasers of the items (clause 5(1)).
4. These provisions would involve a *quid pro quo* for the persons on whom the primary liability was imposed. The provisions would therefore meet objections that were central to the majority decision in *Tape Manufacturers*.
5. I also note that *Tape Manufacturers* was decided by a majority of only one. The only Justices in that case remaining on the High Court are Gaudron J (who was in the majority but will retire in February 2003) and McHugh J (who was one of the minority).

The proposed collection obligations of retailers and distributors

6. Excerpt to the extent of advance payments under section 7(1) (see paragraph 7 below), a retailer would be required to pass on to its suppliers in Australia ("**distributors**") - whether manufacturers, importers or intermediate wholesalers - the amounts of royalty collected by the retailer from retail purchasers, less the amounts of compensation for the retailer in respect of its compliance with the legislation (see clauses 6(1) and 7(3)).
7. A retailer would be required, within three months of receiving a relevant item from a distributor, to pay to the distributor an amount equal to the royalty that would be payable by a retail purchaser of the item, less the amount of compensation for the retailer in respect of its compliance with the legislation (clause 7(1)). Provision is made for refunds to a retailer in cases such as the destruction of items supplied to the retailer (clause 7(4)).
8. A distributor would be required to pass on to the collecting society the amounts received by the distributor from retailers pursuant to proposed section 6(1) or 7(1), less the amounts of compensation for the distributor in respect of its compliance with the legislation (see clauses 6(2) and 7(2)).
9. The collection provisions referred to in paragraphs 6-8 above would, in my opinion, be valid exercises of the Commonwealth's "incidental" powers with respect to copyright. The requirements mentioned in paragraph 7 for anticipatory payments by retailers would be analogous to the imposition of provisional tax which has been held not to be "taxation" in the constitutional sense (eg *Commissioner of Taxation v Clyne* (1958) 100 CLR 246, at 260-263 per Dixon CJ, with whom McTiernan, Williams, Kitto and Taylor JJ agreed).
10. If any of these collection provisions were held to involve "acquisitions of property" in the constitutional sense, the provisions for compensation for retailers and distributors would satisfy the "just terms" requirement in section 51(xxxi) of the Constitution and so avoid the problems seen in that respect by the majority in *Tape Manufacturers*.



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