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30 October, 2006

The Chair
Senate Legal and Constitutional Affairs Committee
Department of the Senate
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Parliament House
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Dear Senator Payne;

Copyright Amendment Bill 2006-
Time-shifting, Section 109A and iPods

I would like to make a brief submission to the Committee's Inquiry into the provisions of the *Copyright Amendment Bill* 2006. I do so as someone who has taught Intellectual Property at the University of Newcastle, but also as an iPod user. My submission mainly focuses on proposed new section 109A in particular, and its success in achieving what I understand to be one of the aims of the legislation, which is to allow "format shifting" of music so that (to quote a Government media release) "people can put their CD collection into iPods or MP3 players."

Before I address the iPod issue, however, let me offer my complete support for the provisions in the Bill (new s 111) which will allow the time-shifting of television programmes. Those of us who have been aware of the law on this matter and are concerned to obey the law have been hoping for such an amendment for many years! I believe the provisions in s 109A allowing copying of music onto personal digital music players are also very worthwhile for the same reason.

But I have had my attention drawn to comments by Kim Weatherall, an academic from the University of Melbourne, on a website which she hosts, which suggest that there are major problems with s 109A as currently drafted if it is to achieve that aim, at least in relation to iPods (my submission relates to the iPod specifically, as it is no doubt the most commonly used digital personal music device in Australia today.) Ms Weatherall's comments can be found here and here. I am not sure if Ms Weatherall is planning to make a submission to the Inquiry but I thought I would do so, and add my concerns to those she has expressed.

Essentially the problem is this: the iPod only operates in conjunction with Apple's iTunes music player software, rather than simply as a stand-alone device. (iTunes is available as a music player for all major operating systems, not just the Mac OS, and so is used by iPod users who have Windows machines as well others.) Transferring music to an iPod from an audio CD is a 2-stage process: (1) the audio

CD needs to be copied into iTunes, on the user's personal computer; (2) the iPod needs to be connected to the user's computer and the music then transferred. Once that process has taken place, however, the software does not remove the copy of the music from the computer's hard drive. Indeed, the way the iPod and iTunes software operates at the moment, it is possible (though perhaps not inevitable) that deleting the copy of the music from the computer will result in the copy on the iPod being deleted next time the iPod is connected to the computer. (So the copy on the computer is designed to be permanent, and hence the proviso at the end of proposed s 109A concerning a "temporary copy" would not seem to apply.)

The problem is that it is at least possible (and I think quite likely) that s 109A as currently proposed will not allow an iPod user to engage in this process. The committee is of course familiar with the provisions of the *Copyright Act* 1968 (the Act) which currently would make it a breach of copyright for someone to undertake the process described above. Proposed s 109A would not solve this problem because it only allows one "main copy" to be made of music in the one "format". This flows from para 109A(1)(d) which makes it a precondition of someone being able to rely on this exemption from the normal operation of the Act that "the format in which sounds are embodied in the main copy differs from the format in which sounds are embodied in the record".

The problem partly arises from the use of the word "format". I think most people would read the provision as referring to the type of digital encoding or compression that is applied to an audio track to enable it to be played on a computer or a digital personal music device.

The provision operates well at stage (1) of the process noted above; it seems clear that a digitally transformed version of a track on an ordinary audio CD is in a different "format" from that of the audio CD. (I understand, though others may have more information on the technical side, that the format used by Apple is called "AAC", although I am not entirely sure whether this is the format into which tracks from an audio CD are transformed. But I will assume for the moment that this is correct, and that this is the format in which the file is transferred onto the iPod.) The problem then arises at stage (2), the transfer to the iPod, where effectively the same file is copied over to the portable device. This copying does not seem to comply with para 109A(1)(d), as it seems to simply be the copying of an AAC file onto the iPod in the *same* format as it exists on the computer.

It may be that a court, confronted with the apparent stark clash between the operation of s 109A if enacted as it stands, and the stated purposes of the Government to allow the copying of music into iPods, would somehow work around this. It might be possible, for example, to read the word "format" as meaning not simply the relevant digital encoding, but the whole package of "device plus encoding". If that were so, then copying the file to an iPod would indeed amount to to putting it into a "format" which "differs" from the original main copy.

But the court would still be confronted with proposed sub-section 109A(5) which seems to have the effect that once one "main copy" is made of something, then that main copy cannot itself be copied, even into *another* format- since when applying s 109A(1) to the iTunes copy on the computer, sub-section 109A(2) could not be relied on to establish that the computer copy was not "an infringing copy", and hence para 109A(1)(c) would not be satisfied.

In short, it seems that more work needs to be done on s 109A to ensure that it permits what should be able to be commonly done with iPods all over Australia. My suggestions would be as follows:

(A) There should be a clarification provided of the intended meaning of the word “format”. The section could include somewhere a statement along the lines that copying a main copy from a personal computer to a portable music device is to be deemed to be copying into a different format for the purposes of para 109A(1)(d).

(B) I suggest that there is no real need for sub-section 109A(5). The provision is designed to prevent more than one main copy being made. But I see no pressing social or commercial need for this. Commercial copying of tracks and wide distribution over the internet is prevented by the requirement in para 109A(1)(a) that the copy be made for “private and domestic use”, as well as by sub-section 109A(3). Why should someone, if they own a legitimately purchased CD, not be able to provide a copy of the music to all the children in the family who own an iPod? More to the point here, why should they not be able to have a copy to listen to on their computer, and a copy to listen to on their iPod while travelling? If s 109A(5) is (contrary to my suggestion) to be retained, it or some other provision ought to make it clear that the ordinary process of transferring music to an iPod is to be permitted (perhaps by clarifying that another copy of the main copy into a different “format” is permitted, once the definition of “format” is clarified as in recommendation (A)).

Yours sincerely,

(Neil Foster)

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