

Copyright Amendment Bill 2006: the new copyright exceptions

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Schedule 6:

- ‘time-shifting’ broadcasts s 111
- ‘format-shifting’ for private use, inc print, photographs, sound recordings and films
- Flexible dealing provision, s 200AB: uses not covered by other sections, libraries and archives, educational institutions, person with a disability, parody or satire, subject to three step test.
- Fair dealing for research or study, s 40
- Copying of material by libraries and archives

Options for reform (EM):

- Add specific new exceptions;
- Add a flexible extended dealing exception;
- Add specific private copying exceptions and a flexible dealing exception;
- Introduce a statutory licence for private copying;
- No change to Act and wait for market based solution.

Background:

- Digital Agenda Reforms (2000)
- Report of the CLRC: *Copyright and Contract* (2002)
- US-Australia Free Trade Agreement (2004)
- *Kazaa* case (2005)
- *The Panel* case (2005)
- *Sony v Stevens* case (2005)
- TPM review (2006)
- Digital Agenda review (2005)
- Fair Use inquiry (2005)
- Government response to Digital Agenda review (2006)
- Government response to the TPM Review (2006)

Time shifting

- Problems?
- Everyone does it!
- Allowed in US as fair use under *Sony* doctrine (although this in doubt since *Grokster*)
- Current s 111 too narrow
- Evidence of strong market in sales of DVDs of tv shows

Current s 111

- Making of a film or sound recording of a broadcast for private and domestic use
- Did not extend to underlying work

Proposed s 111

- Person makes a cinematograph film or sound recording of a broadcast
- In domestic premises
- Solely for private and domestic use by watching or listening to the material
- at a time more convenient than the time when the broadcast is made

Proposed s111

- Making of the film or recording does not infringe copyright in the broadcast or any work or subject matter included in the broadcast
- May loan the article or thing to a member of the lender's family or household for private and domestic use

Format shifting

- Owner of a book, newspaper or periodical publication makes a reproduction ('the main copy') from it of a work contained in that publication
- For private or domestic use
- Instead of the work
- In a different form
- Disregard temporary copy

Format shifting: printed materials

- If main copy is sold, let for hire etc will be held to be infringement
- Excludes loan of main copy to a member of the lender's family or household for private or domestic use
- Disposal of item will make main copy infringing (does not deal with destruction)
- Temporary reproduction to be destroyed at first practicable time during or after making of main copy

photographs

- Owner of photograph
- Private and domestic use
- Instead of the original photograph

Sound recordings

- Private and domestic use
- Instead of
- Not podcasts/ infringing copy
- Format in which sounds are embodied in the main copy differs from the format in which sounds are embodied in the record
- No other copy in a format substantially identical to the format in which they are embodied in the main copy

Sound recordings

- Making of main copy not an infringement of copyright in sound recording or underlying work or other subject matter
- Commercial dealing will render copy infringing
- Loan to family/ household for private/ domestic use allowed

Sound recordings

- The problem with iTunes: Govt aware of this and intend to fix it
- 'Temporary' copy?
- Copy saved in iTunes necessary

Cinematograph films

- Owner of videotape
- Makes an electronic copy of analog form
- For private and domestic use
- Instead of the videotape
- Not infringement of copyright in cinematograph film or work or other subject-matter included in the film

Flexible dealing exceptions:

- New section 200AB
- 4 conditions:
 - Circumstances of use amount to a special case
 - Use is covered by sub-section (2), (3), (4) or (5)
 - Use does not conflict with a normal exploitation of the work or other subject-matter
 - Use does not unreasonably prejudice the legitimate interests of the owner of the copyright owner/ licensee
- Does not apply if another exception provision applies to that use

Permitted uses:

- Use by or on behalf of a body administering a library or archives
- For purpose of maintaining or operating library or archives
- Not made partly for the purpose of the body obtaining a commercial advantage

Permitted uses:

- Use by or on behalf of a body administering an educational institution
- For the purpose of giving educational instruction
- Not made partly for the purpose of the body obtaining a commercial advantage

Permitted uses:

- Use by or for a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form
- For the purposes of obtaining a reproduction or copy in another form/ with a feature that reduces the difficulty
- Not made partly for purposes of obtaining a commercial advantage

Permitted purposes:



- parody or satire

US cases:

- *Campbell v Acuff-Rose* (US SC 1994)
- *Dr Seuss Enterprises v Penguin Books* (9th Cir 1996)
- *Leibovitz v Paramount Pictures* (2nd Cir 1998)
- *Columbia Pictures v Miramax* (1998 DC Cal)
- *Sun Trust Bank v Houghton Mifflin* (11th Cir 2001)
- *Mastercard v Nader 2000* (2004 DC NY)
- *Kane v Comedy Partners* (2003 DC NY)

Three step test

- Berne Convention Art 9(2) (expressed to protect rights of the author)
 - Introduced in 1967
 - Compromise to include existing limitations in national law and restrict development of further exceptions
- ‘It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’

Three step test

- WCT Art 10
- Agreed Statement to Art 10:
- ‘It is understood that the provisions of Article 10 permit contracting parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.’

Three step test

- TRIPS Art 13 (specifically incorporated in CA)
- nb. moral rights excluded
- Members shall confine limitations or exceptions to exclusive rights 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.

Martin Senftleben 'Copyright Limitations and the Three Step Test' 2004

- 'Is it capable at all of fulfilling the extensive tasks which have explicitly been assigned to its catalogue of abstract criteria? Or is it only a fig leaf for the helplessness of international policy makers?'

WTO Panel decision

- ‘certain special cases’ limitation or exception should be clearly defined and narrow in scope and reach, no need for special public policy
- ‘not conflict with a normal exploitation of the work’ uses enter into economic competition with normal extraction of economic value
- ‘Not unreasonably prejudice the legitimate interest of the right holder’ causes an unreasonable loss of income

Adoption of the three step test

- EU Art 5(5) Information Society Directive
- Italy
- Greece
- Applied by domestic courts eg Germany

The way ahead?

- Use as a tool to balance rights of owners and users
- Avoid overemphasis on economic rights
eg parody, Ginsburg
- Senftleben: apply test in similar manner to fair use?
- Gowers Review UK

Next steps:

- Bill referred to Senate Legal and Constitutional Affairs Committee for report by 10 November 2006

Changes to s 40

- Fair dealing for the purposes of research and study
- Copy of an article from a periodical is a fair dealing
- Does not apply if another article reproduced for different research/study
- Deeming effect of s 10(2) and 10(2A)

EM:

- New s 40(5) makes the definition of reasonable portion in ss 10(2) and (2A) *exhaustive* for the types of works it covers for the purposes of s40.

Official copying of library and archive material

- S 49(5) and s 50(8) deeming effect of reasonable portion
- S 49(9) and s 50(10) new def of 'library'
- S 51A changes to declaration required for copying
- New copying significant works (s 51B) recordings and films (s110BA) and published editions (s112AA) in key cultural institutions' collections (body administering collection under statute)