Wednesday, 1 November 2006

Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email: legcon.sen@aph.gov.au

Dear Sir/Madam

Re: Submission to the Senate Legal and Constitutional Affairs Committee regarding the Copyright Amendment Bill 2006

Apple Computer Australia Pty Ltd and Apple Computer Inc welcome the opportunity to submit to the Senate Legal and Constitutional Affairs Committee its position on the *Copyright Amendment Bill 2006* (the Bill).

Apple believes that all Australians will benefit from a change to the *Australian Copyright Act 1968* (the Act) as outlined in this Submission. This community includes consumers, copyright owners, as well as manufacturers of playing and recording devices, from VCRs to personal digital assistants and telephones.

Furthermore, for the reasons set out in greater detail in this submission, Apple submits that the current provisions of the Bill will leave the Act still outdated and overly restrictive given today's technology and the legitimate expectations of consumers. Many common everyday acts of copying to MP3/MP4 players/devices, such as an iPod, computers and even to VCRs, which consumers reasonably expect not to be illegal, would still constitute an infringement of copyright under the Bill's current form.

Overview

In particular, Apple highlights the following areas of the Bill, which Apple believes require further modification to meet the Bill's original intent and spirit. Under the Bill in its current form, it will continue to be illegal for Australian consumers to:

1. record a radio or television broadcast for private and domestic purposes in a number of common situations, for no apparent reason;
2. to copy their own CDs using iTunes and place a copy of the CD or any track on his or her MP3/MP4 player (e.g. an iPod), for personal and domestic use;
3. to make other legitimate uses of any computer storage device, whether an iPod or otherwise, to store copies of documents, images and other copyright material;
4. to make legitimate copies of video material onto current, widely accepted technologies such as video iPods because of the restriction of the Bill to the older videotape format.

Apple
PO Box A2629
Sydney South
NSW 1235

T 133 622
F (02) 9261 1040
www.apple.com.au

Apple Computer
Australia Pty Ltd
A.B.N. 46 002 510 054

Apple Background

Apple has been a leader in copyright reform, supporting copyright owners and the sensible development of copyright law. It is a necessary part of Apple's innovative product development philosophy that not only Apple, but all copyright owners, will benefit from increasing the utility to consumers of copyright subject matter, and in developing new means of supplying copyright material to consumers by means which ensure a fair commercial return to copyright owners. Any attempt to maintain copyright commercialisation models of the last century by any technical means will be doomed to failure.

Apple does not condone and has never condoned copyright infringement, at any level, of any kind. However, Apple believes that Australian copyright law needs to be amended to offer the greatest benefit to both copyright owners and copyright users, including the record and film companies, Apple itself, and Australian consumers.

There is no question that Australia needs to reconsider its approach to exceptions to copyright infringement. This is made clear from any number of sources including:

- Numerous reports all reaching the conclusion that Australia's present system needs revision. These include reports from the Joint Standing Committee on Treaties,[1] the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America,[2] and the Copyright Law Review Committee;[3]

- Fundamental changes in technology with which Australia's current provisions have been unable to deal; and

- An inability of the current system to reflect both the views and the behaviour of the people of Australia.

The iPod is the world's largest selling digital music player, both in Australia and in the world, with annual sales of the iPod now numbering in the tens of millions globally. The iPod is capable of playing music files in a number of formats, including the popular MP3 format and Apple's proprietary AAC (Advanced Audio Coding) rights managed format.

Linking Apple's roles in the computer and entertainment markets is Apple's iTunes, which has two components. The iTunes Store is the world's largest on-line source of licensed music. Apple has entered into agreements with all four major music companies and over 1,000 leading independent record labels, and as a result, is able to offer through the iTunes Store more than 3 million songs locally. To date, the iTunes Store has sold more than 1 billion songs worldwide, and currently operates in 21 countries, including Australia. .

The other component of iTunes is the iTunes' software, the world's easiest to use, most intuitive digital jukebox. This software comes with every iPod, pre-installed on every Apple computer, and available for download and installation on both Apple computers and computers running the Microsoft Windows operating system. The iTunes software allows computer users with an internet connection to access the iTunes Store and, if they are in a

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[1] Commonwealth of Australia, Joint Standing Committee on Treaties, Report 61, The Australia-United States Free Trade Agreement (June 2004) p 238, Recommendation 17.

[2] Senate Select Committee on the Free Trade Agreement, Final Report on the Free Trade Agreement between Australia and the United States of America, August 2004, paragraph 3.117.

[3] *Supra*, note 1.

country where Apple has reached agreement with the record companies, download licensed music and music video files. The iTunes software also allows a user to convert music files into MP3 or other formats. The iTunes software also operates as the means for organising and playing the music and music video files downloaded from the iTunes Store. The iTunes software can also be used to transfer, organise and play music from the user's CDs to his or her computer and to his or her iPod, although Apple constantly warns consumers that this is only permissible where it is not a breach of the copyright law to do so.

Apple develops products and technologies that adhere to many industry standards in order to provide an optimised user experience through interoperability with peripherals and devices from other companies. Apple has played a significant role in the development, enhancement and promotion of many of these industry standards.

Copyright Amendment Bill 2006

This submission follows on from a request for submissions and on the discussion paper, *Fair Use and other Copyright Exceptions Issues Paper*, issued by the Commonwealth Attorney-General's Department in May, 2005, in response to which Apple lodged a Submission in June 2005. Apple's Submission to the issues paper is attached as *Appendix A* for consideration by the Committee.

Moreover, Apple has outlined specific responses and proposed changes to the Bill attached in *Appendix B*, which provides commentary and proposed amendments to the following sections:

- Sections 111 and 248A - Recordings of broadcasts for private and domestic use;
- Section 43C - Private copies of literary works;
- Section 43J - Private copies of artistic works;
- 109A - Private copies of sound recordings; and,
- 110AA - Private copies of films.

Apple believes that changes to the Bill as proposed in this Submission and its Appendices will benefit not only consumers but also copyright owners, by increasing the economic utility to consumers of their products, without in any way diminishing their sales of their conventional products.

Further, Apple believes the current Bill does not adequately meet the Government's objectives to implement innovative reforms reflective of current technology. It is important to reinforce that proposed section 109A(1)(b) fails to legitimise the standard use of modern technology, such as iTunes and iPods, for copying of CDs - a legitimate expectation of the modern consumer.

Apple welcomes Government's commitment to listen to and consider comments by industry and stakeholders to institute the necessary technical changes to the Bill so as to achieve one of the Government's primary objectives – 'to ensure that people can transfer music from CDs they already own onto their iPods or other music players'.

Apple again welcomes to present its views to the Committee and urges it to consider the proposals attached in both *Appendix A* and *Appendix B* of this submission. Finally, Apple would welcome the opportunity to appear before the Committee.

Yours sincerely,

Tony King
Managing Director
Apple Computer Australia Pty Limited

APPENDIX A

SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT IN RESPONSE TO THE FAIR USE AND OTHER COPYRIGHT EXCEPTIONS ISSUES PAPER DATED MAY 2005

PRESENTED BY

APPLE COMPUTER INC. AND APPLE COMPUTER AUSTRALIA PTY LIMITED

JUNE 2005

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Apple Submission Regarding Fair Use, Fair Dealing and Other Exceptions to Infringement under the *Copyright Act 1968*

1. Executive Summary

1.1 The need for change

Apple believes that consumers will benefit from a change to the Australian *Copyright Act 1968* (the "***Copyright Act***") as proposed in this Submission – but so also will copyright owners, as well as manufacturers of recording devices, from VCRs to personal digital assistants and telephones. It is Apple's submission that, whilst copyright owners may lose sales in some traditional markets, and indeed will be able to demonstrate that they already have done so, such a change to the law will not only reflect a social and economic change which is taking place, it will be part of a process which opens up new opportunities. The recording industry has been able to adapt to new technologies, aided and supported by technology innovators such as Apple, Sony and others – and is already reaping greatly increased rewards in online sales. The answer is not to refuse to change outdated legislation that makes the new technology illegal, so as to protect the old.

1.2 A narrow exception

New technologies for the distribution of works and other subject matter in a digital form, along with an expectation that such works will be copied for the purposes of and in the ordinary course of use, as well as the availability of new personal copying technologies, require recognition of copying of non-infringing copies for private and domestic use.

Amendments are proposed to resolved this problem as well as the following amendments:

- The backup provisions which presently relate only to computer programs should be extended to all works and other subject matter supplied in a digital form; and
- There should be a protective provision regarding copies permitted to be made, so that they are not subsequently commercialised in any manner.

1.3 A general fair use defence

Apple supports the recommendation of the Copyright Law Review Committee in its Report *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (September 1998), with reservations. Whilst the adoption of such a defence will deal with a number of problems as identified by that Report and to which the CLRC's review was directed, it is unlikely, in Apple's respectful submission, to deal with the vice identified in this Submission, which was not one to which the CLRC's enquiry was directed. This is so for two reasons:

(a) it will take time for the scope of the new provision to be interpreted, and there will be an undesirable period of uncertainty;

(b) it is inevitable that the new provision will be seen as replacing the old fair dealing and other defences, first and foremost, and there is a very substantial risk that the very fact that an express defence for copying for home use was not included will by found by a Court to mean that the fair use defence was not intended to go so far. This conclusion is likely to be supported by the CLRC's own expression of doubt that the fair use defence it recommended would extend that far.

For this reason, Apple presses for a specific defence permitting private and domestic copying of lawfully acquired copyright material, other than computer programs. Computer programs are excepted as they are already the subject of established contractual licensing practices, which distinguish them from other copyright material, such as sound recordings and films, as well as, at present, specific fair dealing defences in Part III Division 4A of the Act.

1.4 Circumvention devices and services

The definition of "technological protection measure" should be amended to be more general, as in its present form it is confusing, and has limited effect. A simpler solution is recommended, subject to safeguards for legitimate copying technologies.

2. Apple Computer Inc and the new digital technologies

1. Apple is one of the world's leading information technology companies. Apple is also one of a handful of companies in the world that creates and supplies hardware, software and content in both the computer and entertainment industries. Apple designs, manufactures and markets personal computers and related software, services, peripherals and networking solutions. The company also designs, develops and markets a line of portable digital music players along with related accessories and services including the online distribution of third-party music and audio books. The company's products and services include the Macintosh line of desktop and notebook computers, the iPod digital music player, the Xserve server and Xserve RAID storage products, a portfolio of consumer and professional software applications, the Mac OS X operating system, the online iTunes Music Store, a portfolio of peripherals that support and enhance the Macintosh and iPod product lines, and a variety of other service and support offerings.

2. Apple has been involved in the computer industry for almost 30 years, producing the first successful mass-produced personal computer in 1977, which developed into the Apple // personal computer. Apple produced the first computer with a graphical user interface (GUI), and in 1984, launched the Macintosh range of computers, which elevated the GUI to a new level of ease-of-use, to a level which is now adopted as the standard for computer interfaces throughout the computer industry. The company was the first major computer manufacturer to include CD-ROM, DVD-ROM, CD burners and DVD burners in its computers. For many years, Apple computers have been the computer of choice for many in the content creation industries.

3. Apple is committed to bringing the best personal computing and music experience to students, educators, creative professionals, businesses and consumers around the world through its innovative hardware, software, peripherals and Internet offerings. The company's business strategy leverages its unique ability, through the design and development of its own operating system, hardware and many software applications and technologies, to bring to its customers around the world meaningful new products and solutions with superior ease-of-use, seamless integration and innovative industrial design. The company believes continual investment in research and development is critical to facilitate innovation of new and improved products and technologies.

4. Apple believes personal computing is in an era in which the personal computer functions for both professionals and consumers as the digital hub for advanced new digital devices. This view led Apple to a redesign of the portable music player – indeed, to approach it for the first time as a portable device for the storage and use of all personal digital files – resulting in the revolutionary design of the iPod. This product has redefined the category, as a result becoming the leading personal music and digital file storage device around the world

5. The iPod is the world's largest selling digital music player, both in Australia and in the world, with annual sales of the iPod now numbering in the tens of millions globally and in Australia.

The iPod is capable of playing music files in a number of formats, including the popular MP3 format and Apple's proprietary AAC (Advanced Audio Coding) rights managed format.

6. Linking Apple's roles in the computer and entertainment markets is Apple's iTunes, which has two components. The iTunes Music Store is the world's largest on-line source of licensed music. Apple has entered into agreements with all four major music companies and over 1,000 leading independent record labels, and as a result, is able to offer through the iTunes Music Store more than 1.5 million tracks. To date, the iTunes Music Store has sold more than 400 million songs worldwide, and currently operates in 18 countries. The iTunes Music Store is now available in North America and Europe. Apple is still negotiating with Australian record companies to set up an iTunes Music Store for Australia.

7. The other component of iTunes is the iTunes software, the world's easiest to use, most intuitive digital jukebox. This software comes with every iPod, pre-installed on every Apple computer, and available for download and installation on both Apple computers and computers running the Microsoft Windows operating system. The iTunes software allows computer users with an internet connection to access the iTunes Music Store and, if they are in a country where Apple has reached agreement with the record companies, download licensed music and music video files. The iTunes software also allows a user to convert music files into MP3 or other formats. The iTunes software also operates as the means for organising and playing the music and music video files downloaded from the iTunes Music Store or copied from a user's CDs. The iTunes software is also the means by which a user can transfer music from his computer to his iPod.

8. The attributes of the personal computer, including its ability to run complex applications, possess a high quality user interface, contain large and relatively inexpensive storage, and easily connect to the Internet in multiple ways and at varying speeds, can individually add value to these devices and interconnect them as well. Apple is the only company in the personal computer industry that controls the design and development of the entire personal computer - from the hardware and operating system to sophisticated applications. Apple provides innovative industrial design, intuitive ease-of-use, and built-in networking, graphics, and multimedia capabilities. Thus, the company is uniquely positioned to offer integrated digital hub products and solutions. Apple develops products and technologies that adhere to many industry standards in order to provide an optimized user experience through interoperability with peripherals and devices from other companies. Apple has played a role in the development, enhancement, promotion, and/or use of numerous of these industry standards, many of which are discussed below.

9. Apple believes that a change to the law as proposed in this Submission will benefit not only consumers but also copyright owners, as participants in reform.

10. Apple has been a leader in copyright reform, supporting copyright owners and the sensible development of copyright law. It is a necessary part of Apple’s innovative product development philosophy that not only Apple, but all copyright owners, will benefit from increasing the utility to consumers of copyright subject matter, and in developing new means of supplying copyright material to consumers by means which ensure a fair commercial return to copyright owners. Any attempt to maintain copyright commercialisation models of the last century by any technical means will be doomed to failure, and to attempt to do so by means of retention of outdated or ineffective provision of the *Copyright Act* will lead only to disregard, if not contempt, of the law by consumers.

2.1 Scope of submission

11. Apple's submission focuses, therefore, upon the need for Australia to amend the *Copyright Act* and the way in which the *Copyright Act* needs to be amended to offer the greatest benefit to both copyright owners and copyright users, including Apple, Apple's consumers in Australia and Australian consumers in general.

12. This submission covers 3 central areas, namely, the need for:

(a) Australia to revise its exceptions to the *Copyright Act*;

(b) a more open-ended US fair use style defence, as recommended by the CLRC in its report *Simplification of the Copyright Act: Part 1*[1] ("**CLRC fair use style defence**"); and

(c) a new specific exception allowing copying for private domestic use of lawfully acquired content.

3. The Need to Revise the Exceptions to the *Copyright Act*

13. There is no question that Australia needs to reconsider its approach to exceptions to copyright infringement. This is made clear from any number of sources including:

- numerous reports all reaching the conclusion that Australia's present system needs revision. These include reports from the Joint Standing Committee on Treaties,[2] the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America,[3] and the Copyright Law Review Committee;[4]
- fundamental changes in technology with which Australia's current provisions have been unable to deal; and
- an inability of the current system to reflect both the views and the behaviour of the people of Australia.

14. In the late 1980s, the House of Lords was called upon to consider the legality of a dual cassette deck in the case of *CBS Songs Limited v Amstrad Consumer Electronics plc*.[5] While accepting that the domestic copying of audio tapes, which was widely engaged in every day by UK citizens, was an infringement of copyright, Lord Templeton did not consider this to be a satisfactory situation. His Honour commented as follows:

> *"From the point of view of society the present position is lamentable. Millions of breaches of the law must be committed by home copies every year. Some home copies may break the law in ignorance, despite extensive publicity and warning notices on records, tapes and films. Some home copies may break the law because they estimate that the chance of detection are non-existent. Some home copies may consider that the entertainment and recording industry already exhibit all the characteristics of undesirable monopoly - lavish expenses, extravagant earnings and exorbitant profits - and that the blank tape is the only restraint on further increases in the prices of records. Whatever the reason for home copying,*

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[1] Copyright Law Review Committee, Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners (September 1998).

[2] Commonwealth of Australia, Joint Standing Committee on Treaties, Report 61, The Australia-United States Free Trade Agreement (June 2004) p 238, Recommendation 17.

[3] Senate Select Committee on the Free Trade Agreement, Final Report on the Free Trade Agreement between Australia and the United States of America, August 2004, paragraph 3.117.

[4] *Supra*, note 1.

[5] [1988] AC 1013.

> *the beat of Sergent Pepper and the soaring sounds of the Miserere from unlawful copies are more powerful then law abiding instincts or twinges of consciousness. A law which is treated with such contempt should be amended or repealed."*

15. Though directed to UK consumers in the context of UK copyright law, Lord Templeton's comments were equally applicable to Australia in the context of home taping of audio tapes in the 1980's and 1990's, and remain equally applicable in the context of newer technologies today.

16. These problems have been highlighted most recently in the hearing by the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America (the "**Senate Select Committee**"). Senator Cook, the Chairman of the Senate Select Committee, stated that:

> *"I was surprised to learn, as I am sure many were, that an act such as recording a television program for later viewing is protected under the US fair use provisions but is not afforded the same use in Australia."*[6]

Senator Cook then went on to admit that, on this basis, he was a serial copyright infringer.[7] However, Senator Cook made no statement suggesting that he would now stop recording television programs. In a situation where Australia's lawmakers do not themselves understand the boundaries of copyright law, and where they cannot be relied upon to obey it, it must be asked whether such a law can ever be effective.

17. The Senate Select Committee also discussed Australia's response to the recording of television programs. This response has been a limited one. At present, s 111 of the *Copyright Act* creates an exception for the recording (copying) of a broadcast. It is not an infringement of copyright in the broadcast if that broadcast is recorded.

18. However, when a broadcast is made, copyright can, and usually does, subsist in elements other than the broadcast itself. When the program being broadcast is pre-recorded, that program is a cinematographic film, and so copyright subsists in the film. Further, even if the broadcast is of a live event, such as a sporting event or a performance of music, the broadcast almost invariably includes advertising and music. As a consequence the recording of the broadcast will necessarily entail infringement of copyright in the advertisements, in a pre-recorded sound recording and/or the musical and literary works performed.

19. This aspect of the problem was brought out before the Senate Select Committee in a discussion between Mr Chris Creswell, a consultant with the Copyright Law Branch of the Attorney-General's Department, and Senator Cook.[8] The example used before the Senate Select Committee was that it was not an infringement of copyright to record a live broadcast of a football game. However, if instead there was delayed coverage of the same game, to tape that coverage would be an infringement. As sporting events, particularly football, are often broadcast live into some states or regions and delayed in their broadcast into other states or regions, current law makes the issue of whether a viewer recording that broadcast for his own private use is infringing copyright, a law of the Commonwealth, dependent entirely on the state or region in which a person makes the copy.

20. As mentioned, an even more bizarre outcome from the present law is created where there is live coverage of a sporting event on a commercial network. That live coverage will contain

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[6] Hansard, Tuesday 18 May 2004, FTA 86.

[7] Hansard, Tuesday 18 May 2004, FTA 86-89.

[8] Hansard, Tuesday 18 May 2004, FTA 86-87.

commercials. When a person records that coverage, the recording of the sporting event is not a copyright infringement, but the recording of the commercials is. This is the case even though the person intends to record the sporting event, and only records the commercials as an unavoidable consequence of the recording process.

21. These breaches of Australia's current copyright laws primarily take place through the use of an analogue video tape recorder (VCR), the device that was at the subject of the US Supreme Court's decision in *Sony Corp. v. Universal City Studios Inc.*, 464 US 417 (1984) ("**the *Betamax* case**"). In that decision, the Court held that the use of a VCR to tape television broadcasts for private domestic use was fair use under US copyright law, a decision only available to it because of the open-ended nature of the "fair use" defence under United States law.[9] However, the same arguments apply equally in the digital environment.

22. Software and hardware is available for use on all modern personal computers that enables them to be used for recording and watching television broadcasts. Many companies are also making stand-alone devices that record television broadcasts either to a computer hard drive (often referred to as digital video recorders or DVRs, such as the TiVo technology) or to a recordable DVD.

23. Whilst the video recorder is the most high profile example (in terms of jurisprudence) of problems with the current Act, by means of a process commonly referred to as "time shifting", it is far from the only example. Similar problems exist with music, particularly with a process known as "format shifting". Format shifting takes place when an acquirer of copyright material in a particular format copies that material in order to have it in another format.[10] Format shifting in music first became common when people started to copy LPs onto tape.

24. Format shifting today often involves computers. The CD-RW drives included in Apple computers since 2001 allow Apple's customers to take CDs that they have purchased, extract songs of their choosing from those CDs to be placed on the hard drive of their Apple computer and then, using the CD-RW drive of their Apple computer, make a compilation CD of those songs. This process was the subject of a very successful advertising campaign by Apple in the United States that featured a wide range of musical artists including Barry White, George Clinton, Smashmouth and De La Soul voicing their support for the process.[11] This commercial was possible because, in the United States, this use of Apple's computers to make a compilation CD, at least when done for private domestic use, is widely considered to be fair use. Virtually all computers sold by every manufacturer in recent years have included hardware and software that enable the creation of compilation CDs.

25. Though Apple has sold more than 400 million tracks through its iTunes music store, Apple has no doubt that much of the licensed music placed on the Apple iPod is placed there through format shifting. Using the iTunes software, a user rips music from CDs that they have purchased to their computer, and then copies that music to their iPod. Though Apple supplies

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[9] See discussion in Copyright Law Review Committee, Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners (September 1998).

[10] There is no basis for attempting to afford different legal status to time shifting compared to format shifting. This is because, although the former is generally used to refer to the recording of video content to watch at a later time and the latter to the transfer of music from one format to another, these distinctions are likely to break down more and more over time, if they have not already done so. For example, the recording of a television broadcast involves the transfer of the broadcast from a broadcast format to a recorded format on a particular type of magnetic or digital recording medium. Similarly, devices are already available that can be programmed to record a radio broadcast so that it can be listened to at a later time.

[11] See http://www.theapplecollection.com/Collection/AppleMovies/mov/concert_144a.html

the iTunes software and the world's most popular portable digital music player, numerous other companies supply software which enables copying music from CDs and numerous other companies supply portable digital music players.

26. Just like the video recorder, these practices are widespread. Most ordinary people regard such practices as a reasonable use for music that they have paid for. However, whether copies are made from CD or LP, and whether they are made to iPod, CD or tape, these practices remain an infringement of copyright under current Australian law. They provide another example of the problem in Australia's copyright system exposed to the Senate Select Committee when it considered the video recorder.

27. It is a further important consideration, in Apple's submission, that there is a very widespread concern amongst the public about compliance with copyright law in Australia. Apple takes care in all advertising in Australia to point out that copying of music files from CDs or online may be a copyright infringement. There are many legitimate uses that can be made of iPod and iTunes, such as storage of family photographs, material offered for free download by radio broadcasters such as 2JJJ, "talking books" and other material which the consumer is entitled to download and store. However, it is obvious that the current state of the law in Australia, as it is observed, greatly inhibits the use of these Apple products. Apple can state that it has received queries from consumers concerned about infringement of copyright – it is evident that Australians want to "do the right thing", but find ridiculous the current state of the law which inhibits what is seen as legitimate domestic copying.

28. In Apple's submission, however, it is not enough for the recording industry to adjure consumers to buy their music online. For many consumers, this is seen as an alternative source for music, but there is no legitimate reason for the law to prohibit the copying for domestic use of CDs already purchased by the consumer. In addition, for many consumers, much material that is the subject of copyright is simply not readily available for purchase online.

29. Apple does not support illegal filesharing of music, whether online or by sharing copy CDs.

30. The situation before the Senate Select Committee, as well as the problems with music outlined above, highlight the problems raised by Lord Templeton, and show that those problems still exist in Australia today. The limited exceptions that exist in the *Copyright Act* do not address the primary problem. Australians are not aware when everyday activities are or are not copyright infringing. Further, even if Australians were aware of this, there is no evidence suggesting that they would be inclined to stop those activities.

31. It is clear, therefore, that Australia is in need of an exception to copyright infringement that can be:

- reasonably understood by the general public; and
- accepted by the public as reasonable.

The public cannot observe copyright law if they are unaware of it, and even if aware, will not comply with that law if it is regarded as unreasonable.

4. Apple supports the CLRC fair use style defence, with reservations

32. Apple supports, in general terms, the introduction of a US fair use style defence as proposed by the CLRC in its report *Simplification of the Copyright Act: Part 1*.

33. Such a provision could well be introduced to replace a great number of provisions in the Act today, in Part III Divisions 3, 4, 4A and 7, and equivalent provisions in Part IV Division 6, as recommended by the CLRC. However, the introduction of such a provision into the *Copyright Act*, as recommended by the CLRC is unlikely, in Apple's respectful submission, to deal with the issues that it has identified in this Submission for two reasons:

(a) it will take time for the scope of the new provision to be interpreted, and there will be an undesirable period of uncertainty; and

(b) it is inevitable that the new provision will be seen as replacing the old fair dealing and other defences, first and foremost, and there is a very substantial risk that the very fact that an express defence for copying for home use was not included will by found by a Court to mean that the fair use defence was not intended to go so far. This conclusion is likely to be supported by the CLRC's own expression of doubt that the fair use defence it recommended would extend that far.

34. Whilst the adoption of the CLRC fair use defence may solve a number of problems with current Australian law, as well as offer the benefits recognised by the CLRC, the issue at the centre of the problems exposed by the Senate Standing Committee will not be entirely addressed. In large part, this can be attributed to the fact that the CLRC's mandate was to simplify the existing exceptions to the *Copyright Act*, not to add additional defences or to ensure that all conduct that should be excepted from infringement was the subject of the proposed general defence.

35. The only reason why it was assumed by the CLRC that an Australian fair use style defence would extend to the recording of television programs to watch at a later time, a process known as "time-shifting", was the decision of the US Supreme Court in the *Betamax* case.

36. As stated above, in the *Betamax* case, the US Supreme Court held that time-shifting was fair use under US copyright law. However, what is often overlooked in a discussion of this case is that whether such a use was a fair use under US law was far from clear up until the Supreme Court handed down its decision. The Supreme Court eventually ruled 5-4 that time shifting was fair use and thus not copyright infringement. However, as late as the conference of the Supreme Court justices following oral argument, during which initial votes were cast and the task of writing the majority opinion was assigned, the majority was in favour of holding time shifting not to be fair use.[12] It was only between this conference and the date of judgment that this majority shifted. Further, the District Court initially held that time shifting was fair use.[13] This was unanimously reversed by the Court of Appeals for the Ninth Circuit.[14] Thus, even though time shifting is considered to be fair use under US law as a result of the *Betamax* case, only 6 of the 13 judges who heard the case so ruled.

37. Thus, if Australia adopts changes to the *Copyright* Act as recommended by the CLRC alone, there is no guarantee that Australian courts would reach a decision consistent with the Supreme Court majority in the *Betamax* case, as opposed to the decision of the overall majority of the judges in that case. Indeed, some expert commentators have already

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[12] See William Patry, *"Justice Blackmun and Sony"*, 1 June 2005, available at http://williampatry.blogspot.com/

[13] *Universal City Studios Inc .v Sony Corp.,* 480 F.Supp. 429 (C.D. Cal. 1979).

[14] *Universal City Studios Inc .v Sony Corp.,* 659 F.2d 963 (9th Cir. 1981).

expressed the view that such an exception would not cover time shifting (or format shifting).[15] More significantly, the CLRC itself expressed doubt that time-shifting would fall within the Australian fair use style defence it recommended.[16] If Australian courts were to construe an Australian fair use style defence as recommended by the CLRC consistent with the overall *Betamax* majority, then recording a television program to watch at a later stage would remain an infringement under Australia's copyright law and the disconnect between the law on the books and the law in practice would continue.

38. Even if Australian courts were to hold that time shifting was fair use under the CLRC fair use style defence, there is no guarantee that they would reach a similar decision with respect to format shifting.

39. Format shifting is widely considered to be a fair use under US law. However, this is merely an assumption. It has not been so held by a court. This assumption is based on the *Betamax* decision and *dicta* in the decision of the Court of Appeals for the Ninth Circuit in *RIAA v. Diamond Multimedia*[17] (which concerned whether the Rio music player was a digital audio recording device subject to the restrictions of the *Audio Home Recording Act* of 1992, and which did not address the question of fair use). Thus, there is no clear guidance for US consumers as to whether this conduct is fair use or not. As a result, opinions still differ as to the legal status of format shifting for personal use.

40. In their submissions to the Senate Select Committee, the Australian Record Industry Association ("**ARIA**"), the industry body representing the recording industry in Australia, claimed that the US *Copyright Act* (Title 17) does not create an exemption for making copies of recordings for private and domestic use.[18] Such copying would necessarily include format shifting.

41. On this basis, it must be concluded that the introduction of the CLRC fair use style defence in Australia would not guarantee protection for owners of digital recording devices in respect of activities widely considered a fair and reasonable use of legitimately acquired copyright material. A consumer who copies a CD which he or she has bought onto an iPod to listen to on the train or in the car is committing a copyright infringement. The copyright owners expect that consumer to buy 2, or even 3 copies, or buy another device (a portable disc player). These actions are basic, everyday actions of the consumer of 2005. They are based on the very actions that Lord Templeton had in mind when he pointed out the flaws of the copyright system in *Amstrad*, a case involving the use of blank tapes.

42. Furthermore, without a specific, technology neutral exception to complement the CLRC fair use style defence, each time new technology that allows a new form or process of copying of copyright protected material for private domestic use is developed, such as TiVo or new forms of access online through portable telephones or other roaming devices, the technology will have to be tested anew before the court. The recording industry argues that the decision in the *Betamax* case cannot be extrapolated to such new uses. There will be no certainty as to whether the use of a technology to copy material for private domestic purposes infringes until the courts have considered it. This is not an ideal situation, particularly for consumers.

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[15] See The Australian Copyright Council, Supplementary submission to Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, 7 July 2004 at page 4, available at http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub462a.pdf

[16] See Copyright Law Review Committee, *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (September 1998) at page 145 [paragraph 8.55].

[17] 180 F. 3d 1072, 1079, (9th Circ. 1999).

[18] See http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub133a.pdf at page 1

43. Apple accepts that the legal status of a particular activity under the CLRC fair use style defence is not certain in any situation until a court rules upon it. Generally, however, this lack of certainty is outweighed by the advantages of such a defence, as discussed in the CLRC report. It is because of these advantages that Apple supports the CLRC fair use style defence. However, it is Apple's submission that these advantages do not outweigh the advantages of a specific exception in the context of private domestic copying. This is because, in that situation, the potentially infringers are consumers. They are not commercial entities, nor do they have the support of government or educational institutions. They cannot be said to be in any position to seek legal advice every time they decide to put music on their iPods, backup a CD or tape something from a television broadcast. What consumers need to complement the CLRC fair use style defence is an exception directly aimed at their day-to-day private domestic copying activities, which is technologically neutral.

44. Apple therefore submits that something is needed in addition to the CLRC's recommendations. The CLRC's report focuses upon what fair use means for activities currently protected by the *Copyright Act* as fair dealing. It does not consider whether fair use alone is enough to resolve the problems at the heart of Lord Templeton's statement in *Amstrad*, those of the private home user. Apple submits that in addition to the fair use exception, a specific exception relating to copying for personal domestic use needs to be included.

5. A specific exception for private and domestic copying

5.1 Private and domestic copying

45. It will be recalled that there was an ill-fated attempt to introduce a "blank tape levy" amendment to the *Copyright Act* in 1989, under which, in return for the amendment of the infringement provisions of the Act so that making a copy of a *sound recording* solely for private and domestic use a levy would be imposed upon the sale of blank tape for collection by a collecting society and payment to participating copyright owners. The amending legislation was the *Copyright Amendment Act 1989*, which introduced a new Part VC to the Act, Division 2 of which was entitled "Copying with blank tapes" and included s.135ZZM(1) as follows:

> *Copyright subsisting in a published sound recording, or in any work included in a published sound recording, is not infringed by making on private premises a copy of the sound recording if the copy is made on or after the proclaimed day on a blank tape for the private and domestic use of the person who makes it.*

46. The amendment was struck down by the High Court as unconstitutional in *Australian Tape Manufacturers Association & ors* v *The Commonwealth* (1993) 176 CLR 480.

47. The laudable reasons behind the proposed amendment were summarised by Dawson and Toohey JJ in their joint judgment as follows:

> *Notwithstanding the existence of copyright, the private or domestic taping of sound recordings has become widespread and there has hitherto been no practical means by which the owners of the copyright in them could control this practice or obtain compensation for the use of their material. Material*[19] *placed before the Court without objection indicates that the practice is world-wide and, although there is no*

[19] The Court referred to, from the UK, *Report of the Committee to Consider the Law on Copyright and Designs, Copyright and Designs Law*, (1977) Cmnd 6732 (the "Whitford Report"); from Canada, House of Commons, *Second Report of the Sub-committee on the Revision of Copyright, A Charter of Rights for Creators*, (October 1985); Dillenz, "The Remuneration for Home Taping and the Principle of National Treatment", (1990) Copyright 186; from the US, Congress, Office of Technology Assessment, *Copyright and Home Copying: Technology Challenges the Law*, (October 1989)

evidence before us of its exact extent in Australia, it is clearly the mischief at which the legislation is aimed.

The Court then referred to the judgment of Lord Templeman in *CBS Songs Ltd. v. Amstrad Consumer Electronics Plc* referred to above.

48. This issue should now be addressed again. However, the nature of availability of suitable copyright material, in digital form on CDs, and on the World Wide Web, for example, and the advance of copying technologies are such that it is respectfully submitted that it is no longer necessary or practical to impose any form of collecting society scheme of the type contemplated by the *Copyright Amendment Act 1989*. On the one hand, the owners of the content, both of works and of subject matter other than works, are all now engaged in direct licensing programs for the supply of works and other subject matter over the Web, and it is no longer the case that copies are being made from broadcasts which were not intended to be a means of dissemination of copies. On the other hand, new digital technologies have come within reach of consumers in a way enabling them to have multiple devices for storing and re-using the content they obtain. Hence it is normal for a person to download or purchase a non-infringing copy of a song, images, a video or a literary work (from a copyright owner or its licensee) onto a computer, and then transfer the copy to a portable computer and/or another portable device simply for personal use. This is within the contemplated scope of exploitation, and should not be regarded as a copyright infringement.

49. Naturally, the scope of the proposed change does not extend to any commercial exploitation of any kind of the data or the copy.

50. It is important to note that computer programs, on this occasion, are subject to entirely different considerations. It has long been practice in the case of computer software that the software is licensed, and the licensing conditions and prices are calculated according to the grant of licence given. Computer software is widely varied in nature and value, and no easy solution exists for any amendment of the same kind with respect to it. In addition, a number of software-specific fair use exceptions already apply to computer programs under Part III Division 4A of the *Copyright Act.*

51. Accordingly, it is submitted that the *Copyright Act* should be amended by new provisions in each of Parts III and IV so that copyright subsisting in a published literary, dramatic, musical or artistic work (other than a computer program), or any published subject matter other than a work, is not infringed by making on private premises a copy of the work or other subject matter by a person if:

(a) the copy is made from a non-infringing copy of the work or other subject matter belonging to that person, obtained from the copyright owner or a person authorised by the copyright owner to sell the work or other subject matter (so, for example, not being a copy which has been borrowed or rented); or

(b) the copy is made from a broadcast or other communication to the public by the copyright owner or a person authorised by the copyright owner to communicate the work or other subject matter to the public

and the copy is made for the private and domestic use of the person who makes it.

52. Such an exception would be consistent with Australia's international obligations as described in section 4 of the Issues Paper. Specifically, Australia's international obligations under copyright law require that exceptions:

(a) are confined to certain cases. This exception is limited to clearly defined circumstances;

(b) do not conflict with the normal exploitation of the work or other subject matter. This exemption relates to private activities, not the commercial exploitation of the work or other subject matter; and

(c) do not unreasonably prejudice the legitimate interests of the rights holder. This exemption relates to existing activities which are widespread and which rights holders have not sought to enjoin.

The domestic use exception outlined above therefore complies with all of these criteria.

5.2 Defences applicable to computer programs relevant to data files

53. In addition, it is submitted, the manner of supply of copyright materials enabled by digital technologies is such that a provision such as s. 47C (the making of backup copies) is now required in respect of copies of works and other subject matter *other than computer programs*. Indeed, the extension of this provision to all works (other than computer programs) and other subject matter supplied in a digital form is supported by the CLRC in its 1995 report on the protection of computer programs.[20] One of the two reasons that the CLRC gave to justify a right to make backups of computer programs was that "their medium of storage is such that they are easily corrupted or destroyed."[21] As digital content other than computer programs, such as sound recordings and cinematograph films, are predominately supplied on the same mediums of storage (CDs and DVDs) as computer programs, the CLRC's argument justifying the right to make backups of computer programs is equally applicable to these other works and other subject matter.

54. In respect of all the abovementioned provisions, a provision such as s. 47G may be considered desirable so that, having made a copy for a permitted reason, that copy may not subsequently be exploited commercially – otherwise an obvious loophole.

55. Accordingly, it is submitted that the *Copyright Act* should be amended so as to provide:

(a) a defence equivalent to s. 47C is introduced with respect to all works (other than computer programs) and other subject matter supplied in a digital form; and

(a) a provision such as s. 47G is introduced with respect to copies permitted by the Act to be made of works (other than computer programs) and other subject matter in digital form.

5.3 Defences should be “subject to contract”

56. As is recognised in the Issues Paper, copyright law and its exceptions are based on the balancing of rights between copyright owners and copyright users. Apple submits that the addition of a specific private and domestic copying exception to the *Copyright Act* should be made subject to contract. Such a clause is needed to make this balance clear and avoid any ambiguity in the *Copyright Act*.

57. As Cary Sherman, the President of the Recording Industry Association of America ("**RIAA**") said in evidence relative to the *Digital Media Consumers' Rights Act* (HR 107) before the US House of Representatives Committee on Energy and Commerce on 12 May, 2004:[22]

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[20] Copyright Law Review Committee, Report on Computer Software Protection (1995).

[21] Id. at [10.15-16].

[22] See http://energycommerce.house.gov/108/Hearings/05122004hearing1265/Sherman1988.htm

> *Members of the music community strive to provide consumers with many different ways of accessing our content. … Not all consumers desire to pay for complete access to material. Some may want to access entertainment only one time, or for a week or a month. In the case of music, some may want a subscription that allows them access when they desire it without the burden or cost of acquiring a permanent copy.*
>
> *Currently, download music services provide for permanent copies on a track by track basis or an album basis; the ability to share the song with some other computers; the ability to burn a copy onto a CD-R; and the ability to transfer the song to portable digital music players. In other words, the marketplace is addressing what consumers want and expect, and that's how it should be.…*
>
> *Record companies are committed to giving consumers the information they want and need before buying a copy-protected CD, DVD-A, SACD, or other optical disc product. Just over a dozen copy-protected CDs have been released commercially to the public in the United States. The typical copy-protected CD contains a prominent label that informs the consumer about the copy protection. In this case, just as in the case of meeting consumer expectations with regard to flexibility on digital services, consumers will measure value by how well they are able to use the product in different ways. The marketplace is once again working, just as it should.*
>
> *We continue to work with technology providers to give consumers more choices and greater control over how they access and use digital content and we are committed to providing information to consumers about these products. But our continued ability to offer choices and personal control relies upon the protection afforded by digital technologies. By allowing unimpeded circumvention of these protections with the empty and unenforceable directive to only make non-infringing copies, HR 107 lays waste to the effective-and balanced-DMCA.*

58. Of course, the thrust of Mr Sherman's testimony would probably be directed against the submission which Apple makes, but his reasons are applicable to this proposition regarding the freedom to limit the use which a consumer makes of a digital file, however received, and to pay accordingly. The general private and domestic copying defence proposed is only meaningful where a consumer is supplied a conventional CD or digital track unrestricted by enforceable contractual conditions of supply. It is in Apple's respectful submission completely wrong-headed to argue that a defence afforded in the *Copyright Act* should be understood to be a right, regardless of the conditions of acquisition or the nature of what is acquired – as it has been argued in recent consumer actions in Europe that contractual conditions of download or technological protection measures in some way deprive consumers of a right to make usable (playable) copies.

59. The interaction between contract and copyright is particularly common today in the world of software and is becoming increasingly common in the context of digital entertainment. It has long been the practice in the case of computer software that the software is licensed, and the licensing conditions and prices are calculated according to the grant of licence given. Computer software and content is widely varied in nature and value, and no easy solution exists for any amendment to the *Copyright Act* to govern the terms of such a license. Such a process is best left to be determined by each software distributor and content provider through defining licensing conditions, and allowing the market to determine whether those conditions are reasonable.

5.4 Will the film and recording industries be severely damaged?

60. There can be little doubt that the film and recording industries, like all copyright owners, are harmed by the unlawful sharing of copyright material on the Internet. Apple, being a software company, is subject to the same problems which afflict other copyright owners, and loses

millions of dollars every year to copyright piracy. Apple understands the problem of copyright piracy.

61. It is possible that the film and record industry will lose revenue from the introduction of a defence in the *Copyright Act* allowing private and domestic copying of properly obtained copyright material. In truth, however, it is improbable that families will purchase multiple copies of a CD or a DVD, and with the ready availability of copying technologies on every personal computer for years, this horse has probably already bolted.

62. Apple believes that by making readily and cheaply available legitimate digital downloads the film and recording industries can stem the tide of illegal filesharing. As mentioned above, it is Apple's experience that purchasers of Apple computers and iPods are generally concerned to do what is right, and to comply with the law, but it would appear that many will not do so if they regard the law as absurd and artificial. It is time to allow them to do so. Whilst it is important to impose and police speed limits, to prohibit the use of motor cars at speeds greater than 20 km/h invites disregard.

63. Already, information available from the recording industry both in Australia and internationally indicates that the availability of legitimate downloads increases revenues to the recording industries.

64. In a statement made by Mr John Kennedy, Chairman and CEO of the International Federation of the Phonographic Industry (IFPI) on the IFPI website,[23] Mr Kennedy states in respect of record industry worldwide sales:

> *As the IFPI Digital Music Report 2005 report testifies, 2004 has seen an amazing change in the digital music landscape. And the market will grow apace in 2005. Here are some key highlights from this report:*
>
> - *Record companies have digitised and licensed over a million songs. In 2004 the available catalogue on the biggest online services doubled from around 500,000 to around one million tracks*
> - *The number of online services where consumers can buy music has increased four-fold to more than 230 worldwide – and over 150 of those are in Europe*
> - *Services like iTunes and Napster have become household names internationally – but local repertoire services in many countries are also developing fast*
> - *The digital download market is growing geometrically – in 2004 downloaded tracks rose more than ten-fold to over 200 million in the US, UK and Germany combined*
> - *Record companies have seen their first year of significant revenues from digital sales – from practically zero to several hundred million dollars. Jupiter thinks this will double in 2005*
> - *Digital sales could rise to as much as 25% of total sales in five years, according to some record companies and third party analysts*
> - *Consumer attitudes are changing – the latest IFPI European survey shows increasing awareness of, use of, and intentions to use, legal download services*

[23] See http://www.ifpi.org/site-content/online/intro.html

> *Legitimate online music services have done what some thought only a year ago was unthinkable: they have proved that they can take on the unauthorised free alternatives. Online music today offers unbelievable value for the consumer: for 99 cents in Europe – the price of a loaf of bread, a bus fare, a can of Coke – you can download a piece of music that will stay with you for life. For those who claim they took music for free because there was no digital legal alternative, there is no longer any excuse.*
>
> *....*
>
> *I am confident that in twelve months' time the digital music market will have grown very significantly around the world. A sector that currently accounts for a very small percentage of the industry's revenues is poised for take-off in the next few years. At long last the threat has become the opportunity.*

65. In similar vein, the Australian Record Industry Association (ARIA) on its website states:[24]

> *Despite the reversals in the industry's fortunes that occurred in 2004, the industry remains optimistic about the coming year.*
>
> *In 2004, there was a ten-fold increase in the global market for legitimate digital music downloads – a trend that the industry anticipates will start to be replicated locally during 2005. Whilst the online services currently operating in Australia have yet to break through in the same way that they have overseas, the industry is encouraged by the overseas results during 2004 and looks forward to similar success locally during 2005.*

66. The comments of ARIA are particularly significant in that the recording industry has not agreed, as yet, to the launch of iTunes, the largest source of legitimate digital music downloads in the world, for Australia.

67. In each of the statements reported above, there are important warnings regarding the continuing efforts of copyright industry to stem internet piracy, the importance of which Apple wholeheartedly endorses. However, it is submitted that the amendments to Australian copyright law proposed by this Submission will have no effect whatsoever on record sales, nor in the fight against online copyright infringement. The proposed amendments, by enhancing the utility of recorded music legitimately obtained by consumers, will increase the market for both retail and online sales.

6. Technological Protection Measures

68. Similar to the issue of the relationship between copyright law and contract is the issue of the relationship between copyright law and technological protection measures ("**TPM**"), including digital rights management ("**DRM**"). TPMs and DRM are being increasingly used by software and content providers to manage and control the use that may be made of the software and content they provide. The more than 1.5 million licensed tracks that Apple makes available via the iTunes Music Store are made available in Apple's proprietary DRM format only. Through the use of DRM, Apple is able to offer purchasers of music from the iTunes Music Store the ability to play a purchased song on 5 separate computers, for example. These limitations allow retailers like Apple to limit a purchaser's ability to distribute content to other users who have not paid for it while still allowing users a broad range of rights.

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[24] See http://www.aria.com.au/pages/AustralianRecordSales2004FullYearResults.htm

69. DRM, along with any other form of technological protection measure, is a reasonable mechanism through which a copyright owner can attempt to prevent copying of their intellectual property. The use of this technology forms part of a contract. Users who purchase songs from iTunes do so with the knowledge of the limitations on copying those songs. The acceptance of those limitations, and the technology that supports them, is a condition of the contract under which the music is purchased. Like any other contractual condition, the use of DRM or any other technological protection measure, should not be limited by copyright law. It is the right of the parties to a contract to determine its terms. If a party is not satisfied with those terms, they can choose not to enter into that contract, and thus, not acquire that content from that source.

70. Such limitations are vitally important to protect the interests of the copyright owners in receiving a fair return for their material. For reasons made clear above, Apple sees no contradiction between the imposition of technological protection measures and the proposed rights of fair use and private and domestic copying.

71. It is because of their importance that Apple submits that the provisions of the *Copyright Act* relating to technological protection measures should be clear. At present, they are not.

72. Section 116A and the definitions of "technological protection measure", "circumvention device" and circumvention service" were introduced by the *Copyright Amendment (Digital Agenda) Act 2000* ("**Digital Agenda Act**") with the intention of protecting copyright owners who use such "technological protection measures" to prevent counterfeiting activities from the supply by others of means to bypass or "circumvent" such protective measures.

73. At the outset, it should be noted that history teaches us that no technological protection measure has ever achieved that purpose for very long. Nonetheless, many suppliers of digital technology and content use them.

74. It should further be noted that the forms of such measures vary enormously. They can be "hard" (that is, some piece of equipment, such as that which was the subject of the proceedings in *Autodesk* v *Dyason*[25]) or soft, that is they can be internal or external to the software or content being protected, and they can work by copy prevention, copy discouragement, disablement or encryption ("scrambling"). If one is serious about this type of protection, it will always be very difficult to describe a technological protection measure, and drafting should try not to be as prescriptive as the drafting in the Digital Agenda Act, for some reason, tried to be.

75. At the time of its introduction, the definition of "technological protection measure" was criticized in that:

(a) it introduced a concept of "intention" with respect to the technological protection measure - the purpose of the alleged technological protection measure to be protective in a particular fashion had to be proved; and

(b) it seemed to relate only to devices which prevent access to a work by a "code or process" or which prevent the act of copying.

76. Hence, it has been observed, the amendments would not even have addressed the type of anti-piracy protection represented by the device the subject of the decisions of the High Court in *Autodesk* v *Dyason*, which one might have expected to be prominent in the minds of those drafting the legislation.

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[25] (1992) 173 CLR 1; 22 IPR 163; (1993) 25 IPR 33

77. The inadequacies of the present provisions, for the purposes of Australian legislation, became evident in the decision Sackville J of the Federal Court handed down in *Kabushiki Kaisha Sony Computer Entertainment Inc. v. Stevens*.[26] Even though overturned by the decision of the Full Bench of the Federal Court,[27] which decided to give the provisions an interpretation which went beyond what they actually said but reflected the intention of the legislators, the opportunity should now be taken to replace the definition of "technological protection measure" so as to avoid further embarrassment (let alone money thrown away in proceedings dealing with it).

78. It is respectfully submitted that the English provision, s. 296 of the *Copyright Designs and Patents Act 1988* ("**CDPA**") is to be preferred. Again showing admirable simplicity and clarity of expression, s. 296 provides a copyright owner with a right of action against a person who knowingly, inter alia, makes, imports, sells, or lets for hire, or advertises for sale or hire any device or means specifically designed or adapted to circumvent copy-protection. The section extends its protection to a person issuing copies of a copyright work to the public, giving them the same rights as a copyright owner has in respect of infringement. Section 296(4) of the CDPA reads as follows:

> *References in this section to copy-protection include any device or means intended to prevent or restrict copying of a work or to impair the quality of copies made.*

79. This drafting, furthermore, has the benefit of the decision in *Kabushiki Kaisha Sony Computer Entertainment Inc. & Others v. Edmunds (t/a Channel Technology*),[28] in which Sony had claimed that an importer of a "mod chip" known as "the messiah" had contravened s. 296 of the CPDA. Based on the facts of the UK case, it seems that this chip had the same effect as the "mod chips" that were the subject of the Australian proceedings, that is to enable CD-ROMs that are unauthorised and/or from other regional zones to play on the PlayStation 2 console sold in the UK. As a result of the clarity of the English definitions, it was not disputed that the "Boot ROM" system and the embedded codes put into genuine CD ROMs and DVDs by Sony constituted the type of copy-protection envisaged by s. 296 of the CPDA, the copying intended to be prevented being the loading of the game into the computer.

80. The arguments made by the defendant in the UK proceedings involved the proper construction of s. 296(2) of the CDPA which provides that the section applies to "any device or means specifically designed or adapted to circumvent the form of copy-protection employed."

81. The defendant argued that the device had other uses than those which supported piracy, such as allowing people to play legitimate back-up copies or games imported from outside Europe. The defendant submitted that for this reason the messiah did not fall within the ambit of s. 296, which, it was claimed, only applied to devices designed specifically to permit piracy. Sony responded that it did not matter whether or not there were, or were potentially, uses which did not involve any infringement of copyright so long as there were uses which would involve infringement of copyright and the defendant knew of these uses.

82. The English High Court (Jacob J) rejected the defendant's argument, and found for Sony. It did not matter that, once circumvented, the machine may read non-infringing material. In the court's view, the moment it was conceded that Sony's embedded codes were devices or means intended to prevent or restrict copying of a work within s. 296(4), it followed that the messiah was designed to circumvent those codes. Having reached this conclusion Jacob J

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[26] [2002] FCA 906 (26 July 2002)

[27] [2003] FCAFC 157 (30 July 2003)

[28] [2002] EWHC 45(Ch)

found that it was clear that the messiah chip was likely to be used on a considerable scale for reading pirate works.

83. It is respectfully submitted therefore that the current provisions should be replaced with the simpler provisions of s. 296 of the CDPA.

84. It is further submitted, however, that the new provision should make clear that a circumvention device or service is not a device which has the purpose of enabling the making of a useable copy in circumstances permitted by the Act (such as backup, private or domestic use, fair use and so on).

7. Responses to Specific Questions raised by Issues Paper

85. Apple responds as follows to the ten issues identified for consideration in the discussion paper:

The Government seeks your view on the operation of the exceptions in the *Copyright Act* (particularly the fair dealing exceptions in ss 40-43(2) and ss103A-103C) in providing a balance between the interests of copyright owners and copyright users.

Apple submits that the operation of the exceptions that currently exist in the *Copyright Act* are inadequate in providing a balance between the interests of copyright owners and copyright users. For the reasons set out in greater detail above, these exceptions are outdated and overly narrow in light of today's technology, resulting in many common everyday acts of domestic copying falling outside of these exceptions and thus constituting infringements of copyright..

The Government seeks your view on whether the *Copyright Act* should be amended to consolidate the fair dealing exceptions on the model recommended by the CLRC?

Apple supports the recommendation of the Copyright Law Review Committee in its Report *Simplification of the Copyright Act 1968, Part 1: Exceptions to the Exclusive Rights of Copyright Owners* (September 1998), with reservations. For the reasons set forth in greater detail above, whilst the adoption of such a defence will deal with a number of problems as identified by that Report and to which the CLRC's review was directed, it is unlikely, in Apple's respectful submission, to deal with the disconnect that exists under current law between the law on the books and the law in practice with respect to private domestic copying. As submitted above, Apple believes that a further specific exception with respect to copying for private and domestic use needs to be created in order to supplement the exceptions recommended by the CLRC..

The Government seeks your view on whether the *Copyright Act* should be amended to replace the present fair dealing exceptions with a model that resembles the open-ended fair use exception in United States copyright law.

Apple agrees that an open-ended fair use exception should be created but only to the extent that this exception is proposed by the CLRC. As set forth, this exception should be supplemented with a further specific exception with respect to copying for private and domestic use.

The Government seeks your view on whether the *Copyright Act* should be amended to include a specific exception for time-shifting television and radio broadcasts – including underlying works, films, sound recordings and live performances - and if so, under what conditions.

Apple submits that rather than a specific amendment to the *Copyright Act* focussing on time shifting television and radio broadcasts, a broader exception dealing with home use of the kind discussed in Apple's submission above needs to be created. Such an amendment would cover both time shifting of television and radio broadcasts, while being technology and use neutral, thus providing flexibility for new technology.

The Government seeks your view on whether the *Copyright Act* should be amended to include a specific exception for format-shifting, and if so, for what materials and under what conditions.

Apple submits that rather than a specific amendment to the *Copyright Act* focussing on format shifting, a broader exception dealing with home use of the kind discussed in Apple's submission above needs to be created. Such an amendment would cover both time shifting of television and radio broadcasts, while being technology and use neutral, thus providing flexibility for new technology.

The Government seeks your view on whether the *Copyright Act* should be amended to include a specific exception for making back-up copies of copyright material other than computer programs, and if so, for what materials and under what conditions.

Apple submits that for the reasons set forth above the backup provisions which presently relate only to computer programs should be extended to all works and other subject matter supplied in a digital form.

The Government seeks your view on whether the *Copyright Act* should be amended to include a statutory licence for private copying, and if so, for what materials and under what circumstances

Apple submits that the *Copyright Act* should not be amended to include a statutory defence in respect of private and domestic copying. For the reasons set out in its submission, Apple supports only a limited exception with respect to copying for private and domestic use, for which a statutory defence is inappropriate.

The Government seeks your view on whether the *Copyright Act* should be amended to include other specific exceptions or statutory licences, and if so, under what conditions.

As set out above, Apple supports amending the *Copyright Act* to include a specific exception with respect to copying for private and domestic use and to extend the backup provisions which presently relate only to computer programs to all works and other subject matter supplied in a digital form. Other than these exceptions and the implementation of the recommendations of the CLRC, Apple does not believe that any further modifications need to be made to the *Copyright Act*.

The Government seeks your view on other options for implementing reform, and the costs and benefits of those options.

Apple submits that no other options other than those discussed above in the body of its submission are necessary for implementing reform.

The Government seeks your view on any other matters arising out of this Issues Paper.

Apple makes no submissions on any matters arising out of this issues paper other than those discussed above in the body of its submission.

APPENDIX B

Appendix B: Copyright Amendment Bill 2006: Exceptions and other Digital Agenda review measures

Present law	Proposed amendment	Comments	Suggested Amendments
Sections 111 and 248A – Recordings of broadcasts for private and domestic use The *Copyright Act* presently provides that it is not an infringment of the broadcaster's copyright *in a broadcast* to make a recording of the broadcast, or a copy, "for the private and domestic use of the person by whom it is made." The problem with this is that a broadcast usually includes other copyright material, such as a film, sound recording, literary work etc., so a typical VCR, TiVo or hard disk recording is an infringement of the copyright in this other material, except in the case of some live broadcasts (with no ads!). There is no general fair use exception under Australian law.	The Bill's proposed exception to infringement on the one hand broadens this exception to *all* copyright material included in the broadcast, but for some reason narrows it at the same time, by requiring: 1. that the recording must be made "in domestic premises"; 2. that the reason for the recording is for "watching or listening to the material broadcast at a time more convenient". A footnote in the Bill also states that making a copy of the recording "may" infringe the copyright in the material recorded, but with no explanation.	The expansion is good, but these restrictions seem unnecessary, and create some absurd situations. For example: 1. to make a copy at work in order to watch later at home; 2. to make a copy while watching the broadcast; and 3. possibly, to record a television broadcast to the hard drive of a computer, edit it and save it to DVD will continue to be illegal. No doubt many other examples of quite everyday and unthreatening consumer behaviour can be given. There is no good policy reason for this arbitrary distinction will remain infringing activities, even though many consumers would not see any distinction.	Remove requirements that the broadcast must be made "in domestic premises" and in order be watched or listened to "at a time more convenient" and replace it with "another time" in order to allow people to watch/listen to the broadcast while recording it.

Section 43C – Private copies of literary works The *Copyright Act* presently does not allow the copying of any literary works for private and domestic use. There are extensive provisions allowing for photocopying in research, education and for those with disabilities, including statutory royalty schemes, but we are not concerned with those here. There is no general fair use exception under Australian law.	The Bill proposes to create an exception to infringement by making a *single* copy of "a book, newspaper or periodical publication" made "in a form different" from the original by the owner of the copy for private and domestic use "instead of the work as contained in the book, newspaper or periodical publication."	Of course this is an improvement. But why are recipes, letters, manuals, pamphlets, poems that are not collected in a "book" and all the other things of which ordinary people want to make a copy not included? Also, the Bill requires reproductions of works to be made in a "form" different from the original. The meaning of "form" is not defined and there does not seem to be any reason why the form of these works would need to be different from the original. Also, why "for use instead of" – why cannot the two forms co-exist – one for reading at home, one in the train, for example? The provisions relating to "temporary copies" are complex, and unnecessary if any copies are permitted for a private or domestic use.	Amend subsection (1) as follows: (1) This section applies if: (a) the owner of a copy of a literary work (other than a computer program), not being an infringing copy,(the ***original copy***) makes from it a reproduction (the ***main copy***); and (b) the main copy is made for his or her private and domestic use. Delete the remainder of sub-section (1). In subsection (6), replace "book, newspaper or periodical publication" with "original copy". Delete sub-section (7).

Section 43J – Private copies of artistic works The *Copyright Act* presently does not allow the copying of any artistic works for private and domestic use. There are certain exceptions in respect of photocopying and photographing artistic works in public places. There is no general fair use exception under Australian law.	The Bill proposes to create an exception to infringement by making a *single* copy of photograph (only!) made "in electronic form" from the original by the owner of the copy for private and domestic use "instead of the original photograph."	Again, an improvement, but why so limited? Why, again, could not this exception apply to cartoons, drawings and other artistic works? Also, the Bill requires reproductions of works to be made in an "electronic form". The meaning of "electronic form" is not defined and there does not seem to be any reason why the form of these works would need to be different from the original. Also, why "use instead of the original" – why cannot the two forms co-exist – one in the book at home, one as a mobile 'phone wallpaper or computer screensaver? The provisions relating to "temporary copies" are complex, and unnecessary if any copies are permitted for a private or domestic use.	Amend subsection (1) as follows: (1) This section applies if the owner of a copy of an artistic work, not being an infringing copy, (the ***original copy***) makes a reproduction (the ***main copy***) of it for his or her private and domestic use. Delete the remainder of sub-section (1). Amend subsection (2) as follows: (2) The making of the main copy is not an infringement of copyright: (a) in the artistic work; or (b) in a work, or published edition of a work, included in the original copy. In subsection (6), replace "photograph" with "copy". Delete sub-section (7).

109A – Private copies of sound recordings The *Copyright Act* presently does not allow the copying of any sound recordings for private and domestic use. There is no general fair use exception under Australian law.	The Bill proposes to create an exception to infringement in respect of the copying of sound recordings to allow the owner of a record (not being records made by "downloading over the internet a digital recording of a radio broadcast or similar program" and not being an illegal copy in the first place) to make a copy for his or her private and domestic use, subject to a number of conditions, including that: • in making the copy the user must change the "format" of the sound recording; • any further 'main copy' must be in a different format; and • at the time of making the copy, the user must not have made a previous copy.	Again, a well-intentioned change – but is it completely useless? The process involved in copying a CD onto an iPod, for example, requires that a person make two copies of a sound recording. A person puts a CD into a computer and, using iTunes, the music from the CD is copied to the computer hard drive as MP3 files and from the MP3 files the music can then be copied to the iPod. Although the Bill allows for the making of a "temporary copy as a necessary part of the technical process of making the main copy", under the Bill, this copy must be destroyed "at the first practicable time during or after making the main copy". This prohibits a person from keeping a copy made to a hard drive when "shifting" music to an iPod, and prohibits a person from playing a copy of a sound recording off his or her hard drive if it has been copied in this way (although in practice, people will often play music directly off the hard drive in this way). Further, downloading music onto an iPod can require that a person	The unnecessary complexities of this proposed provision are easily removed by deleting subsections (1)(b), (d) and (e) and the final paragraph of subsection (1), as well as subsection (7). In addition, the words "instead of the record" should be deleted from subsection (1)(a). After these amendments, the new s. 109A would be follows: **109A Copying sound recording in different format for private use** (1) This section applies if: (a) the owner of a record embodying a sound recording makes a copy (the ***main copy***) of the sound recording for his or her private and domestic use; and (b) the record is not an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording. (2) The making of the main copy is not an infringement of copyright in the sound recording embodied in the record or in a literary, dramatic or musical work or other subject-matter included in the

		keep both the hard copy of a song on his or her computer and the copy on his or her iPod, and if the "temporary" copy on the hard drive is destroyed, the next time the person plugs the iPod into the computer, the song will be deleted from the iPod. There is a further problem with respect to iPods as the Bill requires that the 'main copy' be made from the original sound recording, with the result that even if a temporary copy of a sound recording on a hard drive is deleted, the main copy will have been made from an MP3 file on the hard drive of a computer and not from the main copy, therefore that copy could not benefit from the exception. The Bill exception also proposes that the exception not apply to sound recordings made by "downloading over the internet a digital recording of a radio broadcast or similar program". Whilst the contents of a podcast are licensed from the particular broadcaster (it is not clear what a "similar program" means!), and so not problematic, it is not clear what purpose this odd exception has. What could be wrong with a private	sound recording. *Dealing with main copy may make it an infringing copy* (3) Subsection (2) is taken never to have applied if the main copy is: (a) sold; or (b)let for hire; or (c)by way of trade offered or exposed for sale or hire; or (d)distributed for the purpose of trade or otherwise. Note: If the main copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the main copy but also by the dealing with the main copy. (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the main copy by the lender to a member of the lender's family or household for the member's private and domestic use. *Copying main copy may infringe copyright* (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purposes of working out whether this section applies again in relation to the making of another copy of the sound recording from the main copy.

		or domestic copy of a podcast? Does it suggest that licensed downloads of sound recordings other than radio broadcasts "or similar programs" could have the benefit of the exception, despite any contractual provisions that may be attached to the download? Finally, whilst the reference to a change of "format" has a certain popular appeal, it is without any clear meaning. Of course, it includes a shift from Audio Format to MP3 format, but does it include a shift from one hard drive format to another? What useful purpose does the reference to "format" really have?	*Disposal of record may make the main copy an infringing copy* (6) Subsection (2) is taken never to have applied if the owner of the record disposes of it to another person.

110AA – Private copies of films The *Copyright Act* presently does not allow the copying of any film for private and domestic use. There is no general fair use exception under Australian law.	The Bill proposes to create a limited exception for the copying of cinematograph films. However, the Bill only refers to videotapes, providing that a copy can only be made from a videotape into electronic form, as well as including the other unnecessary complexities referred to above.	This excludes DVD technology and other technologies including video clips on CD's. It may be that this restriction was put in place to protect the interests of copyright owners in the sale of DVDs - although, given any restriction to a private and domestic purpose, the copyright owners surely are not harmed as one would not expect a household to buy 2 copies of a film of DVD. If so, this restriction overlooks the large and increasing number of other formats in which video material is supplied, including in video clips on CDs. Son any view, such a technologically biased restriction does not make sense. Again, it is not an unreasonable expectation of consumers that they should be entitled to make copies of video-clips included on CDs (for example) or downloaded legitimately (under licence) to view on their iPods. Again, the proposed section contains unnecessary complexities to do with intermediate copies.	In subsection (1)(a), replace the words "videotape embodying a cinematograph film" with “a copy of a cinematograph film (the ***original copy***)”. In subsection (1)(b), replace “videotape itself” with “original copy”. Delete subsection (1)(c) and the remainder of subsection (1) and all of subsection (6).