

A Comment on the Copyright Exceptions Review and Private Copying

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Abstract

The issue of private copying, and how it fits with copyright law, has hit front and centre of the current copyright exceptions review. While copying is widespread, and iPods are popular, under current Australian copyright law, almost all private copying – including time-shifting and format-shifting (or ‘space-shifting’) – is an infringement of copyright. It appears that one aim of the current copyright exceptions review is to address this mismatch.

The relationship between copyright and private copying is a highly complex issue, particularly in a digital environment. A brief paper cannot hope to cover all the relevant issues involved in a manner which is anywhere near comprehensive. The aim of this paper is twofold. First, it provides a set of seven premises for assessing any proposed solution. Second, it uses these premises, and some information about systems in other countries, to offer comments on three major issues in reaching a solution.

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1 Introduction

The issue of private copying, and how it fits with copyright law, has hit front and centre of the current copyright exceptions review.¹ Private copying was the focus of the Government's Issues Paper,² and of public debate. At a public seminar on 15 June 2005, Chris Creswell, a consultant to the Attorney-General's Department who is involved in the Review stated explicitly what any reader of the *Issues Paper* would know: that this Review, first and foremost, was about whether the 'private copying issue' could be fixed – whether with a fair use defence, or by some other means.

Private copying is a highly complex issue, particularly in a digital environment. A brief paper cannot hope to cover all the relevant issues involved in a manner which is anywhere near comprehensive.³ Nor will I frame an optimal system to deal with private copying. Instead, my aim is to provide a set of premises for thinking about private copying, and to comment on some of the most pertinent questions raised in the current review.

The Paper has three parts. Part 2 briefly outlines the private copying problem. Readers more interested in the comments should skip to the next section, below page 8, where I set up seven basic premises which, I argue, should be used in assessing solutions to the private copying issue.⁴ Finally in Part 4 I explore three key questions which arise in the current review.

2 The 'problem' of private copying

The problem that currently exists in Australian law is clear:

- On the one hand, a great deal of private copying is going on – and the amount of copying is only increasing as digital technology has made it easier to copy;⁵
- On the other hand, most of that copying infringes copyright law and provides no remuneration to copyright owners.

¹ Holding a Review was an element of the Government's arts policy in the last election: *Strengthening Australian Arts* (4 October 2004), at 22. The Attorney-General confirmed the planned review in February 2005; an Issues Paper was released in May 2005 (below n2).

² Attorney-General's Department, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (May 2005).

³ For a more comprehensive treatment see P. Bernt Hugenholtz, L. Guibault and S. van Geffen, *Final Report: The Future of Levies in a Digital Environment*, March 2003, IVIR (Europe); William Fisher III, *Promises to Keep* (2005) (US); Neil Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File-Sharing' (2003) 17 *Harv J. L. & Tech.* 1 (US); Stan J. Liebowitz, 'Alternative Copyright Systems: The Problems with a Compulsory License' (31 October 2003), at <http://www.utdallas.edu/~liebowitz/intprop/complpff.pdf> (US); Peter Eckersley, 'Virtual Markets for Virtual Goods: The Mirror Image of Digital Copyright?' (2004) 18 *Harv. J. L. & Tech.* 85 (US/Aust).

⁴ At the presentation of this paper in Sydney and Melbourne there were six premises. The 'new seventh' is a premise which was underlying the earlier presentation, but unstated: namely, that copyright law is a desirable system to maintain for the benefit of creators and those who invest in creators and the distribution of their creations.

⁵ Much copyright material is available in digital form already, or are readily convertible to such. Equipment for copying, compressing, storing and transmitting digital copyright is readily available.

By ‘private copying’, I am referring to copying that occurs for non-commercial purposes, in a non-public setting. This definition is consistent with the wording of the European Union Information Society Directive, which allows Member States to create an exception to copyright for ‘reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial’.⁶ Examples include home copying of the music from a CD onto a personal computer or an MP3 player, or the home taping of copyright material from a broadcast.

2.1 *The reality of copying*

How much private copying is going on? Certainly, common knowledge and available evidence indicate it is widespread, both in Australia and elsewhere.

One form of evidence is the popularity of digital devices – in particular, MP3 players – the prime use of which is enjoying copied music. In the US, sales of portable MP3 players more than doubled in 2004, to over 6.9 million units.⁷ In Australia, too, such devices are popular: sales of Apple’s iPod increased from just under 23,000 in the first quarter of 2004 to more than 330,000 in the first quarter of 2005.⁸ And while in many countries music can be purchased specifically for use on iPods, much of the music on these devices is privately copied – sourced from users’ CDs and from file-sharing networks. iPods can play unprotected formats commonly ‘ripped’ from CDs or downloaded – in particular, MP3s – and music which is protected using Apple’s own digital rights management (DRM), FairPlay. Apple does not license FairPlay to other providers,⁹ meaning that the only DRM-protected music played on iPods is purchased from Apple’s own iTunes store. In early 2004, it was pointed out that while Apple had sold 2.9 million iPods, iTunes had sold 60 million individual songs.¹⁰ As some activists pointed out,¹¹ this meant that 21 iTunes songs had been sold per iPod. Smaller iPods hold 1,000 songs. 21 songs use up about 0.7% of the space on a 3,000 song iPod.¹² In Australia, while iPods have been available for over a year, there *is* no iTunes store.

⁶ 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 (‘Information Society Directive’), O. J. L. 167, 22/06/2001, p.0010-0019, Article 5.2(b). US law also has an exception which prevents the bringing of an infringement action of copyright based on the non-commercial use by a consumer of a digital audio recording device or digital audio recording medium for making digital musical recordings or analog musical recordings: 17 U.S.C. §1008.

⁷ Organization for Economic Cooperation and Development (OECD), Working Party on the Information Economy, *Digital Broadband Content: Music* (June 2005), DSTI/ICCP/IE(2004)12/FINAL, at 70, quoting the Consumer Electronics Association.

⁸ ‘iPod sales bad for disc’, *The Australian*, 12 June 2005.

⁹ ‘Music industry eyes “casual piracy”’ *SiliconValley.com*, 15 June 2005, available at <http://www.siliconvalley.com/mld/siliconvalley/11898486.htm> (last visited 19 June 2005).

¹⁰ The figures are of course much higher now: as at 20 June 2005 the Apple website stated that iTunes had sold over 400 million songs: <http://www.apple.com/itunes/> (visited 20 June 2005).

¹¹ In particular, Downhill Battle, a music activism organisation. The report is available at <http://www.itunesperipod.com> (last visited 18 June 2005).

¹² Economically, this is not surprising either. As US IT/IP researcher Ernest Miller has pointed out, in the US, in March 2004 it cost US\$499 to buy a new 40G iPod. At that same time, it would cost US\$10,730 to fill that same iPod with songs purchased online at 99 cents each, the standard price on the US iTunes site: Ernest Miller, ‘Why the a la Carte Music Model is Doomed’ (March 10, 2004), available at <http://www.corante.com/importance/archives/002343.html> (last visited 18 June 2005).

Another indication comes from surveys of consumers. In the United States, a survey in early 2005 found that about 36 million Americans (27% of Internet users) download either music or video files. Not all of this is from file-sharing networks; some 19% of these (about 7 million American adults) had downloaded files from someone else's iPod or MP3 player.¹³ In Europe, a recent survey found that 69% of Internet users have used their computer to play digital music files or rip CDs; 40% use MP3 players to store or play digital music.¹⁴ In Australia, a study done for the Australian Record Industry Association (ARIA) in early 2003 found that in the six months prior to the study, around 3.6 million Australians burnt a music CD, and that 40% of the general population had at some stage received a burnt CD (69% in the 18-24 age group).¹⁵ The source material for such burnt CDs was their own legitimately acquired CDs (54%), borrowed CDs (34%), and the Internet (28%, including file sharing services). When the ABA conducted a survey back in 1998,¹⁶ 67% of respondents reported that they recorded or borrowed music from their friends, 42% recorded from the radio, 31% recorded or borrowed from family, 27% recorded from television and 4% recorded or downloaded from the Internet.¹⁷

2.2 *The illegality of copying*

Despite the social reality of copying, the vast majority of it is an infringement of copyright.

Under Australian copyright law, owners of copyright have the exclusive right to make reproductions (copies) of copyright material.¹⁸ No general exception to copyright infringement for private copying currently exists in Australian law. There is an exception for copying for 'the purpose of research or study' which would perhaps be a defence to some tiny proportion of private copying, by music students.¹⁹ There is also a very limited exception in s 111 of the *Copyright Act* which states that it is not an infringement of copyright in a television or radio broadcast to make a copy of that broadcast 'for the private and domestic use of the person by whom it is made'. However, it is generally accepted that s 111 does not extend to the copying of the *underlying works* which are broadcast:²⁰ for example, the underlying cinematograph film which will exist for any pre-recorded show.²¹ This means that

¹³ Pew Internet and American Life Project, *Music and Video Downloading Moves Beyond P2P*, March 2005.

¹⁴ Nicole Dufft, Andreas Stiehler, Danny Vogeley and Thorsten Wichmann, *Digital Music Usage and DRM: Results from an European Consumer Survey* (May 2005), available at http://www.indicare.org/tiki-read_article.php?articleId=109 (last visited 19 June 2005).

¹⁵ Australian Record Industry Association, *Impact of Internet Music File Sharing & CD Burning* (16 July 2003), available at <http://www.aria.com.au/pages/news-and-press-releases-file-sharing-cd-burning.htm> (last visited 18 June 2005).

¹⁶ Quoted in Australian Copyright Council, *Remuneration for Private Copying in Australia: A Discussion Paper*, September 2001, at 1

¹⁷ While the figures in 2005 do not represent a significant rise in the *proportion* of the population who copy, these figures do not capture the *scale* of copying, which is likely higher now than in 1998 with the increased storage capacity of the new devices.

¹⁸ *Copyright Act* 1968 (Cth) ss 31 (works), 85-88 (subject matter other than works under Part IV).

¹⁹ *Copyright Act* 1968 (Cth) ss 40 (works) and 103C (Part IV subject matter).

²⁰ Under s 113 of the *Copyright Act* 1968 (Cth), copyright subsisting under Part IV (in the broadcast) does not affect copyright existing in underlying Part III works (s 113(1)) or Part IV works (s 113(2)).

²¹ See Issues Paper, above n2 at 26; Copyright Law Review Committee, *Copyright and Contract* (Final Report, 2002), para.3.163; S. Ricketson and C. Creswell, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Lawbook Co Looseleaf) at [11.580]. It should be

‘[r]ecording a broadcast may still infringe the copyright in any work, film or sound recording that is included in the broadcast and may infringe performers’ rights if it is a live broadcast of a performance.’²²

The result is that ordinary consumer devices are tools for a great deal of copyright infringement. Australians infringe copyright almost every time they tape a television show,²³ and every time they put music from their legitimately purchased CDs onto their iPods. That undoubtedly makes a very large proportion of Australians infringers of copyright under current law – a position which has rightly been condemned as simply not making sense.²⁴ It has attracted increasing media attention in recent times.²⁵ Australian senators were certain surprised to be told that they were infringers in the hearings relating to the Free Trade Agreement with the United States²⁶ last year.²⁷ As head of the Senate Select Committee, Senator Peter Cook put it,

‘You have now given me a huge guilt burden. I am in breach, I am a serial offender, and I am only let off by virtue of the fact that the damages are infinitesimal and it is probably not worth the owner of the copyright pursuing me.’²⁸

2.3 *Identifying the problem*

It is important to be clear that the ‘problem’ is *not* the magnitude of the copying. The copying actually has many social benefits – copyright content is being more readily and more often consumed by Australians in all kinds of new ways. We would generally consider that more use of and access to copyright material is a social good. It is a fairly basic, and economically sound proposition that if we can increase use of copyright material, without undermining incentives, then we should. Copyright law imposes limits on reproduction and other uses of copyright material only so far as necessary to ensure appropriate incentives for creation.

So the problem is not the copying. The problem is the mismatch between law and reality – and that it is possible that some of this copying may damage copyright

noted that s 111 has not been interpreted by a court, and it might be argued that such a narrow reading could not have been intended at the time when the exception was introduced, and that, on this basis, the exception should be read more broadly to ensure that it is not infringement in *any* copyright rights implicated by such private/domestic recordings. However, there is a response to such an argument: namely, that as it is, copyright in broadcasts is supported by different rationales and might well be treated differently from other forms of copyright.

²² Issues Paper, above n2 at 26.

²³ The exception would be where completely live television is recorded.

²⁴ As long ago as 1988, the House of Lords pointed out the problem here: *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at 1060, noting that ‘From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copiers every year ... A law which is treated with such contempt should be amended or repealed. ... home copying cannot be prevented, is widely practised and brings the law into disrepute.’

²⁵ See, for example, ‘Click at your own risk’, *Sydney Morning Herald*, 3 August 2004; also ‘iPods prompt copyright rethink’, *The Australian*, 6 May 2005.

²⁶ Australia-United States Free Trade Agreement (‘AUSFTA’) (Washington, 18 May 2004) [2004] ATS 1, entered into force 1 January 2005.

²⁷ See *Hansard*, 18 May 2004, FTA 86 and following (Senator Cook noting his “surprise” to learn that recording to watch later is protected as legitimate in the US but not in Australia)

²⁸ Senator Cook, Chair, *Hansard*, 18 May 2004, FTA 87

owners' legitimate interests in receiving remuneration. And the issue is what we do about this mismatch.

3 Seven premises

As noted above, this paper does not purport to provide complete answers to the questions raised by private copying. Rather, I seek to provide a set of principles for evaluating the issues raised in the debate, and then apply those principles to some of the particular questions raised in the *Issues Paper*. In this part of the paper, I provide the framework, in the form of seven 'premises'.

3.1 *Premise 1: Law has its limits here*

Despite the arguably ludicrous current state of the law, it is important to remember: the world will *not* end if we do not get the law right at this point in time. There are four reasons for this.

First, in my opinion private copying is not actually going to stop anytime soon. The law is only one factor in this equation: social norms, technology and markets for technology all dictate that copying will continue. Consumers today expect to be able to make some copies of copyright material: including for porting (using in a different device)²⁹ and time-shifting (recording to enjoy later). Their experience of technology markets in recent years has been of *increasing* features and portability, not less, and 'digital technologies have persistent effects on consumption habits'.³⁰ In short, consumers have been sold an ever-increasing cycle of more convenience and more portability – your music, your movies, at the time and place of your choice.³¹

This experience has combined with a long-standing practice of private copying, so far tolerated by copyright owners, because it did not suit them to sue consumers, and monitoring enforcement was physically impossible. The result is that, in terms of the social norms relating to private copying, some forms of copying are generally considered to be acceptable. This includes time-shifting and format-shifting, but it also includes some sharing between friends and family.³² Arguably an implicit bargain has been set up.³³ The ability of any law, or any technology, to rescind that implicit bargain between users and suppliers of content is limited, at least in the short to medium term.³⁴ I believe that copyright owners will continue to allow some such

²⁹ Figures are not widely available on this issue, but one recent European survey found that 84% of Internet users want the ability to transfer music between digital devices: Dufft et al, above n14 at 24.

³⁰ OECD, above n7 at 12.

³¹ Kathy Bowrey, *Internet Cultures* (Cambridge UP, 2005).

³² Dufft et al found that 75% of Internet users want to share digital music with friends or family: Dufft et al, above n14 at 24.

³³ As Burrell and Coleman note, '[Copyright] "anomalies" are often long-standing and will have formed the basis of agreements and entrenched understandings as much as any other aspect of copyright law. There comes a point when an element of a system becomes so engrained that if a theory can only account for it as an anomaly the presumption has to be that it is the theory that needs to be re-examined.' Robert Burrell and Alison Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge UP 2005) at 180.

³⁴ On the other hand, the OECD has commented on the lack of transparency about usage rights, and the way that usage rights vary even within the catalogue of a single digital music provider: OECD,

copying, whether by failing to enforce rights against users, or by using DRM which gives *some* ability to time- and format-shift.³⁵

Second, no country has yet found the perfect legal solution. Systems are in flux all around the world. The US has a small levy system which was designed to apply to largely obsolete technology.³⁶ Canada's relatively new private copying levy system has been subject to challenges and ongoing disputes.³⁷ Even in Europe, where private copying levies have a long history, those systems are in the process of adjusting to the new reality of digital rights management and multi-media devices,³⁸ with disputes, for example, in Germany over whether such things as personal computers and printers should be subject to a levy,³⁹ and equipment makers lobbying the European Commission to roll back such systems.⁴⁰ The European Commission is seriously considering changing the provision which addresses private copying levies in the Information Society Directive – a provision only 4 years old.⁴¹

above n7 at 54. As the OECD and the *Issues Paper* note however, companies have an incentive to make their services more attractive and interoperable. Other commentators argue that while copyright owners are unlikely to interfere with well-established usage rights (no one wants to 'break consumers' television sets'), *other* innovative services may *not* be rolled out due to copyright claims: see J. D. Lasica, *Darknet: Hollywood's War Against the Digital Generation* (John Wiley & Sons 2005), Ch.6.

³⁵ There is some evidence that this is occurring. Foxtel Australia's new personal video recorder (the Foxtel iQ set top box) allows for taping, and Foxtel's Digital service offers some whole channels on 'time-shift' (delayed from the 'main' channel). As at 20 June 2005, songs purchased at the US iTunes store could be burned onto an unlimited number of CDs for personal use, listened to songs on an unlimited number of iPods and played songs on up to five Macintosh computers or Windows PCs: <http://www.apple.com/itunes/store/> (visited 20 June 2005). See also "'Speed Bump" for CD pirates', *The Australian*, 17 June 2005 (Sony's new copy protection technology for CDs allows three copies).

³⁶ The *Audio Home Recording Act 1992* ('AHRA'), codified at 17 U.S.C. §§1001 – 1010. It was originally introduced to address concerns at the time that Digital Audio Tapes (DAT) were introduced: see S. Elkman and A. Christie, 'Regulating Private Copying of Musical Works: Lessons from the U.S. Audio Home Recording Act of 1992', IPRIA Working Paper No. 12/04 (September 2004).

³⁷ See generally Michael Geist, 'The State of File-sharing and Canadian Copyright Law', *Toronto Star*, 6 June 2005, available at http://www.michaelgeist.ca/resc/html_bkup/june62005.html (last visited 19 June 2005). A Federal Court decision regarding the constitutionality of the levy (*Canadian Private Copying Collective v Canadian Storage Media Alliance* (2004) 247 DLR (4th) 193) is currently on appeal to the Supreme Court of Canada. In the first decision on the levy for private copying, the Canadian Copyright Board received over 3,000 written comments. In the third round, the Board received 1,500 written comments: Memorandum of Argument for the Retail Council of Canada et al, in the Supreme Court of Canada (copy on file with author).

³⁸ See further Hugenholtz et al, above n 3, and below Part 4.1.3, page 20.

³⁹ In December 2004 the District Court of Munich decided that the private copying levy applied to personal computers: see Rik Lambers, *Constitutional Code Blog*, 'German PC Levy', 31 December 2004, available at <http://constitutionalcode.blogspot.com/2004/12/german-pc-levy.html> (last visited 19 June 2005). In May 2005 a court in Stuttgart upheld a lower court decision that the levy covered computer printers (see Rik Lambers, *Constitutional Code Blog*, 'German Court Confirms Printer Levy', 13 May 2005, available at <http://constitutionalcode.blogspot.com/2005/05/german-court-confirms-printer-levy.html> (last visited 19 June 2005).

⁴⁰ '€3.28 extra per gigabyte?', *International Herald Tribune*, 19 May 2005, available at <http://www.ihf.com/articles/2005/05/18/business/fees.php> (last visited 19 June 2005).

⁴¹ Tilman Lueder, 'Legislative and Policy Developments in the European Union', Paper given at 13th Annual Conference on International Intellectual Property Law and Policy, Fordham, 31 March – 1 April 2005, available at http://europa.eu.int/comm/internal_market/copyright/docs/docs/fordham2005_en.pdf.

Third, the technology is in flux. There is an argument that even now, over eight years after the WIPO Internet Treaties were concluded,⁴² technology and markets for digital content and digital rights management are changing so quickly, we should ‘wait and see’ how things develop.

Fourth, not only will the world not end if the private copying issue is not solved now, but in my opinion, truly fundamental interests are unlikely to be threatened. The most pressing issues in copyright exceptions are not here. They are in those areas where freedom of speech and freedom to create *are* threatened – areas like the scope of the fair dealing defence following the decisions in *The Panel* case,⁴³ and its impact on freedom of political communication.⁴⁴ A second, more pressing concern is how anti-circumvention laws will be implemented in a post-AUSFTA world.⁴⁵ These issues deserve as much, if not more attention.

3.2 *Premise 2: We should try to get the law more right*

Despite the immediately preceding discussion, I remain of the view that it is desirable to try to get the law right in this area – or at least, *more* right than it currently is.

The first reason is this: as matters currently stand, Australian copyright law is an ass. Laws which exhibit asinine qualities breed disrespect for the law.⁴⁶ Ridiculous rules are also easy targets for people who are not in favour of the copyright system as a whole. This problem was demonstrated during the consultations on the AUSFTA, where the area of private copying was held up as an area where US law was *more* generous to users than Australian law. This is not helpful for the many creators and industries which rely on copyright. It is at least arguable that consumers who consider copyright law ‘completely out of touch’ will be less inclined to obey its strictures.

Second, while the law have not so far stopped individuals from copying, they can have an effect on many businesses, including technology providers, consumer equipment manufacturers and telecommunications companies. Such parties will currently be advised by their lawyers that many features consumers might want – including copying, shifting, and storing – are an infringement of copyright. With Australian law on secondary liability currently in flux,⁴⁷ the potential, even theoretical

⁴² WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), both concluded 20 December 1996 in Geneva.

⁴³ In particular, the decisions of the Full Federal Court on the scope of the fair dealing defence (*TCN Channel Nine Pty Ltd v Network Ten Pty Ltd* (2002) 118 FCR 417) and the identification of a ‘substantial part’ (*TCN Channel Nine Pty Ltd v Network Ten Pty Ltd (No 2)* [2005] FCAFC 53)

⁴⁴ As my colleague at Monash, David Lindsay, has pointed out, it is remarkable that the government’s *Issues Paper* (above n2), a paper that raises issues of fair use and copyright exceptions, does not mention ‘freedom of expression’ once. These issues have been raised by Associate Professor Robert Burrell in his presentations at the Seminars referred to in the ‘opening credits’ of this paper, and in his new book, Burrell and Coleman, above n33.

⁴⁵ Australia is required to implement new anti-circumvention laws by 1 January 2007: AUSFTA Article 17.12.

⁴⁶ See *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at 1060 (quoted above n24).

⁴⁷ Several cases are currently before the courts in Australia, including the KaZaA litigation, where the provider of the file-sharing software is being sued by the Record Industry (Federal Court File

liability of individual consumers can have an effect on whether certain kinds of technology or services are offered to companies who are more likely to be sued.⁴⁸ This is particularly an issue for Australia. A vast amount of copyright content consumed in Australia comes from overseas. There are no doubt Australian businesses, including small businesses, which are or could be involved in the content *delivery* business, but who cannot afford to take the risk of lawsuits in this uncertain legal environment.

3.3 Premise 3: Any solution will be a compromise solution

The third premise is a simple one: aiming for a perfect system to deal with private copying and copyright is not realistic. Suggestions for reform have to recognise the existing law as a starting point: a very detailed system operating within a very detailed ‘supranational code’ of international copyright obligations, both multilateral and bilateral.

Implicit in this idea of that the solution is a compromise is the view that the rights of copyright owners are not unlimited, and that, in the real world, the point at which copyright owners’ rights should end and users’ rights ‘begin’ is uncertain.⁴⁹ Taking this position means rejecting the idea that the aim should be to ensure that copyright owners have rights which are as ‘perfect’, as close as possible to rights in tangible things like apples, cars, and land. This position has been taken in numerous government reports on copyright,⁵⁰ and is inherent in the utilitarian model which underlies Anglo-Australian perspectives on copyright.

3.4 Premise 4: The government is not just a neutral arbitrator here

In choosing a compromise solution, the government is not simply a ‘neutral arbitrator between competing interests’. The government is also the elected representative of the members of the public, who are not necessarily present at negotiations. This is a complex role. It is therefore important to establish some guiding principles for assessing any compromise. The next three premises represent an attempt to set out some principles which may be used in assessing the legitimacy of any particular solution.

Number N 110 of 2004, heard December 2004 and March 2005). Another case is *Australasian Performing Right Association Limited v Metro on George Pty Limited* (2004) 61 IPR 575, regarding secondary liability of a night club for infringing performances; this case was appealed but the appeal was settled in May 2005.

⁴⁸ The private copying of individual has in past cases been used by copyright owners as a ‘hook’ for imposing (or attempting to impose) liability on technology and service providers: see, for example, *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd* (2001) 114 FCR 324.

⁴⁹ *Issues Paper*, above n2 at page 8, [3.2].

⁵⁰ Eg *ibid*; see also Intellectual Property and Competition Review Committee, *Review of Intellectual Property Legislation under the Competition Principles Agreement* (Sept. 2000) (‘IPCR Report’); Copyright Law Review Committee, *Simplification of the Copyright Act 1968: Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (September 1998).

3.5 *Premise 5: Any solution should be consistent with Australia's international obligations and maintaining copyright.*⁵¹

One principle that the Australian government should apply, in considering the appropriate compromise, is that copyright law is, and continues to be, an important part of Australia's creative policy. There are good economic and moral justifications for copyright.⁵² It is important to Australia's creators and creative industries. Clearly, one of the principles, in assessing any solution, is that that solution should maintain the fabric of the copyright system and its objectives. Clearly, too, we must act consistent with our existing international obligations, which include, importantly, the 'three step test'⁵³ which limits exceptions to copyright to those which apply:

- To certain special cases;
- Which do not conflict with a normal exploitation of the work; and
- Do not unreasonably prejudice the legitimate interests of the right holder.⁵⁴

3.6 *Premise 6: Australians should not be worse off than consumers overseas.*

A second principle is that consumers in Australia should not end up worse off than consumers elsewhere in the world in terms of the rights and access to they have to copyright material.

This is not currently the case. One of the key impulses motivating the Senate Select Committee and JSCOT in making their recommendations regarding personal copying was the fact that they were told – accurately – that while consumers overseas, including in the US, did not infringe copyright in many private copying scenarios, Australian consumers were 'serial infringers'. This was – quite understandably – perceived to be an undesirable anomaly.⁵⁵ The problem is graphically illustrated by the contrast between the positions currently taken by the Australian Record Industry Association (ARIA) and its sibling in the US, the Recording Industry Association of America (RIAA), in relation to format-shifting. Each Association has a website with a 'Frequently Asked Questions' Section. In the US, the RIAA's website cheerily states:

'If you choose to take your own CDs and make copies for yourself on your computer or portable music player, that's great. It's your music and we want you to enjoy it at home, at work, in the car and on the jogging trail.'⁵⁶

The equivalent Australian website is not nearly so cheery:

⁵¹ This premise was not included in the original version of this paper, because it seemed self-evident.

For the avoidance of doubt, however, even this obvious premise should be spelled out.

⁵² For a broad summary, see IPCRC Report, above n50, pp32 – 35.

⁵³ Berne Convention for the Protection of Literary and Artistic Works 1886 (last amended 1979) 1161 U.N.T.S. 31, Article 9(2); Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) Article 13; World Intellectual Property Organisation Copyright Treaty (WCT) Article 10; reaffirmed in Australia's case in AUSFTA Article 17.4.10(a).

⁵⁴ See generally *Issues Paper*, above n2, at 10-11.

⁵⁵ See Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report* (August 2004) at [3.104] – [3.118]; Joint Standing Committee on Treaties, *Report 61: The Australia-United States Free Trade Agreement* (June 2004) at [16.35] – [16.50]

⁵⁶ RIAA website, <http://www.riaa.com/issues/ask/default.asp#stand> (last visited 19 June 2005)

‘Except in very limited circumstances which are specifically set out in the Copyright Act (e.g. for the purposes of research, study, criticism or review), no such general right [to make copies for personal use] exists under Australian law.

...

As a consumer, the purchase of a CD only gives you the right to own the physical disc, to play it privately, and to pass on the same physical disc to another person. You have not bought the right to make or distribute copies, whether on CD-R or over the internet. This means that copying the music on the CD, without the permission of all relevant copyright owners, is an infringement of copyright.’⁵⁷

The ‘no worse off’ criteria is one starting point for a discussion of proposed solutions, and a yardstick for measuring the outcome of any political process. Two qualifications however are important. First, as a criteria it can only take us so far. The limitations of comparative law are such that accurately assessing whether Australians are ‘better’ or ‘worse off’ would be practically impossible – it would require us to take into account not only copyright law, but also other laws including consumer protection and competition laws.⁵⁸ Furthermore, systems in different societies may rely on quite different principles and priorities: some societies, for example, place a very high legal value on concepts of privacy and human dignity, which, while obviously important here, perhaps play a less central role in the shape of the law.⁵⁹

Note also that I am arguing here that Australian *consumers* should end up no worse off than *consumers* elsewhere. My focus is not on whether *as a whole* the Australian copyright system is more generous, or less generous, to ‘user interests’ broadly conceived.⁶⁰ How generous, for example, the Australian systems of statutory licenses are is largely irrelevant to whether Australian *consumers* ought to have copying rights.⁶¹ It is cold comfort to consumers denied even the legal right to make a time-

⁵⁷ ARIA website, <http://www.aria.com.au/pages/faq.htm#Q4> (last visited 19 June 2005). In a public statement in July 2003, ARIA did ‘acknowledge[] and confirm[] the extent and effect of private copying’ – but notably did *not* go so far as to call such copying ‘great’: ARIA, ‘The Blank Media Levy: Not In the Interests of Artists or Record Companies’ (July 2003), available at <http://www.aria.com.au> (visited 20 June 2005).

⁵⁸ Neil Netanel, ‘Asserting Copyright’s Democratic Principles in the Global Arena’ (1998) 51 *Vanderbilt Law Review* 217, 274

⁵⁹ For example Germany, which has a constitutional system which places a very high value on individual dignity, autonomy, and privacy: Katerina Gaita and Andrew Christie, ‘Principle or Compromise? Understanding the original thinking behind statutory license and levy schemes for private copying’, IPRIA Working Paper No. 04/04, available at <http://www.ipria.org/publications/workingpapers/Occasional%20paper%202.04.pdf> (last visited 19 June 2005).

⁶⁰ By ‘user interests’ I am referring to the whole set of different users – from individual consumers, to students and researchers, and public institutions such as archives, museums, and libraries.

⁶¹ One of the arguments sometimes made is that *overall* the Australian system of exceptions for user groups *as a whole* is more generous than the US ‘fair use’ defence: see, for example Mr Michael Fraser (Copyright Agency Limited (CAL) (an Australian collecting society)), *Hansard*, Senate Select Committee, 4 May 2005, at 36 (‘[o]ur act is framed in respect of particular exceptions and I believe the Australian community has at least as good access under fair dealing and non-remunerative provisions and statutory licences as the American community does’).

shifting copy of a movie from free-to-air television to know that libraries are better protected here than in the United States.

3.7 *Premise 7: Consumers should not pay twice for a copy*

A final premise follows from Premise 6: consumers should *not* have to pay twice for copies of copyright material. Of course, this also accords with simple common sense. If consumers pay a levy in return for the ability to make private copies, they should not be either paying copyright owners again for that ability through licenses on individual works, or prevented from making such copies. If technological measures are applied to copyright works which prevent reproduction, then consumers should not be paying for the right to make copies. This principle is recognised in the European Union, where the Information Society directive attempted to reconcile these issues by prescribing that the ‘application or non-application of technological measures’ must be taken into account in calculating the amount of ‘fair compensation’ for acts of private copying.⁶² By providing that Member States must take ‘account of the application or non-application of technological measures,’ the Directive implies that compensation would be unjustified in cases where private copying has been made technically impossible.⁶³

4 Using the premises to assess solutions

In Part 3 of this paper I set up seven premises which can be used in order to assess any solution offered for the private copying problem described in Part 2. In this last part of the paper, I use those premises to offer thoughts on the three matters that confront the government in seeking to broker a solution. Those three matters are:

1. The form of the solution;
2. The scope of solution, and the trade-offs involved; and
3. Other conditions which should be considered in reaching any solution.

4.1 *The form of the solution*

The first matter which the Australian government has to consider is the *kind* of solution we might adopt: whether it should be a free exception –and if so, whether it should be general or specific - or a statutory license (for example, a levy on recording media in return for a broader right to make private copies).

As noted above, one solution is to do nothing, and wait for matters to ‘work themselves out’.⁶⁴ I will not consider this option further. Not only are the parameters of such a ‘solution’ well known (ie, the law continues to be an ass), but it also does not seem likely given the concern on the part of Australians’ elected representatives about their (and their kids’) ‘serial infringer’ status.⁶⁵ It will therefore, for the moment,

⁶² See Information Society Directive, above n6, Recital 35.

⁶³ Hugenholtz et al, above n 3 at 37.

⁶⁴ See above Part 3.1, page 8.

⁶⁵ Above n28 and accompanying text.

be set to one side, as we consider the solutions that would require reform of Australia's copyright law.

4.1.1 *Remunerated or Unremunerated?*

The first issue that needs to be determined is whether any solution adopted for the private copying problem should be remunerated or unremunerated. A remunerated solution would involve some form of statutory license, and involves divorcing the copyright owners' right to *control* uses of copyright material from the right to receive *remuneration* for such uses.⁶⁶

Free exceptions to copyright are not just 'defences', but define the boundaries of the copyright owners' rights which, as noted above, are limited.⁶⁷ They arise where some other interest outweighs the copyright owners' interests, for example, on public policy grounds.⁶⁸ Statutory licenses (also known as 'compulsory licenses') tend to be used where an act falls within that set of uses which might be termed 'normal exploitation' which copyright owners have a right to control, but the costs of managing and enforcing such rights would be prohibitive. So, for example, the statutory license under Part VA of the *Copyright Act* recognises that if universities and schools had to negotiate with copyright owners for the right to make copies of material for use in instruction, the costs of such negotiations could be overwhelming and might lead to inefficiently low use of materials in teaching. The license, as Ricketson and Creswell observe, 'represents an attempt to approximate what would otherwise be freely negotiated by the rights owner ... and the user'.⁶⁹

Should private copying be free or remunerated? This is not an area where we are talking about 'transformative' use, or the creation of new material. It is, nevertheless, an area which impacts on public access to copyright material. To a significant extent, the issue of 'remunerated or unremunerated' depends on what kinds of private copying we are talking about, if we take as a starting point that Australian consumers should not be worse off than other consumers. If the exception is limited to certain, very specific uses, this would tend to support a free exception. If broader copying rights are proposed, only a statutory levy is a viable option. These trade-offs are considered in Part 4.2 below.

⁶⁶ Or, in terms frequently used in US academic writings, it involves substituting *liability rules* for *property rules*: see Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One view of the Cathedral' (1972) 85 *Harv. L. Rev.* 1089.

⁶⁷ See CLRC, *Copyright and Contract Report* (2002), [3.05]-[3.06] (noting that some of the exceptions, such as those for fair dealing, are fundamental to defining the boundaries of copyright owners' exclusive rights, and quoting Spoor for the view that 'Far from being just a minor appendix to the copyright rule, let alone a mere blot on the copyright landscape, exceptions ... are an indispensable complement to the exclusive right.')

⁶⁸ Ricketson & Creswell, above n21 at [11.10].

⁶⁹ *Ibid.* See also Hugh Laddie, Peter Prescott, Mary Vitoria, Adrian Speck and Lindsay Lane, *Laddie Prescott & Vitoria's The Modern Law of Copyright and Designs* (3rd ed 2000) at [25.1].

4.1.2 *If unremunerated: 'general' or 'specific'?*

If a free exception is to be adopted, the question is whether it should be specific or general – in other words, should we have an open-ended fair use exception, or a specific fair dealing exception.

On this issue, the premises set out in Part 3 assist us little. Either reflects standards applied elsewhere, and would be consistent with the maintenance of a copyright system, and would be at least arguably consistent with international obligations.⁷⁰

Two matters are, however, worthy of comment:

- Would fair use allow much private copying?
- Could we draft a specific, fair dealing defence?

Would a fair use defence 'work'?

Regarding the first of these issues, there is something slightly disingenuous about the highly agnostic discussion of whether a fair use defence would cover private copying in the *Issues Paper*. The *Issues Paper* seems to ignore the influence that the government itself, and legislative history would have on a court's assessment of the defence.

Some commentators assume that time-shifting and format-shifting *would* be allowed by a fair use defence.⁷¹ Others take the directly opposite view.⁷² The view that time-shifting/format-shifting *would* be covered by a fair use defence is based on certain decisions of US courts. The first and most important is a holding by the US Supreme Court, in the *Betamax* case⁷³ that when a person tapes a television program, or movie, to watch later on (ie, 'time-shifting'), that is a fair use. The second important case was a holding of the 9th Circuit Court of Appeals in the *Recording Industry Association of America v Diamond Multimedia Systems Inc*⁷⁴ that some 'format-shifting' is fair use. That case concerned the "Rio" - a portable MP3 player, which came with software that enabled users to download MP3 files from their computer onto the device. The record industry sued, arguing that the Rio was a digital audio recording device, and hence under the *Audio Home Recording Act*⁷⁵ was required to institute 'SCMS' - a

⁷⁰ See *contra* S. Ricketson, *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, WIPO Document SCCR/9/7 (5 April 2003), available at http://www.wipo.int/documents/en/meetings/2003/sccr/pdf/sccr_9_7.pdf (last visited 20 June 2005). Associate Professor Robert Burrell has argued that fair use, if not contrary to the letter of the Berne 3 step test, is contrary to the spirit (public presentation, 15th June 2005). In my view, there is no reason why fair use should not be consistent with international obligations so long as the conditions of the three step test are reflected in the drafting of the considerations courts use in determining whether use is fair or not. A full consideration of this issue is, however, beyond the scope of the paper. In any event, from a realist perspective, there is no way that any international body will ever hold fair use contrary to the three step test, given the existence of the defence in the US.

⁷¹ See, for example, the Australian Libraries Copyright Committee/Australian Digital Alliance Joint Statement on Fair Dealing after the FTA, available at <http://www.digital.org.au/submission/FairDealingProposal.rtf> (last visited 19 June 2005)

⁷² The Australian Copyright Council, for example, has suggested that a fair use defence (as proposed by the CLRC) would not cover private copying.

⁷³ *Sony Corp v Universal City Studios* 464 US 417 (1984)

⁷⁴ 180 F.3d 1072 (9th Cir. 1999)

⁷⁵ Above n36

Serial Copyright Management System that allows first, but not second generation copying.⁷⁶ Most relevant for our purposes were certain obiter comments made by the Court in the case. These comments, however, were equivocal on whether format-shifting was actually fair use:

‘The Rio merely makes copies in order to render portable, or ‘space-shift,’ those files that already reside on a user’s hard drive. *Cf Sony Corp of America v Universal City Studios* ... (holding that ‘time-shifting’ of copyrighted television shows with VCR’s constitutes fair use under the *Copyright Act*, and thus is not an infringement.) Such copying is paradigmatic noncommercial personal use entirely consistent with the purposes of the Act.⁷⁷

The reality in my view is that the current state of the US law is not clear: as is inevitably the case where legislation is drafted in terms of standards rather than clear rules. Both cases are arguably highly fact-specific,⁷⁸ time-dependent (ie, time-shifting looked more harmless in 1984) and dependent on the particular laws (the existence of the *Audio Home Recording Act* of 1992 in the US bolstered an argument that format-shifting was acceptable).

In any event, the real issue is how *Australian* courts would interpret fair use, and to this issue, such debates are only tangentially relevant. A law transplanted from one country to another may take quite a different form in its new host than it took in the original ‘donor’.⁷⁹ As other commentators have explored at more length, one question is whether Australian courts are likely to be generous in their interpretation.⁸⁰ Historically they have not been. Australian courts have been more willing to read copyright owners’ exclusive *rights* broadly than the exceptions, although even there, the position is somewhat inconsistent.⁸¹

⁷⁶ 17 U.S.C. §1002.

⁷⁷ *Recording Industry Association of America v Diamond Multimedia Systems Inc* 180 F.3d 1072, 1079 (9th Cir. 1999)

⁷⁸ For a useful exploration of the fact specific nature of the *Betamax* case, see S. J. Liebowitz, ‘The Economics of Betamax: Unauthorized Copying of Advertising Based Television Broadcasts’ (June 1985). <http://ssrn.com/abstract=342741>. Thanks to David Lindsay for this reference.

⁷⁹ Neil Netanel, ‘Asserting Copyright’s Democratic Principles in the Global Arena’ (1998) 51 *Vanderbilt Law Review* 217, 274

⁸⁰ Robert Burrell and Alison Coleman have made this case in relation to the courts of the United Kingdom: see Burrell & Coleman, *Copyright Exceptions: The Digital Impact* (Cambridge UP 2005), especially chapter 9 (and especially pp263-264, 269). In the absence of an extensive jurisprudence on fair dealing and copyright generally in Australia, many of the authorities of the Australian courts are shared with the UK, meaning that the Burrell & Coleman arguments apply with similar force here.

⁸¹ In some cases, courts have taken an explicitly beneficial approach to interpreting copyright owners’ rights, so far as the text of the legislation allowed: see, for example *Galaxy Electronics Pty Ltd & Gottlieb Enterprises Pty Ltd v Sega Enterprises Ltd* (1997) 75 FCR 8, or *Telstra Corp Ltd v Australasian Performing Right Association Ltd* (1997) 191 CLR 140. On the other hand, the interpretation of broadcast copyright in *The Panel* case (*Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* (2004) 205 ALR 1) could scarcely be called ‘generous’ to copyright owners. Regarding *exceptions*, as Handler and Rolph have pointed out, the approach of the Federal Court in *The Panel* case was scarcely ‘generous’, relying, as Australian courts have frequently done, on narrow dictionary meanings of ‘review’, ‘criticism’ and news reporting: see Michael Handler and David Rolph, “‘A real pea souper’: *The Panel* Case and the development of the fair dealing defences to copyright infringement in Australia’ (2003) 27 *M.U.L.R.* 381

One factor bearing on attitude of the Australian judiciary would be the legislative history that accompanied any change to a fair use defence. On this score, the legislative history thus far is hardly encouraging: several years ago, the CLRC expressed doubt that a fair use defence would cover much by way of personal copying,⁸² and the Issues Paper, while taking an agnostic view, also expresses doubt.⁸³ Given habits of legislative deference by the courts, *if* the legislative history were to state, explicitly, that the government envisaged the defence would cover time-shifting and format-shifting, this would inevitably have an influence on the courts.⁸⁴ If, on the other hand, the legislative history is agnostic, despite claims by various user groups that it would, the courts may well take the view that the government did *not* believe much private copying was allowed.

On the other hand, this doubt may not do Australian courts sufficient credit. Australian judges are aware of the need in copyright law to take account of user interests,⁸⁵ and a shift away from specific fair dealing defences to a general fair use defence may well be taken by courts to justify a different approach – particularly if the reform came with a supportive legislative history.

Could we even *draft* a fair dealing defence?

A second, pressing question is whether it is even possible to draft a proper fair dealing defence for time and/or format-shifting.⁸⁶ This issue is more difficult than might first appear. Consider, for example, how a time-shifting exception might be drafted. At a public seminar in Sydney on 15 June 2005, one industry representative suggested that a limited time-shifting exception might be appropriate, which would allow consumers to tape material from a broadcast, and watch it at a more convenient time – once.⁸⁷ As another person responded – what if there are two people in the household?

⁸² CLRC *Simplification Report Part 1*, above n50, at 143 [8.55]

⁸³ 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 Age* (May 2005). See especially [11.7] (time-shifting); [11.15] (format-shifting), [11.19] (back-up copying), and in particular, [14.5] (noting that 'Prior to interpretation by the courts, there is no way to know if acts such as time-shifting or format-shifting would be lawful').

⁸⁴ Compare, for example, the influence of the Explanatory Memorandum to the Copyright Amendment Bill 1984 (Cth), which refers to the definition of 'material form' as including random access memory. This comment has been relied on by the courts: see *Microsoft Corp v Business Boost Pty Ltd* (2000) 49 IPR 573; see also *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31. Of course, in this case the question was the coverage of a definition, rather than the scope of an open-ended defence, which may lead to different considerations and a different degree of influence.

⁸⁵ See, for example, extra-judicial comments of Justice Sackville: R. Sackville, 'Monopoly versus freedom of ideas: The expansion of intellectual property' (2005) 16 *AIPJ* 65. See also the comments, made during the hearing of *The Panel* case, that the real issues seemed to be fair dealing ones (Kirby J): *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd & Ors* [2003] HCATrans 338 (5 September 2003). And while the position taken on fair dealing in *The Panel* decision was arguably narrow, this was in part a result of the *parties* in the case, who were two commercial parties using for commercial purposes: see, in particular, the comments of Finkelstein J in *The Panel (No.2)*, above n43.

⁸⁶ Another option would be to draft a fair dealing defence for 'private copying'. If this were to be a fair dealing style defence – ie free – it may be that it would not pass a three-step test: Laddie et al, above n69 at [6.6], p351. I will therefore focus my attention on more specific possible defences.

⁸⁷ It may be worth noting that this is the definition of time-shifting that was adopted by the US Supreme Court in the *Betamax* decision: above n73 at 423.

Taken to such extremes, the concerns start to look ridiculous. But the issues not straightforward, particularly in light of the recent Australian legislative tendency to take extreme care with, and insert significant detail into, legislative provisions and definitions in the *Copyright Act*.⁸⁸ Is it 'time-shifting' if a recording is kept for 2 years without being viewed, or has that crossed the line to 'librarying'?⁸⁹ Does 'time-shifting' include transfer to another device if that is the consumer's preferred method for watching at their leisure? Time-shifting also inevitably involves some degree of transfer to a second format (from broadcast signal to stored content) – but is *another* shift to be included? Would a time-shift exception require consumers to destroy a copy after a certain period of time?

One possibility would be to mimic the UK legislation, which allows '[t]he making for private and domestic use of a recording of a broadcast ... solely for the purpose of enabling it to be viewed or listened to at a more convenient time'.⁹⁰ It seems unlikely that copyright owners would be satisfied with an exception drafted in such general terms however. Given the drafting of exceptions added in the recent past,⁹¹ it seems likely that copyright owners would argue that:

- The exception should require destruction of the copy after viewing/listening;⁹² and
- That exception does not apply where source of the recording is an infringing copy or infringing communication of the work.⁹³

The more such qualifications are introduced, the more technology specific, and less useful the exception becomes, and the less likely it is to address problems, such as the problems faced by third party technology providers referred to above.⁹⁴

The difficulties are possibly even *more* challenging in relation to format-shifting. Format-shifting is a significant issue in the current Australian review; the Attorney-General himself refers, in his Foreword to the *Issues Paper* to 'transferring music from a CD onto an MP3 or iPod player',⁹⁵ and in the context of consultations on the FTA government representatives stated a long-standing policy that consumers should

⁸⁸ The difficulties this has caused are evident in the case of *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (2003) 132 FCR 31, currently on appeal to the High Court of Australia (heard February 2005, judgment reserved), where lawyers are poring over the definition of 'technological protection measure' under s 10.

⁸⁹ I am indebted for this example to David Brennan. Different types of private copying are explored further below in Part 4.2.1, page 22

⁹⁰ *Copyright, Patents and Designs Act* 1988 (UK) s 70.

⁹¹ See, for example, the highly confined exception for transient or incidental copying as amended in November 2004: *Copyright Act* 1968 (Cth) s 43B.

⁹² On the basis that this was required to prevent 'librarying': see Laddie et al, above n69 at [20.89] (arguing that it is 'a rather surprising result' that it is possible, under the UK legislation, to build up a home library of recordings)

⁹³ This qualification has been inserted into the *Copyright Act* 1968 (Cth) s 43A (temporary copies made during communication); 43B (temporary reproductions in technical process of use); and the computer program exceptions (Pt III Div 4A). It is also being introduced as a limitation to the German private copying scheme according to news reports: see Rik Lambers, *Constitutional Code* Blog, 'German Copyright Reform Strengthens DRM', 18 January 2005, available at <http://constitutionalcode.blogspot.com/2005/01/german-copyright-reform-strengthens.html> (last visited 21 June 2005).

⁹⁴ See above nn 47-48 and accompanying text.

⁹⁵ *Issues Paper*, above n2, 2.

be allowed to do ‘legitimate things with legitimate copyright material’.⁹⁶ It is hard to imagine general satisfaction with an outcome from this review that did *not* somehow allow format-shifting. On the other hand, it is very difficult to imagine the government adopting a general free exception that allowed for unlimited shifting from one format to another: copyright owners would be likely to argue, with some justification, that this would significantly interfere with emerging markets for digital works and with price discrimination – the selling of copies at different prices that allow different kinds of use. Once again, the more limits that are imposed, the more technologically specific the provision becomes, and the less useful.

These considerations suggest that it will be necessary strongly to resist the attempt to make any exception here specific. In other words, these considerations all tend *in favour of fair use, rather than fair dealing specific defences* – and support a view that a more open-ended defence is needed by *business*, as much as it is by individual users. In order to avoid a long, drawn out battle over the specifics of the exception (and all the rent-seeking on all sides that that would involve), the government should state some principles to be applied to allowable time-shifting, and format-shifting. The principles used in the US fair use defence are at least a start here.⁹⁷

4.1.3 Private Copying Levy

The other option discussed in the Issues Paper is the option of a private copying levy – a statutory license that would impose a levy on digital media, and/or recording equipment, in return for protection from copyright infringement for the making of such copies.⁹⁸

The benefits and costs of levies, and the appropriate form of a levy, have been extensively dealt with elsewhere, in a very large literature, and it is not the role of this paper to explore all the arguments surrounding such schemes. The reality is that if a private copying levy system were to be favoured, a whole new set of consultations would be required on the details:

- What things would the levy be imposed on?⁹⁹

⁹⁶ Quoted in the Senate Select Committee *Final Report*, above n55 at 88-89.

⁹⁷ As David Lindsay has pointed out, the difficulty is a classic one in legal theory: should government choose *rules* (bright line tests) or *standards* (open-ended principles)? Rules are good where the content can be predicted in advance, and/or where behaviour occurs often. Standards are better where it is difficult to identify content, where technology is changing, or where the relevant behaviour occurs rarely. A moment’s thought reveals the problem. These considerations tend in different directions in the case of the fair use/fair dealing debate. The ‘behaviour’ we are talking about here happens often – all the time, suggesting that rules might be preferable. However, the technology is changing rapidly, suggesting standards are better – rules become less certain where technology is changing rapidly. It is possible that this suggests that some form of hybrid is necessary: an exception which is not completely open-ended, but which avoids any attempt to be technologically specific or ‘bright line’. In any event, the discussion above shows that efforts should be made to resist more and more specific rules. See generally Isaac Ehrlich and Richard Posner, ‘An Economic Analysis of Legal Rulemaking’ (1974) 3 *Jnl Legal Stud.* 257; see also Louis Kaplow, ‘Rules Versus Standards: An Economic Analysis’ (1992) 42 *Duke L. J.* 557. Thanks to David Lindsay for both these references.

⁹⁸ Australian Copyright Council, above n16

⁹⁹ This is a serious issue of debate elsewhere. See above n39-40 (disputes within Germany and the EU over this issue) and 37 (disputes in Canada over the coverage of the Canadian system).

- How would levies be calculated, and who would fix them?¹⁰⁰
- What do you do about increasingly multimedia devices and media?
- Who administers the payments? Who *receives* payments? Do you include writers of texts as well as creators of sound recordings/audio-visual works?
- How, exactly, do you take account of the increasing role of DRM? Do you deny levies to people who apply DRM? Reduce levies as DRM increases?¹⁰¹

The enormity of the task in setting up such a scheme in the current environment on a compulsory basis should not be underestimated. Undoubtedly, it would dwarf any past Copyright Tribunal hearings. When the Copyright Board of Canada first set out to set a tariff under the scheme introduced in 1998, it received over 3,000 written comments, ranging over a huge set of issues:

‘the evolution of sound recording technology, the various types of available recording equipment, their operation and the quality of results obtained in making copies of musical works; the origin of the private copying regime; the structure and revenues of the music industry; the impact of home taping on rights owners and on the recording industry; the structure, revenues and profits of the recording media industry; the marketing of audio recording media and audio recording hardware, including claims about the uses they can be put to; the pricing and availability of recordable media and recording hardware in stores, by mail, by phone order and over the Internet, in Canada and the United States; who purchases audio recording media; the various uses to which they are put; the probable impact of the levy on manufacturers, retailers and consumers; the impact of similar measures elsewhere; the public perceptions of the regime and reactions to its implementation; serial copy protection initiatives and technologies; the potential inefficiencies, distortions and grey market activity that may arise from the imposition of the levy, the organization of private copying collectives and the manner in which they went about securing their repertoire; the availability of music on the Internet; the impact of Canadian content rules on the use of music on radio.’¹⁰²

In short, a private levy system would be highly complex. It would involve very significant transaction costs. It would lead to ongoing rent-seeking on all sides – as has happened in Canada. The arguments in favour of such a levy would need to be strong, and whether they are present at this point in time is highly questionable – particularly in light of the trade-offs examined in the next part.

¹⁰⁰ This, too is difficult. In Canada the levy is proposed by the relevant Collecting Society and then determined by the Copyright Board. It is no light task, and dwarfs anything that has ever been done by our own Copyright Tribunal. As noted above, the first hearing by the Canadian Copyright Board received some 3,000 written comments and the system has generated at least two sets of legal proceedings; see above n37.

¹⁰¹ In Europe, it has been argued that the increasing use of DRM will lead to the phasing out of levies: see Hugenholtz et al, above n3; see also Lueder, above n41.

¹⁰² Copyright Board of Canada: *Decision of the Board: Private Copying 1999-2000*, December 17, 1999, at 8

4.2 *The scope of the solution and the trade-offs*

The second matter to be borne in mind in addressing the private copying problem is the scope of any relevant exceptions and the trade-offs involved.

4.2.1 *Different kinds of private copying*

One thing which I believe the Issues Paper does well, in relation to private copying, is clearly differentiate between several types of private copying. In Part 11 of the paper the Attorney-General's Department have set out, in quite clear terms, a series of different *kinds* of private copying: time-shifting, format-shifting, and back-up copying. These, however, are *not* the end of the reasons why people might engage in private copying. Some others which we know happen from various studies are:

- 'Librarying' – copying a movie or a song from a broadcast to keep and watch many times;¹⁰³
- Making mix tapes (DIY compilations) – copying songs from various CDs to make a compilation for particular purposes: for example, a collection of your favourite party hits;
- Making a copy of a friend's or family member's CD;
- Making a copy of a work that is no longer on the market.¹⁰⁴

The second weakness of the Issues Paper is that, when it comes to the options for reform, it fails to take full advantage of the distinctions it has drawn in considering the range of appropriate options. We need, at least in thinking about the kind of compromise solution that we should adopt, to be aware that different arguments apply to different kinds of private copying.

Consider all these uses as lying on a kind of spectrum, depending on their impact on the interests or markets of copyright owners, ranging from 'de minimis' types of uses, as recognised by various countries around the world, through to private copying which, although it occurs for non-commercial purposes, and in an arguably 'private' setting (ie, in the home), is not truly private but rather quasi-public (one example being file-sharing).

¹⁰³ See the figures quoted in the Australian Copyright Council Discussion Paper, above n16 at 1-2, noting that, in 1995, more than half the video tapes held contained programs for retention as opposed to time-shifting, and that less than 20% of households with VCR machines had tapes exclusively for time-shifting purposes.

¹⁰⁴ Arguably, the failure to include these kinds of copying is a hint that the government is thinking only in terms of a narrow, free exception – and not broader issues relating to private copying.

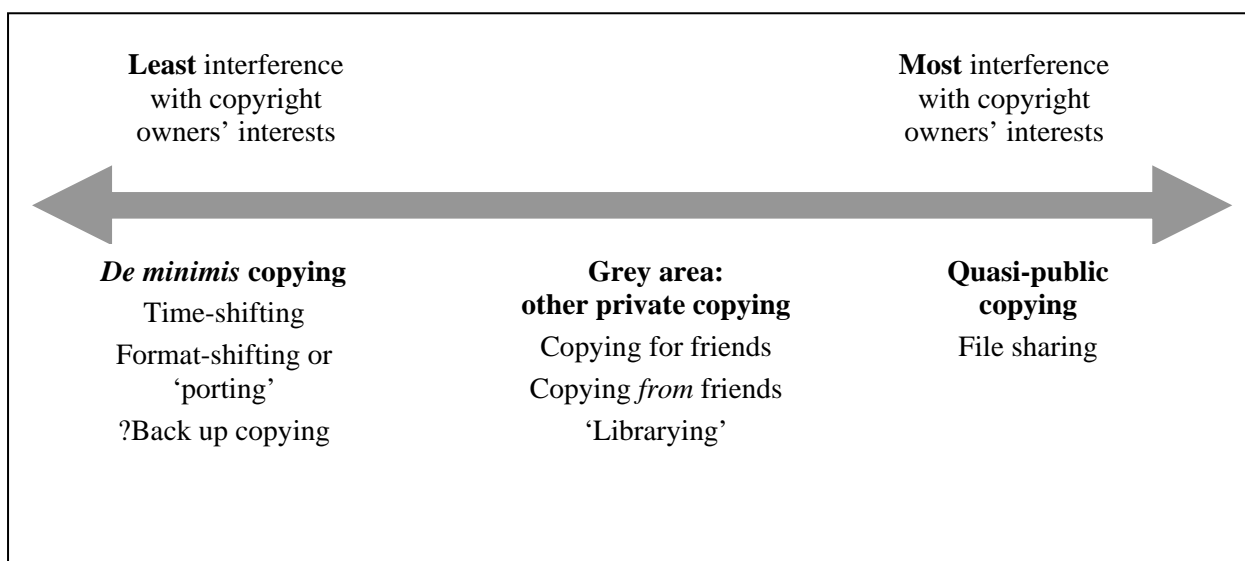


Figure 1: Spectrum of types of private copying

One obvious issue that we confront is how to classify uses as being 'de minimis' as opposed to 'grey area'. Clearly, this is an issue that we could argue about for a very long time; it is also something which is changing over time. On the diagram above I've put three kinds of private copying at the 'de minimis' end – noting that this is a starting point rather than a concluded view.¹⁰⁵

Time-shifting is there because many countries around the world have provided for a free exception for time-shifting of broadcast works. Countries providing for such an exception include the United Kingdom,¹⁰⁶ New Zealand,¹⁰⁷ and the United States (in the form of a fair use defence).¹⁰⁸ In the EU, the *Information Society Directive* allows Member States to introduce exceptions 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 which takes account of the application or non-application of technological measures ... to the work or subject-matter concerned'.¹⁰⁹

The Australian Copyright Council has suggested that 'it is not clear whether countries whose legislation includes a provision allowing private use of copyright material without payment will be entitled to retain those provisions' – an example would be the UK exception allowing time-shifting copying of broadcasts. However, even the fact that the UK has retained such an exception indicates a view that its exception is

¹⁰⁵ Another possible inclusion from Hugenholtz et al is 'material which is downloaded from the Internet for free with the consent of the copyright owner'. Arguably this is indeed de minimis, however, in my view it is better conceived of as not requiring an explicit exception: rather, it should be accepted that material placed online and able to be downloaded for free is subject to an implied license to make private copies; hence any copies made are not infringements.

¹⁰⁶ *Copyright, Designs and Patents Act 1988 (UK)* s 70

¹⁰⁷ Issues Paper, above n 2 at 26. It does not appear that Canada has any exception for time-shifting.

¹⁰⁸ *Betamax* case, above n 73

¹⁰⁹ *Information Society Directive*, above n 6 Article 5.2(b).

allowed. That position gains some support from Recital 35 of the Directive, which states in Recital 35 that '[i]n certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise'.¹¹⁰ In a recent report,¹¹¹ Bernt Hugenholtz has analysed in particular the last sentence of this Recital as meaning that 'fair compensation' is not required for actions such as time-shifting: taking his cue directly from statements by the European Commission.¹¹²

Format-shifting is less clear, but, I think, probably supportable. I have referred above to the question of whether format-shifting is fair use (an uncertain issue under US law). Two factors its justify inclusion at the 'de minimis' end. First, rightholders' own treatment. By not challenging the rise of the iPod in the absence of significant legitimate download services in Australia, rights holders appear to have chosen to ignore a very large amount of format-shifting. In the United States, the Record Industry Association in its Frequently Asked Questions encourages format-shifting.¹¹³ Second, other writers have treated format-shifting as de minimis: including, in particular Hugenholtz in his study of levies under EU law.¹¹⁴ Further, the government has, in the past, indicated its desire to enable uses of legitimate material. According to government representatives, people should be allowed to do 'legitimate things with legitimate copyright material.'¹¹⁵ On the other hand, it should be acknowledged that format-shifting is a less clear case, because of its potential to interfere with growing use of price discrimination – the differential pricing of copyright material depending on the usage rights granted.

Finally, I have included on the list the concept of **back up copies**. This, too, is a somewhat uncertain inclusion. Certainly, it is not the case that back up copies – beyond the particular case of computer software¹¹⁶ – are allowed everywhere. The question would be whether the right to make back up copies of *other* materials is also a de minimis kind of use.¹¹⁷ I've included it as a possible 'de minimis' use for two reasons. First – convergence. It is becoming harder to draw lines between computer programs and other kinds of works.¹¹⁸ Second, when the CLRC in 1995 reported on the protection of computer programs, one of the two reasons given to justify a right to make back-ups of computer programs was 'their medium of storage is such that they

¹¹⁰ Ibid Recital 35.

¹¹¹ P. Bernt Hugenholtz et al, above n 3

¹¹² The 'time-shifting' example comes from a statement by the European Commission on Recital 35, which suggested that time-shifting would qualify as *de minimis*. The concept of 'porting' is a suggestion by Hugenholtz et al: Hugenholtz et al at 36. Hugenholtz et al also suggest that making a CD compilation containing the 'best of my own record collection' might qualify: *ibid*.

¹¹³ See Record Industry Association of America, above n56

¹¹⁴ Hugenholtz et al, above n 3 at 36.

¹¹⁵ Toni Harmer, *Hansard*, 18 May 2004, FTA 95; Stephen Deady, *Hansard* 6 July 2004, FTA p.115

¹¹⁶ Exceptions for the making of back up copies of software are well-established around the world: see United States: 17 U.S.C. 117(a)(2) ('archival' copying); Canada: *Canadian Copyright Act* s 30.6(b); EU: *Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs*, O.J. L. 122 , 17/05/1991 P. 0042 – 0046, Article 5.2; *Australian Copyright Act 1968* (Cth) s 47C.

¹¹⁷ Certainly, many would argue that they are not. Jack Valenti, for example, from the Motion Picture Association of America, has vehemently denied that users have any 'right' to make back-up copies, arguing that they should simply buy new copies when there is a problem.

¹¹⁸ For example, when it comes to video games, the same item will comprehend a cinematograph film and a computer program: *Galaxy v Sega*, above n 81.

are easily corrupted or destroyed'.¹¹⁹ This is just as true of digitally stored copyright content of a non-computer program kind as it is of computer programs.

Sharing with friends I have placed in the middle, or grey area, as something which has less impact on the legitimate interests of copyright owners than file sharing, but more than simple time-shifting or format-shifting. It is worth noting, however, that recent indications are that this is becoming more important – and that copyright owners are becoming more concerned about this kind of ‘sharing’. News reports in June 2005 indicate that the music industry are now dubbing such practices ‘casual piracy’, and taking measures to curb such copying.¹²⁰

4.2.2 *The trade-offs involved in any compromise*

Now consider what, of these acts, the various proffered ‘solutions’ to the private copying problem would allow. The basic trade off is recognised by the Issues Paper:

‘For consumers, the question may be whether it is preferable to have an unqualified free exception or to pay a fee under a statutory license. Many consumers may think it would be fair to time-shift a television broadcast or to format-shift their own CD for free. Other consumers may consider paying a levy would be fair in return for a broader right of private copying, eg one that permitted copying of a CD borrowed from a friend.’¹²¹

In other words:

- If we have a free exception, consistently with our international obligations we can only cover certain, limited kinds of personal copying – those which I have characterised as ‘de minimis’¹²²
- If we have a private copying levy – Australians pay more, but in theory, the *quid pro quo* is a broader range of copying rights.¹²³

Certain kinds of copying are not, at least in the current debate, likely to be covered by *any* kind of levy. As things stand, levies for file-sharing to be seriously on the government’s table at this time.¹²⁴ There is an extensive, and growing literature that

¹¹⁹ Copyright Law Review Committee, *Report on Computer Software Protection* (1995) [10.15] – [10.16]

¹²⁰ ‘Music industry eyes “casual piracy”’, *SiliconValley.com*, 15 June 2005, available at <http://www.siliconvalley.com/mld/siliconvalley/11898486.htm> (last visited 19 June 2005) (reporting that the music industry considers this practice one which ‘surpasses Internet file-sharing as the single largest source of unauthorized music distribution.’ Figures from available surveys indicate that such sharing is very important: in Europe, a recent survey found 73% of users had shared digital music files with friends or family in the last 6 months (see Dufft et al, above n 14 at 16); in the US, some 19% of current music/video downloaders (about 7 million people) had downloaded files from someone else’s iPod or MP3 player: Pew Internet and American Life Project, above n 13.

¹²¹ Issues Paper, above n 2 at 30.

¹²² See Laddie et al, above n 69 at [6.6], p351

¹²³ This is consistent with obligations under international law: it is *highly* unlikely that a free exception for *all* private copying would comply with the Berne Three Step Test embodied in Article 13 of TRIPs and the AUSFTA.

¹²⁴ This is consistent with the approach in other countries. Canada is, to my knowledge, the only country in which the levy has been held to cover copies downloaded from file-sharing networks

points out that where copying implicates copyright owners' remuneration, but enforcement would be difficult, impossible, or unduly interfere with users' interests, a levy system, rather than copyright owners' control, may be preferable. I will, however, leave this issue to one side for the moment – focusing, as I am here, on the current review and current political debate.¹²⁵ What I am interested in here is the trade-offs we make when choosing between limited free exceptions, and a more extensive private copying levy system.

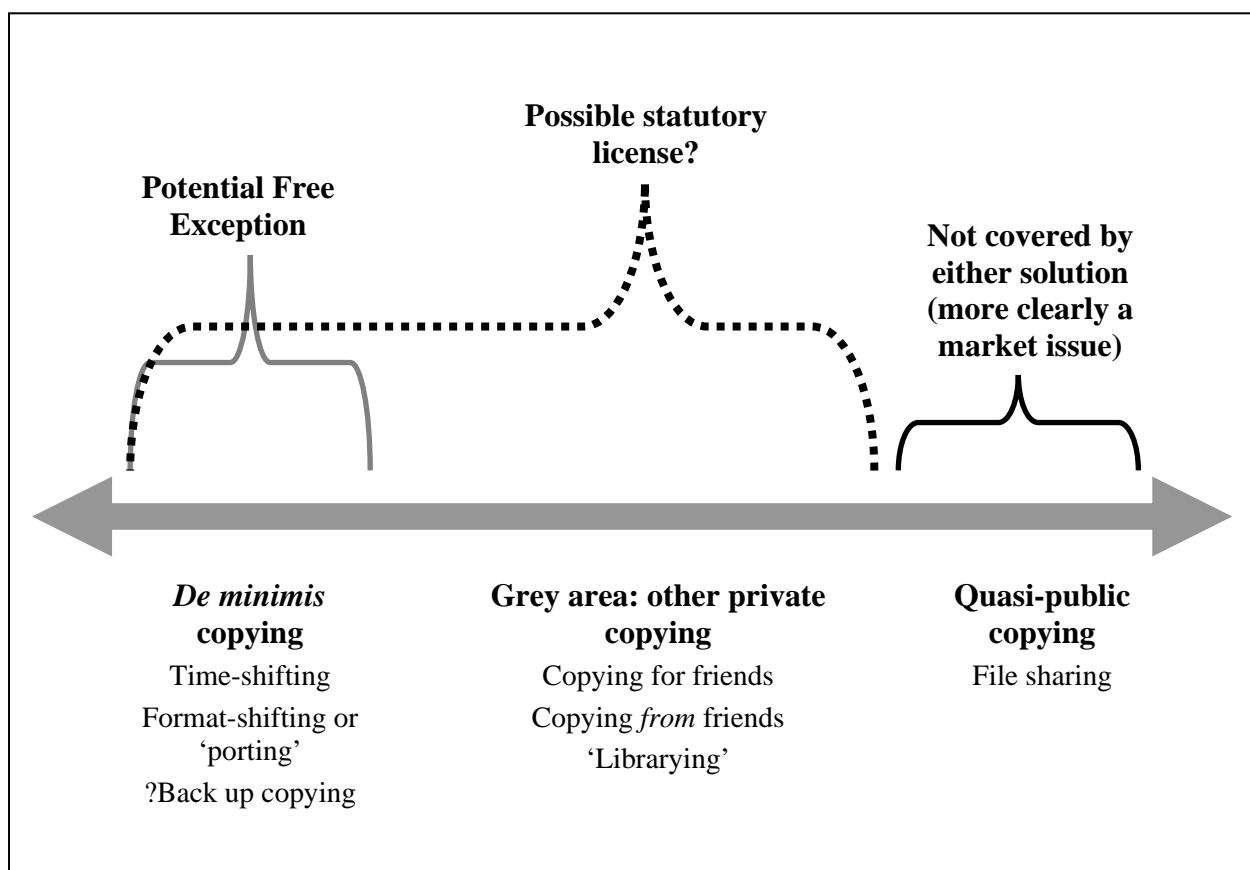


Figure 2: Relating solutions to the spectrum of 'private copying'

What are the trade-offs in adopting one or other of these solutions? Here we can gain some assistance from the premises set out in Part 3:

1. Premise 6: A principle that Australian consumers should be no worse off under a reformed system than they are in other countries; and
2. Premise 7: A principle that consumers should not pay twice for their private copies.

If we apply the idea that Australian consumers should not be worse off than consumers in other countries (remembering that I use this idea as a starting point for

(although even there, the levy does not make *uploading* legal). In Germany, reforms proposed in January 2005 to the levy would change the law so that legal private copying is not allowed from an obviously illegal offer on the Internet: see Lambers, above n 93.

¹²⁵ See generally the writings of Fisher, Eckersley and Netanel, all above n 3.

assessing the options rather than a final conclusion), then certain uses should be free: in particular, time-shifting should remain a free use, and possibly other uses such as format-shifting. In other words, by applying that premise, we end up with a *starting point* that certain, limited uses should be free – as a kind of *minimum* reform in the current process.¹²⁶

The question then becomes: are there real advantages to be gained from moving from this *free* baseline, to a *levied*, more generous system. This is where the principle of double payment rears its head, and, in particular, the impact of technical measures. It seems likely that, over time, the use of technical measures will only increase in relation to the kinds of works that we might conceivably see as being covered by a private copying levy. It also seems likely that such technical measures are likely to seek to control the *very kinds of copying that fall in this 'grey area'* – the kinds where advantages arise for consumers from the introduction of a levy. There is evidence that this is already occurring, with the employment of DRM that ties copies to particular devices. In other words, as Hugenholtz et al have concluded:

‘... most copies that end users of copyrighted works produce in practice, either on digital media or digital equipment, are likely either not to cause more than minimal harm to the right holders [and so, on the ‘no worse off’ principle’, as a baseline should be free], or to fall outside the scope of Art 5.2(b) of the Directive altogether [eg, file-sharing]. Seen in this light, legislatures and courts in Member States should think twice before ‘automatically’ expanding existing analogue levies to digital media or equipment.’¹²⁷

4.3 *Other conditions*

One final matter ought to be the subject of a brief – very brief – comment here. And that is – are there *other* principles which a government, thinking about reform in this area, ought to consider? One of the premises which I started out with was that the government, in this space, must think of the interests of individuals in society.¹²⁸ In my view there is one issue which does need to be considered here, and that is the issue of privacy.

It is well known, of course, that in the digital context, opportunities for the invasion of individuals’ privacy are increasing.¹²⁹ More information about individual activities can be collected, more of our individual interactions leave electronic trails.

That privacy is an important value in Australian society cannot be doubted. Furthermore, in the past, the Australian government has expressed a policy preference that copyright *not* interfere into the private or domestic sphere. In fact, you cannot very well *avoid* that message, if you read the *Explanatory Memorandum* to the *US FTA Implementation Act*. The following express statement occurs no less than 14

¹²⁶ Subject of course to premise 1: that the world will *not* end if we do not deal with these issues.

¹²⁷ Hugenholtz et al, above n3 at iii.

¹²⁸ See above, Premise 4, Part 3.4.

¹²⁹ See eg Michael Kirby, ‘Privacy in Cyberspace’ (1988) 21 *UNSWLJ* 323 at 325.

times in the course of that document: ‘the Government’s policy [is] that the copyright law should not unduly intrude into the private sphere.’¹³⁰

On the other hand, it is also undoubtedly true that efforts to enforce copyright can interfere with privacy significantly.¹³¹ Digital Rights Management (DRM) systems, and efforts to ‘meter’ copyright usage may involve the collection, and processing, of large amounts of personal information.¹³²

Private copying levies were originally introduced into Germany in part because of the need to protect privacy in the home.¹³³ Whether Australia chooses a levy scheme, or leaves matters to the market, privacy should be a relevant consideration in making that choice.

At present, our law is ill-equipped to protect individual privacy in this context. Many of the legal protections for privacy which do exist can be overcome with consent, which can be readily obtained through standard form contracts.¹³⁴ Further, information can be disclosed under Australian law when the holder ‘has reason to suspect that unlawful activity has been, is being or may be engaged in’.¹³⁵ Individual privacy is not an answer to demands by copyright owners for information about infringements. There is nothing in Australian law, at present, which would clearly require copyright owners, in adopting systems for dealing with personal copying, to adopt the least privacy-intrusive means of managing their copyright rights.

I am not arguing that Australia needs to re-write its privacy law here. What I am suggesting is that in considering the ‘terms’ of any compromise solution, in this space the Australian government should take privacy interests into account. Unfortunately, like freedom of expression, privacy issues are little considered in the *Issues Paper*.

5 Conclusions

This paper has offered two things. Part 3 offered a set of premises for considering any proposed solution to the private copying ‘problem’. Part 4 offered comments on a few of the key issues which face the government in the current copyright exceptions review.

¹³⁰ *Explanatory Memorandum to the US Free Trade Implementation Act 2004* (Cth): at paras.591, 595, 597, 599, 601, 603, 605, 607, 642, 646, 648, 650, 652, 654

¹³¹ If proof is needed, see Nic Suzor, ‘Privacy v Intellectual Property litigation: preliminary third party discovery on the Internet’ (2004) 25 *Australian Bar Review* 227 (tracing the various ways in which individual privacy has been eroded in copyright litigation).

¹³² See generally Suzor, *ibid*, and Lee Bygrave, ‘The Technologisation of Copyright: Implications for Privacy and Related Interests’ [2002] 24 *EIPR* 51.

¹³³ See Gaita and Christie, above n59

¹³⁴ See Suzor, above n131, 232. For example, terms can be inserted into Terms of Service agreements (ToS) or End User License Agreements (EULAs), which many users never read.

¹³⁵ See generally Suzor, above n131, 233 (arguing that since disclosure is allowed to ‘relevant persons or authorities’, this might include the copyright owner – in other words, where a copyright owner alleges a breach of copyright, an intermediary may be justified in disclosing any information it has relating to the claim: *ibid*).

Two final points are apposite. First, there is clearly much thinking that remains to be done. The *Issues Paper*, while doing some things well, has significant weaknesses. It does not mention fundamental consumer interests such as privacy or freedom of expression. Nor does it mention the key *economic* issues that one would expect to see explored – such as whether price discrimination is to be encouraged or discouraged. In part, such weaknesses arise from the mismatch, in this review, between the proffered problem (private copying) and the proffered solution (fair use). By focusing on these narrow, mismatched questions, the Issues Paper fails to acknowledge the full scope and complexity of the questions raised. What needs to be considered is the overall scheme of exceptions. This brings me to the second point: as noted above, the issues to do with copyright exceptions are much, much broader than is currently recognised in the review. It is to be hoped that other, equally fundamental issues – such as the scope of the fair dealing defence, and the relationship between exceptions and anti-circumvention law, are also addressed.