

**Australian Consumers' Association (ACA)
Response¹ to the
Attorney-General's Department
Issues Paper**

**Fair Use and Other Copyright Exceptions
An examination of fair use, fair dealing and other exceptions
in the Digital Age²**

May 2005

Preface

The Australian Consumers' Association (ACA) is a not-for-profit, non-party-political organization established in 1959 to provide consumers with information and advice on goods, services, health and personal finances, and to help maintain and enhance the quality of life for consumers. The ACA is funded primarily through subscriptions to its magazines and web site, book publication, fee-for-service testing and related other expert services. Independent from government and industry, it lobbies and campaigns on behalf of consumers to advance their interests.

Introduction

ACA is delighted to see the Attorney-General move quickly to implement the Government commitment to examine the issue of fair use, fair dealing and other exceptions, made in its 2004 election policy *Strengthening Australian Arts*. Australian consumers indeed routinely infringe copyright in their everyday lives when they time shift TV shows, record music to MP3 to use while exercising, or burn compilation CDs for the car. The law is unenforceable. Heavy-handed industry attempts to shift established consumer behaviour risk enormous damage to that industry and to electronic innovation generally.

We are also pleased with the prominent commitment in the Foreword to achieving balance "between the rights of copyright owners and reasonable access to copyright material for users."³ We would note that there is a critical third stakeholder party to the copyright equation in the digital age – the carrier. In our view the carrier has an important species of fair use, the innocent provision of carriage. This has been recognised in the Digital Agenda amendments to the Act, but remains an important component of the balance equation, particularly with regard to caching and enforcement questions.

ACA has campaigned for the institution of a broad fair use exception for Australian consumers for some time. We have argued for the fair dealing exception to be

¹ ACA File Ref: - 05F492/01 7 June 2005 – contact Charles C. Britton Senior Policy Officer, IT and Communications (02) 9577 3290

² [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf)

³ Issues Paper P2

protected from contractual and technological alienation, a concern we will touch upon with regard to any fair use extension. We have debated fair use in the context of various proposals for a 'levy' to remunerate rights holders for consumer copying. As will be apparent from this Response, we are increasingly persuaded that a levy is neither practical nor desirable. We saw fair use as a key issue in the negotiation of the recent US-Australia Free Trade Agreement, as a part of the US copyright balance not imported to Australia along with the more draconian copyright provisions agreed to as part of that deal. We are pleased to see this explicitly acknowledged as part of the context for the Review in the Issues Paper.⁴ We also see fair use as important as taken-for-granted consumer behaviours using decades-old technology such as VCRs and audio-cassette recorders, migrate into the contemporary world of CD-burners and MP3 players and head for future worlds of hard disk recorders and home content servers.

Consumer and fair use

Consumers are time, format and space shifting content. However, the use of any or all of these technologies technically infringes on copyright as defined in Australian law, despite vigorous commercial promotion and enthusiastic take-up by consumers. At the same time Australian consumers seem to have a clear sense of what is fair and what is not. A recent survey of visitors to the CHOICE web site run by the ACA sought to explore this issue.⁵ Asked "Do you think you should have the legal right to copy music and video you've bought?" 98% answered 'Yes'. Queried further as to purpose, the responses were as follows:

Purpose	Count	Percent
for making a backup	236	93.3%
to record in a different format e.g. CD to MP3	241	95.3%
to make compilations	210	83.0%
to share with friends	52	20.6%
other (please write in):	10	4.0%

It is important to note the sharp difference in those who felt it was acceptable to share with friends, i.e. to redistribute material, rather than to consume in way that suited them personally.

To explore the question of time shifting, visitors were also asked "Do you think you should have the legal right to copy programs from television?" Once again an overwhelming percentage (97.6%) said 'Yes'.

Purpose	Count	Percent
So you can watch them at a more convenient time	252	99.6%
To share with friends	91	36.0%
other (please write in):	10	4.0%

⁴ Issues Paper Pp14-15 "Some user interests expressed unease that the amendments followed aspects of United States copyright law that strengthen the ambit of copyright protection without also adopting an open-ended fair use exception which provides a balancing element for users in the United States."

⁵ An online poll, April 2005, guarded against multiple responding, generated 253 responses. It is acknowledged that polls such as these are indicative rather than definitive.

The distinction is again drawn between personal convenience and sharing, although in this instance it is less stark. The inference we draw from both these results is that consumers have a reasonable grasp of what is fair and what is not. They are not ravenous to misappropriate material and hand it out to all and sundry, they just want their consumption of various media to be convenient. They can be trusted with a general right of fair use.

It is interesting to note that similar norms prevail amongst creators of copyright material, as reported in a survey of musicians in the Pew Internet and American Life Musician Web Survey, March April 2004. This survey (compiled in the USA) shows a comprehensive spread of acceptability from overwhelmingly in favour of personal copying through less comfort with sharing, to rejection of misappropriation.

Musicians Perceptions of Legality of Various Copying Behaviors⁶

Copying Activity	Legal	Illegal
Recording a TV show on a VHS tape to watch in your own home at a later time	90	6
Making a photocopy from a book or article for personal use	91	5
Ripping a digital copy of music on your own computer from a CD you purchased	90	6
Posting a story or article online to critique or comment on it	89	5
Sending a digital copy of music over the Internet to someone you know	56	31
Burning a copy of a music of CD for a friend	47	41
Downloading a music or movie file off a file sharing network	33	48
Sharing a music or movie file from your computer over a file-sharing network	33	50
Making copies of music or movies or television programs and sending them to other people	3	95

Consumers expect to be able to make these fair copies, and expect to go on doing so with new media; artists, if not rights holding middlemen, accept such uses. The solution to the current situation of mass technical infringement cannot be found in an attempt to stem the tide of technological possibilities. It would be economically and culturally ill-founded. A useful exposition of the history of piracy panics and technological change is to be found in a recent paper from Mark N. Cooper, Director of Research, Consumer Federation of America and Fellow, Stanford Law School Center for Internet and Society. He points out that

The list is long, stretching back centuries: the initial adoption of copyright principles in relation to the printing press in England in the 18th century, the telegraph in the late 19th century, mechanical pianos at the turn of the 20th century, cinematography early in the 20th century, radio in the 1930s, cable TV in the 1960s, photocopying in the 1970s, VCRs in the 1980s, CD burners in the 1990s, and various digital video recorders (DVRs) in the early 2000s.⁷

⁶ Cited in cyberlaw.stanford.edu/blogs/cooper/archives/BENEFITsofPEERtoPEER.pdf P62

⁷ Time For The Recording Industry To Face The Music: The Political, Social And Economic Benefits Of Peer-To-Peer Communications Networks P12
cyberlaw.stanford.edu/blogs/cooper/archives/BENEFITsofPEERtoPEER.pdf

Indeed, our view is that a better economic foundation for the copyright industries can be established by providing an open and general fair use exception, thus bringing the law into greater harmony with the behaviour and expectations of consumers. This proposition rests on two bases. Firstly, consumers can be educated to a greater respect for copyright material if they are not confronted with the dissonance of unenforceable rights at variance with everyday behaviour. Secondly, a general fair use right would create a zone of opportunity for industry to create provision and payment mechanisms. That is, if a fair consumer use is presumed to be innocent, then a provider can build a system to bring greater convenience to that usage, and in the process may incorporate a remuneration mechanism for rights holders. It can do so as a legitimate business opportunity, with less risk of being accused of authorising infringement. Thus the market will be able to operate in meeting the needs of consumers, and evolve to incorporate the commercial rights of copyright holders.

We note the use of the terms “pirates” and “piracy” in the Foreword. In general it is our view the word “pirate” has little or no utility in the copyright debate. ACA considers that it is important to distinguish between personal or consumer copying and systematic commercial fraud or counterfeiting. Commercial misappropriation occurs when one business takes the intellectual property of another and masquerades or misrepresents its right to obtain benefit from it. This is a business-to-business problem, and also a serious problem to consumers when counterfeit items are passed off at the premium price of the genuine article. Consumer copying is separate issue that relates more to marketplace behaviour and customer service. If a generic or umbrella term is required we would prefer a reference to “copyright infringement”.

Copyright Overview – economic dimensions

We appreciate this Response is not an appropriate place to exhaustively debate the nature of the copyright balance from the consumer perspective. However, we regard it as useful to introduce our perspective where it differs somewhat from the general views and assumptions presented in the Issues Paper.

The Paper asserts “Copyright law promotes creativity and innovation.” We agree that this is an oft-stated policy goal cited in support of the regime. However, we are not persuaded that in general copyright can be demonstrated with such certitude to perform this role. The notion that intellectual property rights exist to reward, foster and generate innovation is a verity rarely examined. Of course it is very useful for rights holders to have this rationale. Intellectual property confers a monopoly right on the holder. A naked monopoly is generally a very unattractive thing, so it requires dressing. A virtuous contribution to the well being of the whole community by way of innovation and all the is held to flow from that (jobs, consumption, prosperity) is such a becoming and beguiling outfit that the monopoly can hardly be seen and what is glimpsed conforms with expectations of modesty. However it is quite possible to see IP arrangements not as a mechanism to produce the innovations, but rather as one that captures the benefits of innovation once they have occurred.

Humans in society seem to have an unstoppable propensity to generate cultural objects, some of them novel. Some countries invest considerable resources in repressing this tendency. Fortunately our society is not one of them. It is instructive, as The Economist did, to look back 600 years to China, which at that time was the most technologically advanced country in the world.

Centuries before the West, it had invented moveable-type printing, the blast furnace and the water-powered spinning machine. By 1400 it had in place many of the innovations that triggered the industrial revolution in Britain in the 18th century. But then its technological progress went into reverse, because its rulers kept such tight control on the new technology that it could not spread. It is a warning that the fruits of the IT revolution should not be taken for granted.⁸

This perspective is an important rejoinder to a notion that consumers are somehow free riding in becoming “accustomed to being relatively free of practical constraints in exploiting new technology.”⁹ In our view it is as easy to see copyright being a wealth capture mechanism as it is to see it being a wealth-generating engine. If the link between innovation and IP monopoly protection is reversed, then suddenly the monopoly has no clothes.

We feel this economic dimension must be appreciated in policy formulation with regard to copyright. Just as copyright holders are fond of asserting their exclusive rights and emphasize that what users have is by exception only, it is worth noting that copyright (and other IP instruments) can also be characterised as an exception, an exception from competition law. Copyright is essentially a legislatively created and approved monopoly. It is our view that claims of copyright holders must be treated with the justifiable scepticism any prudent observer brings to monopoly. Monopoly tends to produce market failure. This means that any problems lamented by the monopoly holder must be tested to see if they do not stem in whole or in part from market failure or abuse of monopoly power.

As Cooper notes,

The business model that the industry is defending is a tight oligopoly in which a handful of companies control the distribution of content. Anticompetitive practices and anti-consumer policies have forced the public to buy overpriced CDs. Over the course of the 1990s, the record companies fixed prices and eliminated singles.

He then presents an analysis of the value to consumers of the distribution channel that the companies have resisted so vigorously. It is notable that:

Having failed to shut peer-to-peer distribution down over the course of five years, in 2004 the record industry finally decided to begin to adapt its business model, at the same time that it continued its litigation.

The results were remarkable. The industry sold more singles in 2004 than at any time since 1984. Assume, based on the evidence of downloading, an average of 1.5 songs downloaded per album. With 150 million downloads in 2004, consumers would have been forced to buy 100 million albums to get the satisfaction of owning the songs they wanted. At an average price per CD of \$13, that would have cost consumers some \$1.3 billion. Buying digital singles at \$1 per single, they spent only \$150 million. The gain in consumer surplus

⁸ Untangling e-economics September 23rd 2000 The Economist

⁹ Issues Paper P8

could be over \$1 billion and is likely to be at least hundreds of millions of dollars.¹⁰

Thus the value equation the industry sought to preserve (and develop by over-pricing and effectively withdrawing singles as a format) abused its monopoly position to the detriment of consumers which can be valued in many millions of dollars. To refuse consumer fair use rights in Australia would in all likelihood perpetuate perverse consequences of this fashion.

IP does have characteristics that present particular issues. It is:

1. Non-rivalrous – use of the property by one does not inhibit use by another.
2. Durable – use by one does not wear or degrade use by another.

However, we would dispute that this inevitably means that absent a rights system as currently constituted, incentive to create works would disappear.

The open source approach is one at variance with the established methods of copyright, and seems capable of producing considerable work. Network effects mean that the more people have access to a communications facility the more valuable that facility becomes. In the digital world, value lies in communication, in information velocity. IP is a network good. The network value proposition has been expressed as Metcalfe's law, which establishes that the value of a network increases as the square of the number of customers of a particular network¹¹. By this network benchmark the more widely shared an IP object, on whatever basis, the more valuable it becomes. Therefore legitimate fair use will actually increase rather than diminish the value of rights holders' intellectual property.

On the question of valuing digital copies it is also important to challenge the notion that because a copy is digital it is somehow perfect. This is touched on in the Issues Paper, which repeats a favourite rights holder refrain that "material in digital form can be flawlessly and inexpensively reproduced and distributed worldwide through the Internet."¹² Admittedly the classic analogue generational copying effect does not occur in digital copying. However, that does not mean all digital copies of a given original work are perfect.

The technique that has really made the digital economy hum is compression. The MPEG standards used for most on-line video and music files use a 'lossy' algorithm - that is data is discarded as the compression copy is made. The technique works hard to make the data loss undiscernible, but as compression rates rise, loss becomes apparent. The person doing the compression from one digital source (or from the original analogue one) to another chooses the compression rate, and therefore the data loss. Thus different digital copies will have different imperfections. The copy is not

¹⁰ cyberlaw.stanford.edu/blogs/cooper/archives/BENEFITsofPEERtoPEER.pdf P5

¹¹ According to Metcalfe's law - "If there are n people in a network, and the value of the network to each of them is proportional to the number of other users, then the total value of the network (to all the users) is proportional to $n \times (n - 1) = n^2 - n$. If the value of a network to a single user is \$1 for each other user on the network, then network of size 10 has a total value of roughly \$100. In contrast, a network of size 100 has a total value of roughly \$10,000. A tenfold increase in the size of the network leads to a hundredfold increase in its value." Carl Shapiro and Hal Varian, "Information Rules: A Strategic Guide To The Network Economy", Harvard Business School Press, Boston, Massachusetts, 1999 at p 184. See also George Gilder, "Metcalfe's Law and Legacy", Forbes ASAP, 13 September 1993 at s185.

¹² Issues Paper P7

perfect, and discarded data cannot be restored. In fact, when data is down-converted and then up-converted back to a higher density, interpolation will to a greater or lesser extent create digital artefacts in the resultant copy. Therefore there are multiple sources of imperfection in digital copying and indeed this creates a market opportunity for copyright holders in the provision of certified standard digital copies for buyers made from reference quality master material.

All digitalisation works on the basis of sampling. Digital copies of a given physical work can differ by virtue of different sampling rates, giving different bit rates and resolution. The digitised 'original' can also impact the quality of the digital copy. Judging the quality of a copy involves a reference master, and a truly flawless digital copy can only originate from such a source. However, most digital copies are made from an analogue copy of uncertain generational status, not a master copy. Most fair use does not involve high grade recording or copying equipment. The results while acceptable to consumers for everyday purposes are far from reaching a professional level.

International copyright treaties

ACA is not qualified or resourced to mount detailed technical argument or commentary on the question of international copyright treaties, however we would urge a realistic and practical assessment of the effect of these treaties in the context of what we understand to be a scant field of test cases.

We also observe the extant fair use provisions in the USA, one of the prime movers in the establishment of the copyright treaties framework. We would consider it exceptionally poor form should the Australian consumer be denied equivalent treatment to their US counterparts in the context of a free trade agreement. The harmonisation framework that has been established will continue to be at odds with general copyright arrangements instigated by our partner in the agreement.

We also observe that to our knowledge, the 'three step test' and other hurdles fail to import any dimension of consumer or user benefit or detriment. There is no imperative to maintain the copyright balance that the Issues Paper so clearly identifies as the primary policy goal of the Government in this area. There is no injunction to maintain the ready carriage of material in networks. In all these aspects, the copyright treaty system is in our view deficient, and while that does not mean the Government should resile from those obligations, it means that consumer and carriage provider concerns must be factored into the policy balance by other means.

Technological protection measures and contract

We note that the Government has until 31 December 2006 to implement tighter controls on circumventing technological protection measures pursuant to the AUSFTA and that it will be conducting a review that will provide an opportunity for further public consultation. We also note the statement that the Government is considering the CLRC's report and recommendations that the Copyright Act should be amended to preserve the integrity of certain exceptions in the face of contractual exclusion or modification.¹³ These open-ended policy processes

¹³ Issues Paper P25

confer an unfortunate element of uncertainty on current consideration of the question of fair use.

As the Issues Paper acknowledges “Technological protection measures have legal protection against circumvention, even where a proposed use might otherwise be permitted.”¹⁴ This has a potential chilling effect on the engagement of consumers with innovation as technology continues to alter the way content is delivered. This problem is highlighted in commentary and discussion of the implementation of a ‘broadcast flag’ in consumer digital television equipment in the US. The deployment of a control flag into free-to-air television that might interfere with the capacity of consumers to undertake the currently most commonplace fair use activity – time shifting – reaches into the heart of the debate. It would play very poorly for most consumers that they have been pushed into digital TV as a matter of government policy, only to find that this means they may strike difficulty undertaking what is now a trivial analogue task.

It also reaches into the future if consumers cannot take advantage of the potential benefits of technology. For instance, one writer suggests:

Technology will support a wide variety of new uses of digital content, so that blog commentary on political programs will be enhanced by footage from ads and speeches, documentarians will be able to easily grab clips from TV, news websites will be able to integrate video into their text reporting, and parodies and reviews of TV shows will be able to incorporate content directly from their sources. Schoolchildren will be able to work on more sophisticated and multi-faceted projects, more easily. And frequent travellers will be able to time and space-shift television broadcasts onto a laptop to watch away from home. The result will both benefit society, and empower individuals.

The “broadcast flag” rule will put an end to all that.¹⁵

The use of a ‘broadcast flag’ will potentially deliver absolute control over the use and re-use of such content into the hands of the broadcaster (interestingly not necessarily into the hands of the rights holder). This is plainly at odds with the recognition in the Issues Paper that:

Giving owners an absolute right to control all uses by other persons would be economically inefficient and, importantly, frustrate the policy objectives copyright is intended to achieve.¹⁶

This broadcast flag is only one species in an entire ecosystem of possible measure that will be deployed to frustrate the fair use activities of consumers with material they purchase in the electronic environment. This is acknowledged in a recent (08-Jun-2005) OECD report from the Directorate for Science, Technology and Industry Committee for Information, Computer and Communications Policy Working Party on the Information Economy about Digital Broadband Content: Music. This report notes

¹⁴ Issues Paper P23

¹⁵ Lauren Gelman Assistant Director of the Center for Internet and Society at Stanford Law School http://writ.news.findlaw.com/commentary/20040318_gelman.html

¹⁶ Issues Paper P8

“Concerns over transparency, privacy, and comparatively restrictive terms of usage rights (e.g., denial of fair use)”¹⁷. It cites studies that:

Note how the interplay between restrictive contractual provisions (Terms of Service) and DRM systems in tandem with supporting laws can significantly limit users’ access to and use of digital content. Beyond supporting anti-competitive practices, DRM systems such as Apple’s FairPlay and DMCA-like laws limit in numerous ways what would in many jurisdictions be potential fair uses, including making copies on additional computers and extracting clips for transformative uses. Moreover, the DRM schemes of online music stores typically limit users’ ability to space-shift and format shift music for players of their choosing. Similarly, online stores eliminate first sale rights - if applicable to the online environment at all by - contractual or technological means.¹⁸

It is clear that the TPM world will be a complex and daunting one for consumers. One critique of the Trusted Computing Platform Alliance initiative illustrates this complexity and probable confusion neatly when it suggests:

One way to protect fair use rights without drastically modifying the current specification is to let individuals become the root of their own certification tree and authorize various devices under their control to view purchased content. Users would need the ability to create their own tree and associate devices with it by loading new trusted certificates and possibly new roots.¹⁹

The challenge lies in understanding what this might mean or look like in practice, let alone how an average consumer might go about doing it. The author ironically notes “Of course, educating consumers so that they can fully exercise their rights is another matter.” At the very least there must be clear and standard labelling and/or disclosure of TPMs and their operation. Consumers also need to be protected against exploitation by virtue of unilateral variation of the function of TPM arrangements post-purchase (such as decreasing the number of allowed viewings or copies).

Simply providing a fair use right and then abandoning it to the mercy of the market is a course fraught with peril. In the final analysis it is our view that it is little point in conferring a fair use exception of any variety on consumers if it is not protected from technological or contractual confiscation. The solution to this may lie in requiring TPM mechanisms to allow reasonable fair use of portions of works, it may lie in allowing the supply and use of circumvention tools to enforce access for fair use or it may lie in legislative protection, with the market and the courts left to provide a solution. Trying to tame TPMs will present a host of practical and legal issues, including the spirit of not the letter of the AUSFTA. It may well be that the march of digital rights management can not be stopped easily any more than the desire for consumers to undertake fair use copying can be. These two imperatives may ultimately find an accommodation in the marketplace; what we wish to see is a sound legal basis to the latter.

Doubtless these matters will be canvassed in the upcoming review relevant to the AUSFTA obligations and in a response to the CLRC contract report.

¹⁷ http://www.oecd.org/document/24/0,2340,en_2649_201185_34995480_1_1_1_1,00.html

¹⁸ <http://www.oecd.org/dataoecd/13/2/34995041.pdf> Note 193, P130

¹⁹ <http://www.computer.org/computer/homepage/0802/Security/>

They also remain material to how any fair use arrangement might be configured and operate.

Exceptions or general fair use

The core anomaly in daily lives of consumers is that using equipment legitimately purchased to manipulate and store copyright material they have obtained in their normal activities (watching television, surfing the net or listening to music) is technically infringing. They should not do it. But they are not going to stop, and there is little or no effort invested in trying to persuade them, let alone make, them. The obvious solution is to legitimise the activities that do little commercial harm (in fact probably deliver various benefits) to harmonise consumer behaviour with legal reality.

At the heart of this harmonisation proposition is the dilemma explored in the Paper as to whether the mechanism to it should be via specific exceptions or creation of a general fair use exception. There are arguments for either approach, and in fact we find these sufficiently persuasive to support an approach that combines both in the interests of delivering both certainty and flexibility.

We feel there is a persuasive case that the exception regime needs a general facility to address fair but unauthorised use for copyright regulation to accommodate changed consumer behaviour and to encourage new market offerings in a rapidly changing environment. In this regard we are attracted to the idea of retaining the existing fair dealing exception, but expanding it to a generic application by the insertion of a phrase like “such as ...” to introduce the usage envisaged as fair dealing.

In our view this approach would move the Australian sufficiently close to the US position to provide some parity following the implementation of the AUSFTA. We have concern that important judicial decisions referencing the fair use doctrine in the USA (e.g. Lexmark) that mitigate consumer impact of the DMCA copyright regime would not hold in Australia without appropriate reform.

There are those who are concerned about the ‘uncertainty’ that would flow from such a change, however we feel these concerns are overstated. The current system is far from certain, both in the legal sense, and in the practical sense for consumers. Most practice would remain unchanged; however this reform would provide an economically valuable space for innovation. It would do this by creating the situation whereby a fair use or dealing would, by default, be legitimate until challenged. Therefore various innovations could be adopted in safety by consumers, and businesses able to build commercial bridges to that consumer behaviour without peril of inadvertently authorising infringement. The issue becomes particularly contentious in the network world. Boundaries of ownership and control over equipment and content in the context of network provided services may not be clear. This approach of a general exception would reverse the current position, where any behaviour by consumers outside the rigid envelope of the rights system is without legal foundation, and there is no way to achieve that beyond revision of the Copyright Act (something that is demonstrably difficult and time consuming).

The current situation also feeds an industry response that demands various behaviours be “stamped-out”. As discussed earlier often whilst continuing to profit one way or

another from that behaviour, or failing to exploit opportunities on offer. Music vendors have been very late to embrace downloading as a legitimate channel, but have benefited from the free promotion file sharing has given their material. Some corporations sell equipment with which to make copies, while at the same time berating consumers for doing so. The analysis of various innovations (for example sheet music printing, photo-copying, audio cassette making, and CD burning), suggests that the concerns are usually overstated and the commercial and economic opportunities neglected or ignored.

On the other hand, the Paper requests comment on the necessity for a specific exception. This issue illustrates the major dilemma of a specific exception based approach; the difficulty of achieving meaningful applicability without excessive narrowness in a technologically changing environment, subject to adversarial interpretation. In our view an exception that allows format shifting should allow backup and restore. However for certainty backup (and restoration) need to be mentioned specifically. As the Paper alludes in the Issue for discussion, the dilemma then arises of what material and under what conditions.

In our view this needs to be approached in way that maximises flexibility and adaptability. Consumers need to be able to use contemporary means to deal fairly with contemporary content in ways that may be novel, but will usually find a base in expectations from past behaviour. People expect to be able to read a book aloud, to listen to music together and view audio-visual material in company. These activities are by and large non-controversial in the physical world, but as they become electronically mediated in network environment, the long and unwelcome shadow of copyright starts to intrude. Consumers expect book-like flexibility in terms of accessing, transporting and sharing contemporary media. As TPMs progressively erode this facility, it is not alarmist to express concern about the ultimate control of reading. Consumers and carriage providers need and deserve a safe space to develop this network world. It is also important for content owners and providers to recognise, that in a network world value resides in having people access and use material, not in locking it up and guarding it.

We are persuaded that as well as a general fair use right, one or more specific exceptions are required to address the most obvious consumer needs, which consist of time, space and format or platform shifting together with content (as well as software) backup.

The topic of backup of non-software consumer items is worth specific comment. The Issues Paper comments on the utilitarian nature of software, although this is something significantly frayed by the immense popularity of computer and console games, where programmed interactivity meets storyline to deliver entertainment. Many consumers have made a significant investment in digitally stored music and film, and while not generally damaged by the player, the media remain relatively fragile, not to mention easily stolen. Consumers know they can safeguard their investment by backing up. They should be allowed to. Part of the resilience of digital media lies in the ease with which it can be copied; safety lies in redundancy.

We feel these require a degree of certainty that should not hang on potential judicial interpretation of the flexible provision discussed above, since as the Issues Paper notes:

Prior to interpretation by the courts, there is no way to know if acts such as time-shifting or format-shifting would be lawful.²⁰

The consumer engagement with these activities is so deeply entrenched and the lack of commercial harm so obvious that there should be no real or implied uncertainty about whether it is fair for consumers to undertake activities such as:

- Backing up a favourite CD or legally downloaded material
- Making a music compilation for their own household and mobile use
- Transferring music from one format to another
- Transferring music from vinyl to CD or other format
- Storing music in an easily portable form while keeping their source safely stored
- Transferring video material from tape to DVD or other format
- Time-shifting broadcast or subscription audio-visual content
- Keeping a stable copy of web material and content for reference

We are not persuaded there is great utility in seeking to refine a definition of fair time or format shifting, or backup, in terms of numbers of copies, formats or periods of retention etc. For the vast majority of consumers' fair use copying is neither systematic nor organised. It is ad hoc and usually temporary. It is important to distinguish between retention and retrieval – owning a pile of undifferentiated recordings is very different from acquiring a library of material. Fair use copying is in our view self limiting and consequently can be dealt with in a straight forward and common sense fashion. It should be simple and free from encumbrance.

We also feel there are compelling arguments from the institutional users that the question of orphan works is sufficient discrete and urgent to require and suit a specific exception.

The reason not to confine reform to simply providing such specific exceptions is that as desirable as these are, they relate only to what is proceeding today as the consequences of innovation yesterday. They do not provide a framework to cope with unanticipated developments tomorrow from the innovations of today. Therefore we feel there are grounds for proposing a two part solution that retains the existing fair dealing exception expanded to a generic application, and enacts certain limited specific exceptions.

Remuneration for private copying and a statutory license

The Issues Paper notes a division of view between certain copyright owner interests over the desirability of instituting a levy based on a statutory license for private copying. ACA is on record as not raising a blanket objection to the proposal for a blank media levy - but we have not given it unqualified support either. We have entertained discussion of the idea in part because of our recognition of the imperative need for a

²⁰ Issues Paper P33

review of the status of private copying in Australia. Our reservations have been that any levy would need to be accompanied by:

1. Fair use copyright provisions that unequivocally allow the consumer to do the fair private copying for which they are being levied.
2. Legislative protection of such private copying rights from contractual exclusion.
3. Capacity for consumer capacity to enforce these private copying rights, including legal access to technology to do so.

Imposing a levy raises consumer expectations – if they are paying to be able to do something, then they should be able to do so. Without the latter two items IP holders could double dip, pick up the levy royalty but still lockup material with contract and technology. This point is acknowledged in the Issues Paper “the operation of private copying statutory licenses has been challenged in some countries by the existence of technological protection measures that stop users from making copies as permitted under national law.”²¹ This seems to us to be the fatal flaw for any levy proposal. At the very least, any legislation that imposed a levy would have to outlaw any TPM that excluded consumers fair use right.

In addition, any levy proposal must address practical issues. A reasonably priced, indeed imperceptible levy would be needed to gain acceptance in the market. Any levy must also avoid catching media used for non-infringing purposes - such as the recordable CDs many now use with PCs and digital cameras, and blank DVD increasingly used for computer data backup and video recording. Any mechanism to achieve this must not create delays or difficulties at the checkout for consumers, thus ruling out form filling or statutory declarations.

In any event, technology has moved on from separate recording media to solid state and hard-disk based memory devices functionally indistinguishable from general purpose components. We are increasingly uncomfortable with the notion of levying such storage elements, particularly schemes that do so based on the capacity of such storage. The problem with this is illustrated in reports of a Netherlands proposed tax on MP3 players. The point made above is echoed in comments that “iPods are used to store legitimate iTunes files which are Digital Rights Management (DRM) protected, this means that copyright is being purchased twice over for these devices if a levy is also paid.”²² The further uncomfortable point is made that:

Already in Germany there is a levy on PC hard drives, that will soon become larger than the entire PC industry revenue if it is left in place. Within two years, as disk drive sizes move to terabyte class on notebooks, and petabyte levels on home DVRs, the tax will come to far outweigh not just the cost of the drive, but the cost of the device.

This *reductio ad absurdum* is unsupportable.

²¹ Issues Paper P22

²² http://www.theregister.co.uk/2005/04/27/netherlands_ipod_tax/

It has been suggested that all media could be levied at a rate proportional to the estimated rate for which media are used for fair use recording. We are not sure the average consumer would see this as fair, requiring them to pay for something they may not ever do, even at a reduced rate.

We also see it as important to distinguish discussion of a levy to compensate for fair use as discussed above and in the Issue Paper, and justifications for a levy that relate to unfair copying, such as burning borrowed CDs or shifting unauthorised MP3 files to a portable player. We are not arguing for those activities to be legitimised. However, we consider there are issues with creating a statutory license for activities that will remain illegal under any fair use arrangement.

There are suggestions that there is an overall economic imperative to institute a levy scheme to remunerate rights holders. In our view the case for this argument is thin. We made our position on the economics of copyright plain earlier in this response. Specifically, content providers can (and have) incorporate the fair use by consumers of their material into the retail price for the original. Consumers have been time and format shifting for decades now with no obvious decline in the fortunes of rights holders attributable to it. The usual arguments that digital is different do not hold here, because the purpose of the copy is not indefinite replication, but simple convenience of consumption. Consumers see fair use as an extension of their taken-for-granted activities such as lending a book or magazine to a friend, making a handwritten note from a book, or reading aloud. None of these subtract from the value of the work. Video-tape recording free-to-air broadcast has functioned as part of consumers lives for some time, and in our view actually contributes value to the broadcaster, since they consumer material (and advertising) they might not otherwise. The ability to listen to music on portable devices has opened new markets for both music and equipment providers. Therefore consumers and a non-remunerated fair use right do not exist in an economic vacuum, and the current operation of the de facto fair use demonstrates it does not result in market collapse; quite the reverse.

In this economic context, we would also reiterate our view on caching conveyed to the Phillips-Fox Digital Agenda Review. In the context of the Paper, we consider caching to be a special case of general fair use. Arguments that there is some efficiency dividend in caching that should be automatically shared with rights owners are unjustified. The rights holder does not do anything to create the efficiency and it would be a complete windfall to gift them with a remunerable right with regard to such temporary copies. This other bid for remuneration in the fair use space further demonstrates the need to settle the issue before micro-payment and monitoring systems become technologically feasible and such imposts can be asserted

de facto. A legitimate fair use environment would allow caching and provide rights holders with an incentive to add value in an attractive payment environment.

Therefore we see essentially insurmountable hurdles to a levy, because:

- It is suspect jurisprudentially since it imposes a cost but cannot guarantee the benefit;
- It rapidly becomes mired in the technological complexity of the modern consumer market;
- It creates potential cost and inconveniences for all consumers of digital storage, not just those that create fair use copies;
- It requires administration, the overhead and complexity of which would be an impost on business.

For these reasons we do not support such an approach as a policy response in the context of the Issues Paper

Conclusion

Therefore in summary we do not endorse any of the options for implementing reform as presented in the Issues Paper, as is.

We feel there are grounds for proposing a two part solution:

- a) Retain the existing fair dealing exception, but expanding it to a generic application by the insertion of a phrase like “such as ...” to introduce the usage envisaged as fair dealing, and;
- b) Enact specific exceptions are required to address
 - a. time, space and format or platform shifting
 - b. content (as well as software) backup
 - c. orphan works

This approach delivers certainty where it is needed most, and flexibility to facilitate future innovation in a technologically neutral fashion.

We specifically do not support the introduction of a consumer levy to fund a statutory license for fair use copying.