

# **Access** **to knowledge** **for consumers**

Reports of Campaigns and Research 2008–2010



CONSUMERS INTERNATIONAL  
KUALA LUMPUR 2010

## **About Consumers International**

Consumers International (CI) is the only independent global campaigning voice for consumers. With over 220 member organisations in 115 countries, we are building a powerful international consumer movement to help protect and empower consumers everywhere. For more information, visit [www.consumersinternational.org](http://www.consumersinternational.org).

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**Reports of Campaigns and Research 2008–2010**

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# Contents

|   |           |
|---|-----------|
| <b>List of Tables</b>                                   | <b>ix</b> |
| <b>List of Figures</b>                                  | <b>xi</b> |
| <b>Introduction</b>                                     | <b>1</b>  |
| <b>I Global consumer survey on A2K access barriers</b>  | <b>9</b>  |
| <b>1 First phase: planning and interviews</b>           | <b>11</b> |
| <i>Dr Jeremy Malcolm</i>                                |           |
| 1.1 Previous research . . . . .                         | 12        |
| 1.2 Classification of access barriers . . . . .         | 13        |
| 1.3 Scope . . . . .                                     | 14        |
| 1.4 Methodology . . . . .                               | 15        |
| 1.5 Preparation of the first phase interviews . . . . . | 17        |
| 1.6 Analysing the interview data . . . . .              | 19        |
| 1.7 Highlights of the interview results . . . . .       | 32        |
| 1.8 Categorising the access barriers . . . . .          | 33        |
| 1.9 Conclusion . . . . .                                | 34        |
| <b>2 Second phase: global questionnaire</b>             | <b>37</b> |
| <i>Dr Karuthan Chinna and Dr Jeremy Malcolm</i>         |           |
| 2.1 Survey development . . . . .                        | 38        |
| 2.2 Refinement of the pilot survey . . . . .            | 39        |
| 2.3 Final form of the questionnaire . . . . .           | 40        |

|   |  |            |
|---|--|------------|
| 2.4   | Administration of the questionnaire . . . . .                                      | 41         |
| 2.5   | Results . . . . .  | 43         |
| 2.6   | Conclusions . . . . .  | 53         |
| <b>II National research on copyright flexibilities</b>  |  | <b>59</b>  |
| <b>3</b>  | <b>Shifting sands?</b>   | <b>61</b>  |
|   | <i>David Vaile, Cyberspace Law and Policy Centre</i>                               |            |
| 3.1   | Introduction . . . . .   | 62         |
| 3.2   | Background . . . . .   | 66         |
| 3.3   | Hypotheses . . . . .   | 71         |
| 3.4   | Survey of consumer views . . . . .   | 77         |
| 3.5   | Survey results . . . . .   | 78         |
| 3.6   | Commentary from experts and stakeholders . . . . .                                 | 100        |
| 3.7   | Conclusions and recommendations . . . . .  | 105        |
| 3.8   | References . . . . .   | 109        |
| 3.9   | Appendices . . . . .   | 119        |
| <b>4</b>  | <b>Fair Use in Israel</b>  | <b>141</b> |
|   | <i>Dr Nimrod Kozlovski, Jonathan Klinger, Uria Yarkoni and Nati Davidi</i>         |            |
| 4.1   | Introduction . . . . .   | 141        |
| 4.2   | Copyright In Israel: Introduction . . . . .  | 145        |
| 4.3   | Israeli Innovation Industry, a case for fair use . . . . .                         | 176        |
| 4.4   | Interviews with market participants . . . . .                                      | 185        |
| 4.5   | Conclusions . . . . .  | 194        |
| <b>III National advocacy and campaigning activities</b> |  | <b>207</b> |
| <b>5</b>  | <b>A brief on important activities on access to knowledge</b>                      | <b>209</b> |
|   | <i>Guilherme Varella, IDEC, Brazil</i>   |            |
| <b>6</b>  | <b>Excessive pricing of educational materials in Cameroon</b>                      | <b>215</b> |
|   | <i>Dieunedort Wandji, Paul Geremie Bکیدik and Charles For-gang, RACE, Cameroon</i> |            |
| 6.1   | Overview . . . . .   | 215        |
| 6.2   | The Survey . . . . .   | 217        |
| 6.3   | Key findings . . . . .   | 217        |
| 6.4   | Activities . . . . .   | 219        |

|           |  |            |
|-----------|--|------------|
| 6.5       | Main Challenges . . . . .  | 220        |
| 6.6       | Outcomes and Impact . . . . .  | 221        |
| 6.7       | Perspectives . . . . .   | 222        |
| <b>7</b>  | <b>A2K advocacy campaign for librarians</b>                                      | <b>225</b> |
|           | <i>Nirmala Desikan, CAI, India</i>   |            |
| 7.1       | Access Barriers – Problems and Solutions . . . . .                               | 226        |
| 7.2       | IPR and Copyright Law . . . . .  | 227        |
| 7.3       | Libraries and Librarians . . . . .   | 230        |
| <b>8</b>  | <b>Access to knowledge through permissive copyright law and policy</b>           | <b>233</b> |
|           | <i>Professor Felicia Nwanne Monye, Consumer Awareness Organisation, Nigeria</i>  |            |
| 8.1       | Abbreviations and glossary . . . . .   | 234        |
| 8.2       | Introduction . . . . .   | 234        |
| 8.3       | Activities . . . . .   | 237        |
| <b>9</b>  | <b>1978... what were YOU doing?</b>  | <b>241</b> |
|           | <i>The African Commons Project and the National Consumer Forum, South Africa</i> |            |
| 9.1       | About the campaign . . . . .   | 241        |
| 9.2       | The Activities . . . . .   | 242        |
| 9.3       | The outcomes . . . . .   | 243        |
| 9.4       | Strengths and weaknesses . . . . .   | 247        |
| 9.5       | Lessons learned . . . . .  | 248        |
| <b>10</b> | <b>Reducing the retail prices of educational books in Zambia</b>                 | <b>251</b> |
|           | <i>Zambia Consumer Association (ZACA)</i>  |            |
| 10.1      | Background . . . . .   | 251        |
| 10.2      | Activities . . . . .   | 252        |
| 10.3      | Conclusion . . . . .   | 253        |
| <b>IV</b> | <b>Papers from 2010 CI Global Meeting on A2K</b>                                 | <b>255</b> |
| <b>11</b> | <b>Rôle du système éducatif dans l'accès à la connaissance</b>                   | <b>257</b> |
|           | <i>Najiba El Amrani El Idrissi et Mohammed Abdou Ammor, ATLAS-SAÏS, Maroc</i>    |            |
| 11.1      | Introduction . . . . .   | 258        |

|           |  |            |
|-----------|--|------------|
| 11.2      | Politique d'intégration des TIC dans l'enseignement au Maroc . . . . . | 259        |
| 11.3      | Alternatives aux contraintes de la Propriété Intellectuelle . . . . .  | 264        |
| 11.4      | Conclusion . . . . .   | 267        |
| <b>12</b> | <b>Mapping A2K Advocacy</b>  | <b>271</b> |
|           | <i>Eddan Katz, Electronic Frontier Foundation</i>                      |            |
| 12.1      | The Origins of A2K . . . . .   | 273        |
| 12.2      | Mapping Out A2K . . . . .  | 278        |
| <b>13</b> | <b>Libraries and Access to Knowledge – Partners with Consumers</b>     | <b>297</b> |
|           | <i>Mariana Harjevschi, eIFL IP, country coordinator</i>                |            |
| 13.1      | Introduction . . . . .   | 297        |
| 13.2      | About eIFL.net and eIFL-IP . . . . .                                   | 297        |
| 13.3      | A2K, Copyright and Libraries . . . . .                                 | 298        |
| 13.4      | Advocacy for Fair Copyright Laws: the role of libraries . . . . .      | 299        |
| 13.5      | Partnering consumer organisations and libraries . . . . .              | 302        |
| 13.6      | eIFL-IP Tools and Resources . . . . .                                  | 303        |
| 13.7      | Conclusions . . . . .  | 304        |
| <b>14</b> | <b>IDEC campaign and Brazilian reform of copyright law</b>             | <b>311</b> |
|           | <i>Guilherme Varella, IDEC, Brazil</i>                                 |            |
| 14.1      | Introduction – IDEC activity in copyright . . . . .                    | 311        |
| 14.2      | The context . . . . .  | 312        |
| 14.3      | The reform of copyright law in Brazil . . . . .                        | 314        |
| 14.4      | The range of discussion . . . . .                                      | 316        |
| 14.5      | Main points for the consumer . . . . .                                 | 318        |
| 14.6      | Copyright and education . . . . .                                      | 319        |
| 14.7      | The consumer and the copyright law . . . . .                           | 319        |
|           | <b>Acknowledgements</b>  | <b>321</b> |

## **Part II**

# **National research on copyright flexibilities**

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# Shifting sands? The moderate impact of Australia's 2006 copyright exceptions

*David Vaile, Cyberspace Law and Policy Centre\**

## Abstract

The 2006 “time-shifting” and “format-shifting” amendments to Australia’s Copyright Act 1968 introduced new exceptions for personal use of various copyright items, belatedly legalising popular uses of digital devices like music players and personal video recorders which had previously resulted in mass infringements of the prohibition on unauthorised reproduction. This report explores sources of evidence (including a substantial online consumer survey, interviews with experts, and surveys of literature and data sources) about their effects, if any, on consumer and industry attitudes and behaviour, and implications for local and international policy-makers. There appears to have been very limited if any direct impact (as was generally expected for changes merely legalising existing practises), with many consumers not aware of the relevant

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\* UNSW Law Faculty, Sydney, Australia. This research was generously supported by Consumers International and CHOICE, formerly Australian Consumers Association, and gratefully acknowledges assistance from Jeremy Malcolm, Catherine Bond, Gordon Renouf, the online survey provider AusPoll, interns and staff of Cyberspace Law and Policy Centre including Sophia Christou, Amanda Belz, Mina Aresh, Stephen Matulewicz, Stephanie Cuevas, Nijat Kassoumov and Stephen Matulewicz, and the 1500 consumers and tens of experts who responded to our invitation to participate in survey and interviews. It grew out of the Unlocking IP ARC Linkage project led by Professor Graham Greenleaf.



legal position either before or after the amendments. There was some evidence supporting the view that they encouraged a greater respect for copyright law generally, and more legal and less illegal behaviour; and not supporting fears about an imagined “floodgate” effect encouraging consumers to think that they could now commit other online infringements with impunity.

## **3.1 Introduction**

### **3.1.1 Consumers International – the Access to Knowledge (A2K) project**

Consumers International (CI) is funded by a grant from the Ford Foundation to develop a Global Consumer Dialogue and Public Education Network on Access to Knowledge (A2K) issues. The goal of this grant is to lend greater support to consumer organisations’ voices worldwide, in trade negotiations and other fora, where consumer interests rarely receive due attention when developing and expanding intellectual property (IP) regimes.

The Global Consumer Dialogue aims to identify problems consumers face in accessing and using copyright protected materials, highlighting access barriers that require further investigation while responding to the legitimate needs and expectations of artists and content creators. The objective of the A2K project is to serve as a catalyst for policy change, encouraging governments and international organisations to develop more balanced IP regimes. This balance will take into account the public interest as well as the interests of rights holders, businesses and other stakeholders.

To this end, CI’s strategies include conducting targeted, impartial, evidence-based research on IP and A2K issues at the national level, in a number of jurisdictions. The Cyberspace Law and Policy Centre and CHOICE (formerly known as the Australian Consumers Association) have partnered with CI to conduct this Australian-focused project *Copyright Limitations and Exceptions in Australia: Effects of the 2006 time-shifting and format-shifting amendments on consumers and copyright industries*.

### **3.1.2 “Copyright Limitations and Exceptions in Australia”: Outline of this project**

Taking as its broad concern the effects of new limitations and exceptions to copyright law at a national level, this project focuses on the 2006

amendments to the *Copyright Act* 1968, the main statute implementing copyright law in Australia.<sup>2</sup>

The introduction of specific provisions (creating new exceptions to behaviour infringing copyright) to allow for “time-shifting”<sup>3</sup> and “format-shifting”<sup>4</sup> of sound and video content in certain circumstances is the starting point for this research. It explores survey evidence and expert observations about the impact, if any, of these changes on consumer attitudes and awareness, and also reported respect or lack thereof for the most relevant provisions of copyright law (these changes introduced in 2006, and the prohibition of unauthorised file sharing and copying).

The broad purpose of this research is to investigate whether there is evidence of any negative or positive economic impacts which can be reasonably directly ascribed to these changes, affecting the interests of copyright industries and rights holders. Further, the project was interested to identify evidence, if it exists, which may help to determine whether any such losses, if they exist, outweighed the presumed welfare benefits that accrue to consumers from the changes.

The project investigated consumer experiences of the amendments, including knowledge of and responses to the changes, and whether consumers’ attitudes towards both copyright industries and copyright law generally have been affected by the changes. The project also sought informed observations about industry attitudes to the 2006 amendments, the experiences of copyright industries in the wake of the amendments, and whether these experiences have influenced industry attitudes towards further potential copyright reforms that might benefit consumers.

One goal of this project, in line with CI’s A2K project, is to draw upon the findings of this research in recommending whether copyright limitations such as the 2006 amendments can be used as a model for adoption in other jurisdictions either with an expectation that all stakeholders will

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<sup>2</sup> *Copyright Amendment Act 2006* (Cth) No. 158 (hereafter “the amending Act”), amending *Copyright Act 1968* (Cth) (hereafter “the Copyright Act”) [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ca1968133/](http://www.austlii.edu.au/au/legis/cth/consol_act/ca1968133/). See below in Appendix 3.9.3 for the text of the amendments.

<sup>3</sup> See for example s111 Copyright Act 1968 (Cth), “Recording broadcasts for replaying at a more convenient time,” introduced by Part 1 of Schedule 6, “Exceptions to infringement of copyright” to the Copyright Amendment Act 2006 (Cth), [http://www.austlii.edu.au/au/legis/cth/num\\_act/caa2006213/sch6.html](http://www.austlii.edu.au/au/legis/cth/num_act/caa2006213/sch6.html).

<sup>4</sup> See the changes introduced by Part 2 of Schedule 6 of the amending Act, s43C “Reproducing works in books, newspapers and periodical publications in different form for private use”; 47J “Reproducing photograph in different format for private use”; s109A “Copying sound recordings for private and domestic use” and s110AA “Copying cinematograph film in different format for private use.” For our purposes ss. 43C and 47J are of lesser interest.

benefit, or if there are risks, that these are in the scheme of things reasonable and not excessive.

#### 3.1.3 Scope

This Report presents findings and conclusions drawn from survey research undertaken for the project, as well as expert observations and our preliminary recommendations based upon these findings (sections 3.6 and 3.7).

A number of components fed into the preparation of this report:

- An online survey of 1,500 consumers conducted by CHOICE's pollster, with survey questions, coding and further analysis from Cyberspace Law and Policy Centre. (Sections 3.4 and 3.5)
- Interviews with experts from industry, institutional and consumer stakeholder groups. (Section 3.6)
- A review of publicly-available copyright industry data and reports, from Australia and elsewhere, for comparative purposes; and a survey of scholarly commentary with respect to the 2006 amendments, as well as relevant policy and law reform documents. (Section 3.8 References)

Commentary around the time of the 2006 amendments, including the Australian Government's 2005 *Issues Paper*<sup>5</sup> and submissions made by various interested groups, provides a useful starting point for concerns and issues that could be expected to arise since the amendments came into force. That discussion offered a perspective grounded in academic, legal and commercial policy issues when these changes were yet to be integrated into the day-to-day lives of consumers as newly "lawful" activities.

However, after this burst of energetic discussion, interest in the effects these changes might have upon consumers' attitudes and behaviour fell away significantly. This is despite continuing anxiety on the part of copyright industries, legal commentators and government over consumer interaction with copyright material, particularly consumer attitudes towards unauthorised uses of copyright material and appropriate public education about what is and what is not lawful use.

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<sup>5</sup> Attorney-General's Department, *Issues Paper - Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (Canberra, Australia, May 2005).

Section 3.3 sets out a series of hypotheses which the survey might support or undermine, in conjunction with other sources of data. Sections 3.4 and 3.5 offer an analysis of results from the online consumer survey carried out for this project.

The online survey described in Section 3.4 was conducted in November 2009 by CHOICE and their pollster AusPoll (who provided the core quantitative results), with the Cyberspace Law and Policy Centre providing formulating questions and structuring the survey, and analysing the qualitative results in questions 4 and 8 and the outcome overall.

The respondents were Australian residents. The survey had 1,500 respondents overall, segmented and weighted to be nationally representative of Australia's population by gender, age band and location.

(There is of course a source of bias intrinsic to an online survey, even where such demographics match the general population, as we believe they do here, namely that those who do not have online access are not polled. As such, this sample can only be taken as a guide to the online segment of the population. However, given that considerable focus was on online behaviours of respondents, the impact of this source of bias may be somewhat lessened, in that the views of those without online access would have been largely inapplicable for many of the questions.)

This survey sought to determine the level of consumer awareness of the 2006 amendments, bearing in mind the significant amount of discussion provoked by the changes within legal and copyright industry circles.

Further, the survey also sought to provide a picture of the relative impact that the amendments may subsequently have had on consumer attitudes towards their uses of copyright material, and the balance between consumers' and copyright owners' interests in the Australian copyright system more generally.

In light of the earlier debates and concerns and the relative silence on these matters in the years following commencement of the amending Act, this survey aimed to explore any evidence of actual effects upon consumer attitudes and behaviour.

This may be of interest where concerns echoing those previously debated in Australia are raised in other jurisdictions that may be considering similar exceptions in domestic copyright systems.

A broad range of literature was surveyed, including scholarly commentary, government reviews, industry reports and statistics. These are noted in Section 3.8 References.

Most legal commentary appeared around time of amendments, often in response to government reviews. There has been little commentary or discussion on these exceptions since then. There is more coverage in

industry reports and economic statistics, although these are ultimately not very helpful in addressing the hypotheses.

## 3.2 Background

### 3.2.1 Copyright developments in Australia

#### US Free Trade Agreement 2004

The *Australia-US Free Trade Agreement* of 2004,<sup>6</sup> which mostly came into force in 2005, introduced a range of IP related measures; many of its 900 or so pages dealt with intellectual property (IP), including the large Chapters 16 and 17. Extensive legislative changes were required to implement it.<sup>7</sup> Although promoted as “harmonising” Australian IP law with that of the US, these changes were largely seen as supportive of rights-holder interests, particularly the movie and music industries, and particularly on the US side (though the Motion Picture Association of America or MPAA, trading internationally as the “Motion Picture Association,” in effect participated on the Australian negotiating side as part of a broad copyright alliance). Penalties increased for many forms of unauthorised use and circumvention of technological protection measures, including that under the earlier *Copyright Amendment (Digital Agenda) Act 2000* (Cth)<sup>8</sup> that was approved in the case of *Sony v Stevens*.<sup>9</sup>

However, conspicuous by its absence was a reciprocal change implementing the US balancing concept of “Fair Use,” which while principles-based and hence potentially simple but vague in application, arguably accorded better with popular notions of fairness. So it was to some extent seen as one-sided. Pressure built for some change, especially as both the iPod and the TiVo, key US entertainment technological advances, were effectively illegal in Australia. And the then-current law also arguably retained the technical prohibition on home private copying of broadcasts, despite the apparent ubiquity of this practice.

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<sup>6</sup> *Australia-US Free Trade Agreement*, (Washington, 18 May 2004) [2005] ATS 1, entry into force: 1 January 2005, <http://www.austlii.edu.au/au/other/dfat/treaties/2005/1.html>

<sup>7</sup> See the *US Free Trade Agreement Implementation Act 2004* (Cth), <http://www.austlii.edu.au/au/legis/cth/numact/uftaia2004363/>, and *Copyright Legislation Amendment Act 2004* (Cth), [http://www.austlii.edu.au/au/legis/cth/num\\_act/claa2004325/](http://www.austlii.edu.au/au/legis/cth/num_act/claa2004325/)

<sup>8</sup> [http://www.austlii.edu.au/au/legis/cth/consol\\_act/caaa2000294/](http://www.austlii.edu.au/au/legis/cth/consol_act/caaa2000294/)

<sup>9</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58; (2005) 221 ALR 448; (2005) 79 ALJR 1850 (6 October 2005), <http://www.austlii.edu.au/au/cases/cth/HCA/2005/58.html>

## International aspects

Bilateral and Multilateral agreements have increasingly been used strategically to pursue approaches that may not be successful for an interest group in one venue or the other alone. Arguably the A-US FTA was used in this way, attempting to set in place changes in the position of users and owners of copyright works that could not have been implemented in multilateral agreements so quickly, if at all. For this reason it is worth noting the broader context.

## 2006 Amendments

By 2006 the pressure for further changes to the copyright law resulted in the *Copyright Amendment Act 2006* (Cth), which among other matters introduced some changes to the exceptions and limitations in the Copyright Act so as to legalise time- and format-shifting as narrowly defined and specific exceptions. They are the subjects of this report. See Appendix 3.9.3 for the text of these changes.

There was limited consideration of a US-style Fair Use model after some agitation, but this was rejected. Australian copyright law remains a morass of particular exemptions and defences for narrow purposes or situations, while the main law is clear that, as an Attorney General's Department officer said to this author, "users don't have rights, they have exceptions and defences to breaches of the overarching provisions favouring owners."

The two changes have been implemented in this complex environment.

### 3.2.2 Time-shifting and format-shifting debates

The literature and commentary discussing time-shifting and format-shifting exceptions in Australia<sup>10</sup> suggests that this debate occupied legal writers and policy commentators largely during the time immediately preceding and during the introduction of the 2006 amendments. Since then, discussion on the provisions appears to have cooled significantly. Neither we nor our interviewees have come across a significant body of discussion of the topic since the changes.

The material also illustrates how the issues and arguments raised by law reform and policy documents, academic commentators, and commercial stakeholders shaped the parameters of the debate surrounding

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<sup>10</sup> See Section 3.8 References, below, for some of the material investigated.

the amendments; the voices of consumers or consumer advocates were relatively little raised or heard, in part due to the lack of a critical mass of staff in the sector who are in a position to be able to engage at the level necessary to participate effectively, and in part because policy makers show limited interest in facilitating such input counter-balancing the well resourced contributions of industry and institutional stakeholders.

#### **3.2.3 Interviews**

As well as the online survey of consumers, we conducted about 20 intensive telephone interviews with some of the people who had participated in the earlier debates, both to invite their recollection of expectations and concerns at the time, and their reaction to the survey. The questions and the list of participants are in the Appendices 3.9.4 and 3.9.5 below in this report.

#### **3.2.4 Copyright industries' and commentators' concerns and expectations**

The Australian Copyright Council submissions raised some typical industry concerns about the potential harm this sort of amendment might do to the interests of copyright owners and artists.<sup>11</sup> Time shifting is seen as having potential for interference with future market for TV shows or with the ability to collect accurate ratings data.

19. A major concern is the potential for these proposals to interfere with the emerging and rapidly growing market for legitimate digital downloads of music and television programs. The Government is proposing to introduce these amendments at the very time that technological developments have enabled consumer desire for “format-shift” and “time-shift” copies to be met by the marketplace.

20. The gap in the market which the proposed amendments are apparently intended to address – the absence of a market for a “time-shift” copy or a “format shift” copy – is rapidly being filled by download services such as ninemsn

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<sup>11</sup> Australian Copyright Council, “Submission [to Senate Legal and Constitutional Affairs Committee] on Submission on Exposure Draft: *Copyright Amendment Bill 2006: Exceptions and other Digital Agenda review measures*” (October 2006), <http://www.copyright.org.au/x0605.pdf>

and BigPond. For example, ninemsn is currently offering recent episodes of McLeod's Daughters for \$1.95, and television programs are available for download from BigPond from \$1.95. Technology is already available which allows people to view digital downloads on a television screen. Allowing these copies to be made without payment will interfere with existing and future download markets.<sup>12</sup>

Format shifting was sometimes seen as a potential dramatic threat to the CD music sales industry, although the business model for this industry has been under a cloud for some time.

While the specific matter of the time and format-shifting exceptions also appears to have become somewhat less of a concern for Australian copyright industries, the more general issue of consumer attitudes, and more importantly, behaviour, with respect to downloading (whether legally or illegally), format shifting, and other ways of accessing and consuming copyright material, has continued to be of significant interest to this category of stakeholders.

The continuing emphasis by copyright industries upon consumer attitudes and behaviour, particularly in advocating changes to copyright law to attempt to alter these attitudes or behaviours, needs to be examined in light of the concerns raised at the time of the amendments by industry representatives and organisations.

## Concerns

Specifically, it is instructive to consider the degree to which some of the concerns raised by some Australian copyright industries have or have not been borne out with the operation of these amendments.

Evidence of impact, if there were any, might be expected to be found in some copyright industries' market and revenue data reports, as well as annual reports and research studies conducted for industry bodies, both in Australia and in other comparable jurisdictions. This data is largely perceived to be consistent with no substantial direct impact from the core changes we are discussing (or data not adequate to answer this question).

Our interviews undermined the perception that there were widespread fears that the time- and format-shifting changes themselves would have a serious adverse impact. It appears that relatively few

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<sup>12</sup> Australian Copyright Council, "Response to government proposals for new exceptions in media release 'Major copyright reforms strike balance,'" (May 2006), <http://www.copyright.org.au/x0601.pdf>



expert commentators expected serious adverse effects directly from the changes. Most were not surprised that there appears now to be little or no evidence of direct impact from the Schedule 6 part 1 and 2 changes.

If anything, the fear at the time was an indirect one, that there would be but one chance to have instituted a “blank media royalty levy” as part of the law reform package. This was seen to be a remunerated extension of exceptions. In reality, the negotiations did not result in such a levy.<sup>13</sup> This was seen as a significant potential loss by many of those associated with industry organisations or collecting societies.

#### **Consumers and technology**

A major theme in the preliminary comments was that “consumer behaviour is driven by technological possibilities,” “law should reflect consumer behaviour but in a way which protects artists rights.”<sup>14</sup> Another way of looking at this is that what the law says is not a high priority for many people, not because they seek to break the law, but because the “affordances” of the technology (what you can obviously do) are so compelling, and the expectation is that if it is legal to buy a device it should be legal to use it.

#### **Complexity: Part of the problem?**

One feature of the changes is their textual complexity. See the Appendix 3.9.3. Some commentators thought this was part of the problem of compliance. Examples cited included “you can make a copy for your mum who lives in but not your girlfriend who lives next door,” direct copies without format changes may still be illegal (ie technological format dependent), and “what does at a more convenient time really mean, if anything?”

However, one lobbyist did not think that the law needed to be able to be understood by ordinary people.<sup>15</sup> So many of the influences on copyright law are now related to compliance with say obligations in Free Trade Agreements or international agreements like Berne and WIPO that it is not realistic for non-specialists to be able to understand the language or appreciate what behaviour is compliant or not, in detail. If this were to be the case, it does not suggest a very consumer friendly compliance

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<sup>13</sup> Commentators [10], [11].

<sup>14</sup> [11].

<sup>15</sup> [10].

regime. Indeed, some other commentators<sup>16</sup> suggested that some of the low level of compliance may be contributed to by the difficulty in understanding exactly what is or is not prohibited or permitted, working from first principles and common sense. The differences in expression of the four relevant amendments were a case in point, with specific inclusions and exclusions in each.

### **Confusion about personal use**

One university copyright officer was concerned that it would be hard to educate users of technology that what was OK for personal use was not OK for professional (ie teaching) use.

### **Removal of irritant**

Many commentators felt there was unlikely to be any direct impact, but that the removal of the prohibition on time shifting TV, and transferring music onto an iPod, would eliminate an absurdity (“an obvious problem”) or irritant, and thus reduce the sources of complaint for consumers and their advocates.<sup>17</sup> Indeed, one felt that it made the difference between being able to rationally explain and justify the Act and not.<sup>18</sup> But this may also “make the debate more difficult, and revert to being a matter for specialists.”<sup>19</sup>

## **3.3 Hypotheses**

A main aim of this report is to consider a range of hypothetical impacts from the changes, and to look for evidence that these have either occurred or not occurred.

We considered some of the potential concerns of vendors/copyright owners and distributors. We were looking for evidence of whether the time- and format-shifting changes would have an impact on the following factors, and considered scenarios where they have no impact, a negative impact from the owner perspective (which may or may not coincide with consumers’ interests), or a positive one. Negative outcomes for creators, vendors or rights holder would of course be significant for assessing these changes or similar initiatives.

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<sup>16</sup> [11].

<sup>17</sup> [12].

<sup>18</sup> [17].

<sup>19</sup> [12].

As we consider the sets of survey results later, it would be useful to compare the results with whatever evidence you might expect to see which would support each of these alternative hypotheses if they had in fact occurred.

(For convenience, we also summarise the outcomes. Discussion is set out under each question in the survey, and in general matters raised by experts.)

#### **3.3.1 Consumer awareness of general copyright laws and obligations?**

This deals with the degree to which consumers appreciate the general law about copyright, and speculates that by ending the controversy about the iPod, this attention may have some impact.

- 1. No impact: As a result of the changes, consumers are no more or less aware of the relevant operation and obligations imposed by copyright law.**
- 2. Negative impact: Consumers become less well informed, or more misinformed, about the nature of copyright law details as a result of the changes.**
- 3. Positive impact: The changes result in consumers having a better understanding of the copyright regime, and the specifics around time- and format-shifting, and other forms of unauthorised behaviour.**

*Outcome:* It appears to be a combination of 1 (no impact, the predominant effect) and limited evidence for some quite minor positive impact. A very large proportion was not aware of the changes.

Expert commentators believed that consumer awareness of copyright law generally was weak, and had limited impact on consumer behaviour compared with other influences such as what the new technology allows, or peer group assumptions about acceptable behaviour.

#### **3.3.2 Consumer awareness of legal behaviour?**

By drawing attention to one form of now legal behaviour, it may be that the amendments prompted people to look more carefully at legal and illegal activities.

1. **No impact: Consumers' level of awareness of what activities are currently legal is unaffected by the changes.**
2. **Negative impact: Consumers are less well informed or aware about what is legal after the changes.**
3. **Positive impact: Consumers are better informed about what is legal (including time- and format-shifting) as a result of the changes.**

*Outcome:* As with hypothesis 3.1 above, it appears to be a combination of 1 (no impact, the predominant effect) and limited evidence for some minor positive impact.

There is also some continued confusion about whether, for instance, format-shifting from CD to iPod is legal (with a significant number wrongly thinking it is not legal), perhaps as a result of overlapping ideas from general industry campaigns about piracy.

### **3.3.3 Consumer awareness of illegal behaviour?**

This deals with the degree to which respondents are aware of the relevant provisions of the Copyright Act 1968 (Cth), which make certain actions, including downloading, copying and “file sharing” without authorisation, illegal.

1. **No impact: Consumers' understanding of what is illegal is not affected by the changes.**
2. **Negative impact: As a result of the changes, consumers are less informed about what is illegal, and for instance wrongly think that unauthorised downloading is legal, or that format shifting from a CD is illegal.**
3. **Positive impact: Consumers are more informed about what is illegal after the changes.**

*Outcome:* As with hypothesis 3.2 above, this is a combination of 1 (no impact, the predominant effect) and limited evidence for some minor positive impact. There remains significant apparent confusion about whether small amounts of unauthorised downloading or copying is legal.

There is disagreement among different expert commentators as to the explanation, with some (including some of the musicians) thinking this is self-serving feigned ignorance, while others seeing some impact of wrong

assumptions about the existence of some sort of general “fair use” right absorbed from popular culture or online discussions on US sites.

#### **3.3.4 Consumer attitudes and intentions about legal behaviour?**

This deals with respect for the scope of activities which are legal, and/or intention of doing them: for instance, time- and format-shifting are properly legal, copyright law in general has the balance right, and intention to do those newly legal things and other legal things, like buy rather than copy songs.

1. **No impact: As a result of the changes, consumers attitude and intention about doing what is legal is unaffected.**
2. **Negative impact: Consumers have less respect for the scope of things which are legal and/or less intention of doing them (example) after the changes.**
3. **Positive impact: The changes result in consumers having more respect for the scope of things which are legal and/or more intention of doing them (example).**

*Outcome:* As with the hypotheses above, this is a combination of 1 (no impact, the predominant effect) and limited evidence for 3, some minor positive impact. Some commentators observed that our questions did not enable distinctions between no impact because of (a) ignorance (“don’t know”), (b) lack of respect (“don’t care”), or (c) the more likely explanation: the changes authorise what they were doing anyway “so why would we change”?

The evidence of slight positive impact would be encouraging for policy makers, as it may indicate that consumers are exercising their entitlements more effectively, but this was a relatively minor component of the result.

#### **3.3.5 Consumer attitudes and intentions about illegal behaviour?**

This deals with respect for the scope of things which are illegal, and/or intention of doing them: for instance, unauthorised file sharing of music or movies is properly legal, copyright law in general has the balance right, and intention to do those still illegal things (like perma-

nently archive files, or copy without format shifting) and other things like copy/download rather than buy songs.

1. **No impact: Their attitude and intention about doing what is illegal is unaffected.**
2. **Negative impact: They have less respect for the scope of things that are illegal and/or less intention of doing them (example). This was the supposed “floodgates,” “give them an inch and they’ll take a mile,” “thin end of the wedge” argument, and one of the potentially serious side effects which might warrant reconsideration of such amendments were it to come to pass.**
3. **Positive impact: They have more respect for the scope of things which are illegal and/or more intention of doing them (example).**

*Outcome:* Consistent again with the pattern above, this is a combination of 1 (no impact, the predominant effect) and limited evidence for 3, some minor positive impact.

Some commentators observed again that our questions did not enable distinctions between no impact because of (a) ignorance (“don’t know”), (b) lack of respect (“don’t care”), or (c) the more likely explanation: the changes authorise what they were doing anyway “so why would we change?”

The evidence of slight positive impact would be very encouraging for policy makers and rights owners, as it does not bear out the concerns expressed by some that consumers would through ignorance or self-interest come to the conclusion that the new laws weakened obligations to avoid infringement or piracy and thus “anything goes.” It tends to support the view that the changes have had a minor though not insignificant discouraging effect on illegal behaviour.

### 3.3.6 Consumer behaviour and market results at macro level

This looks for observable changes in market and commercial results from consumer actions attributable to the changes in the law.

1. **No impact: On purchasing behaviour or sales results etc. is identifiable and attributable to the changes.**
2. **Negative impact: Consumers in this scenario would buy less, so sales of music and movies and related items would fall, and/or profits or margins may also fall.**

**3. Positive impact: Buy more, sales of music and movies and related items would fall, profit fall.**

*Outcome:* The results were inconclusive, but the most consistent explanation is 1, no impact. The consensus among experts we spoke to was that there was no data available that could, or did, show any significant change in consumer behaviour attributable to the changes.

In part this was because the data available was not fine grained or focussed enough to enable this analysis, in part because what data there was available showed limited differences between trends in Australia and elsewhere (as you would expect if the Australian changes in the law created market impacts), but the most consistent observation was that all the other big changes in the international and local markets for say music or video entertainment content were much more influential and dramatic than any effects that would be expected from the time- and format-shifting changes.

Changes in technology, rejigging business models, the extent of legal and illegal downloads and the focus of industry investment were among these much larger influences. They were considered to have swamped and masked any impact of the Australian law changes, being orders of magnitude more likely to explain observed trends.

#### **3.3.7 Vendor behaviour and market results at macro level**

- 1. No impact directly attributable to this change is detectable: Any changes are unrelated to the specific change in the law in Australia.**
- 2. Negative impact directly attributable to this change: This hypothetical option sees creators or vendors produce or invest less, development efforts or innovation falls, confidence and willingness to be active in the market falls, efficiency and prices improve.**
- 3. Positive impact directly attributable to this change: As a result of the changes, creators or vendors produce/invest more, development effort or innovation grows, confidence and willingness to be active in the market increases.**

*Outcome :* The results were inconclusive, but the most consistent explanation is 1, no impact. The consensus among experts we spoke to was

that there was no data available which could, or did, show any significant change in industry behaviour attributable to the changes.

As with the impact on consumers from other influences, it was generally believed that the explanation for changes to products, investment, marketing or channels for music or video content was more likely to be external factors than the 2006 Copyright Act changes. There did not seem to be any industry understanding or view that the law changes, or any consumer behaviour around them, warranted or had prompted substantial responses. This is consistent with their assumption that by in effect formalising what was already occurring, there would be little consumer impact.

### **3.4 Survey of consumer views**

The reason for undertaking this survey has been discussed above. In part it will be filling gaps in research and noting the relative silence on the issues raised at the time of the amendments.

Attention to consumer perspectives has been somewhat neglected so far, especially in light of the amendments that purported to be directed to consumer interaction with copyright material and fitting the law to consumer expectations about what should be “normal” uses.

In this light, we will review the importance of tracking whether consumers even aware of the changes made to take account of their views, whether such consumer attitudes have shifted in any way (ie do consumers now expect that even broader “uses” are acceptable?), what impact amendments had on consumer attitudes towards copyright law and their own interests generally.

#### **3.4.1 Questions**

The questions and the responses will be described as they are encountered below.

#### **3.4.2 Method**

See the section above for formulation of hypotheses. The questions have been framed around these concerns.

The *Copyright Amendment Act 2006* (“The Act”) sparked considerable debate up to its passage. However, this appears to have largely subsided, and little was known about whether speculation at the time by both industry commentators and academia – about the anticipated effect the



amendments on consumer attitudes towards and perceptions of copyright law – were confirmed. The amendments were largely directed at dealing with consumer interaction with copyrighted material, and expectations about what *uses* should be legal.<sup>20</sup>

Whether the amendments expanded consumer expectations about their entitlements to use copyrighted material, or whether consumer attitudes towards copyright law were changed as a result of the amendments was unclear.

To remedy this a survey was conducted. A total of 1,500 observations were gathered. The questions were aimed at discerning the consumer public's general perceptions of copyright law in the context of the 2006 amendments, whether these amendments had any impact on the efficacy of copyright law generally, and if so, if it was negative or positive from the perspective of articulated industry and consumer interests.

There were eight questions, six with fixed response options (“multiple choice”) and two (Q4 and Q8) with free-form questions which asked the respondent why they chose their selected option from the previous fixed response question.

The free-form responses showed most respondents seeking to explain their answers and reasons in a similar fashion; there were few outlying responses which expressed novel views<sup>21</sup> (less than 1%). These free-form responses were therefore also coded into a number of rough categories to give quantitative measures of opinion. This also aided in addressing unforeseen limitations in some survey questions (see below).

### 3.5 Survey results

The survey results for the eight questions are set out below under two groups, first dealing with behaviour and then expectations.

#### Part 1 (Consumer Behaviour)

The first question was directed at determining a general propensity to time-shift, format-shift and download material from the Internet, while the second question targeted knowledge of the legality of these three activities.

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<sup>20</sup> See Second Reading speech and Hansard.

<sup>21</sup> Respondent 93307: “What I do is my responsibility and honestly I don't care”; Respondent 96602: “no-one listens to copyright law anyway”

The results showed that 82%, 54% and 51% of participants respectively had engaged in these activities; post-2006, only the latter activity (downloading) is now illegal. The survey further shows that the likelihood that one has downloaded music or video from the Internet decreases with age; and thus younger respondents are more likely to have engaged in this activity (48% and 47% of those aged 18-24 and 25-34 compared with 39% and 40% of those aged 55-64, and 65 and above).

The second question reveals that 83%, 74% and 45% of respondents believed that the aforementioned activities are legal (however, the latter may be closer to 42% as approximately 3% of the sample misconstrued the question). Of those who had downloaded music and movies from the Internet 30% believed that the activity was legal (again, this may be closer to 27%) while 21% recognised its illegality but asserted they had done the same.

Overall the propensity of individuals to engage in copyright infringing activity remains significant. This is coupled with statistics which suggest that public education about what constitutes copyright infringing activity is inadequate. Many respondents (approximately 30%) who were not familiar with copyright law offered a reason why downloading copyrighted material is acceptable; whatever merit these arguments have, such activity remains illegal. This part of the survey does show a need for more effective public education and also provides some information about how such education may be targeted towards certain groups of the population.

### **3.5.1 Question 1: “Have you ever done any of the following activities?”**

This asked about past actual behaviour in three activities:

- Downloaded music or video material (like movies/TV Shows) from the Internet
- Copied music from a CD that you own to a digital media player
- Recorded a TV show at home to watch at a later time

Over 80% acknowledged time-shifting a TV show, while only 54% recalled copying music from CD to digital device with a change of format (which is legal). Only just over 50% said they have downloaded items from the Internet.

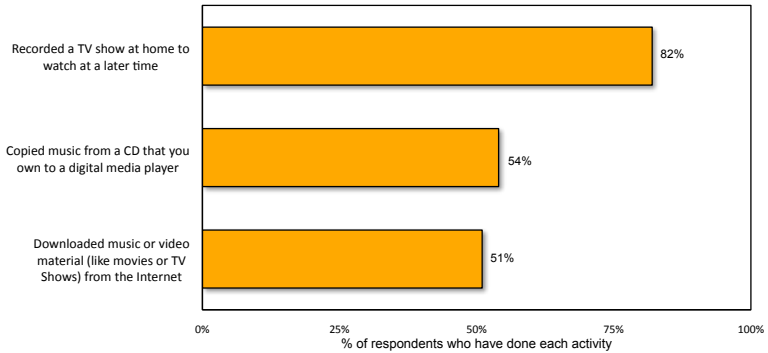


Figure 3.1: Question 1. Have you done these?

Younger respondents were more likely to have copied music from a CD player to a digital media player. For example, 83% of 18-24 year olds and 73% of 25-34 year olds have done this compared to only 31% of those aged 55-64 and 27% of those aged over 65.

Younger respondents were also more likely to have downloaded music or video material. For example, 77% of 18-24 year olds and 68% of 25-34 year olds have done this compared to only 32% of those aged 55-64 and 28% of those aged over 65.

Majority have recorded TV – is this because VCRs are cheaper/more readily available/more widespread that suitably fast connections and high data allowances in many homes?

Half downloaded from online and half copied from own CDs – again, is this just indicative of lesser availability in general population of both fast broadband connections/higher data allowances (being more expensive), and access to technology such as MP3 players/iPods and computers capable of these things?

Do the questions regarding burning music and downloading content merely show that only 50% actually have any interest in accessing this type of content (music/TV shows/movies), whereas more people in the general population mainly just watch TV? (Particularly as these figures appear to be more heavily weighted in terms of the youth of respondents – do young people generally just consume far more cultural content, and purchase more net-enabled computers/MP3 players/CDs etc?)

NB – the third question only asks whether the person has “downloaded from the Internet” – it *doesn't* specify if this downloading was au-

thorised or unauthorised – ie, possible that people who have used iTunes, etc would have also answered “yes” to this – so potentially merely shows that only 50% of respondents even have capacity/inclination to download content (from whatever source, and onto “new” devices like MP3s), whereas far more people are still using “older” technology such as VCRs.

### 3.5.2 Question 2: “Do you think the following activities are legal or illegal in Australia?”

We asked about three activities, music format shifting from CD and TV time-shifting, which were illegal but became legal after the changes, and downloading music you don’t own, which remains illegal. What was surprising was that 45% wrongly thought file sharing was legal, and about a 20% wrongly thought format- and time-shifting were still illegal.

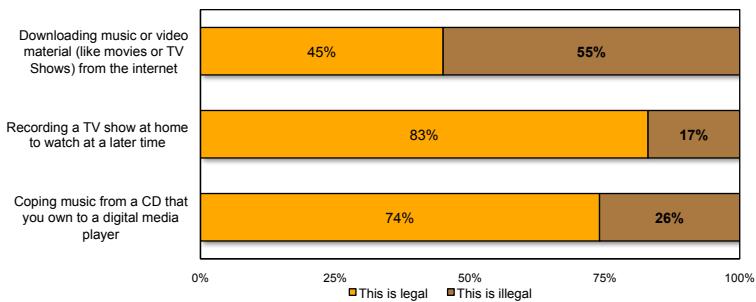


Figure 3.2: Question 2. Legal or illegal?

Younger respondents were more likely to believe it is legal to copy music from a CD player to a digital media player. For example, 82% of 18-24 year olds and 86% of 25-34 year olds believe this is legal, compared to 63% of those aged 55-64 and 67% of those aged over 65.

Younger respondents were also somewhat more likely to believe it is legal to download music or video material. For example, 48% of 18-24 year olds and 47% of 25-34 year olds believe this is legal compared to 39% of those aged 55-64 and 40% of those aged over 65.

Between 25-50% are misinformed about what is legal or illegal, 25-30% think the things legalised in 2007 changes remain illegal, while half think unauthorised downloading is legal.

There appears to show a need for more effective education; or perhaps that complexity is hard to understand and remember, inviting speculation that it may be better to have simpler laws.

**Commentators** criticised the shorthand expression “music you own,” pointing out that (a) you don’t “own” the music on a CD you buy, and (b) various dealings with music you don’t own may be either authorised in a particular business model or permitted by an exception; and hence the question is ambiguous.<sup>22</sup>

The awareness figure downloading without permission in a 2007 ARIA survey was 77%, somewhat higher than this survey.<sup>23</sup>

#### **3.5.3 Question 3: “What is your attitude to downloading unauthorised copyrighted material like movies and music from the Internet?”**

This question asks the recipient’s attitude to downloading unauthorised copyrighted material like movies and music from the Internet? How much of this is OK: None, a little or a lot?

While only a small number (12%, one in eight) thought it acceptable to download as much as you want, a third (34%) thought it is acceptable to download a little. Just over 50% thought no unauthorised downloading was acceptable.

Men were more likely than women to believe it is OK to download as much material as you want (17% compared to 7%).

Half think it is OK to download unauthorised material. Half do it. Half also think it is legal: a case for more education?

Do the respondents understand *what* authorised or unauthorised copyright material is – ie, is there the possibility that, when they think of “authorised copyrighted material,” some participants might be expecting to see a © symbol, or that the material has to be “registered” or not come from the US – or any of the other common misconceptions about what makes something “copyright.” The explanations in the survey only refer to how “copyright material” is protected under law in Australia – it doesn’t point out that pretty much all content (especially available online) is most likely to be “copyright material” - and the issue of particular types of permissions (for particular *types of uses*) being necessary only appears towards the end of the survey.

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<sup>22</sup> [15] mentioned freebies, and different legal options for access.

<sup>23</sup> [15].

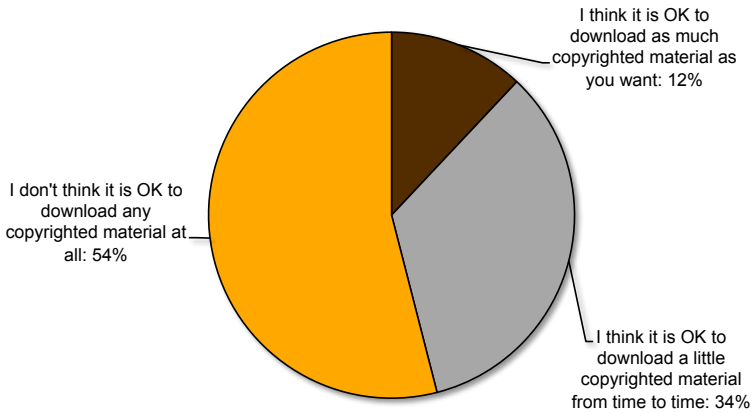


Figure 3.3: Question 3. Attitude to unauthorised downloading?

The third and fourth questions gave respondents the opportunity to voice their attitudes concerning the download of copyrighted material as well as to provide reasons for the same. Only 12% respondents that it was OK to download as much copyrighted material as they wanted (17% of who were male and 12% female); while 34% of people believed it was OK to do so from time to time.

When asked why respondents had answered the third question as they did, the responses fell broadly into three categories: those who recognised the illegality or immorality of downloading copyrighted material, those who provided a justification for why they did download copyrighted material and those who could not provide a reason for downloading copyrighted material.

The former category comprised 49.7% of the total sample; 23.8% of the responses recognised its illegality as the sole reason for not downloading copyrighted material.<sup>24</sup> Others in the subsection, a total of 25.9%, pointed to the immorality of depriving artists of their income (many mentioning royalties in particular).<sup>25</sup>

Of the second category (comprising 29.9% of the sample), five broad

<sup>24</sup> Respondent 14897: "If it's illegal, it's illegal"; Respondent 12609: "because it is stealing from someone else"

<sup>25</sup> Respondent 99067: "It cheats the artist of income"; Respondent 98652: "The artists do not receive their due royalties"

reasons emerged for those who thought it was OK to download copyrighted material from time to time or whenever they wanted:

1. 9.2% had an economic rationale for this. Some based this on the fact that by infringing copyright no-one is harmed in any substantive manner or that it was a "*victimless crime*" and they would not have bought the product anyway.<sup>26</sup> Others fell into this category because they asserted that copyrighted material is too expensive<sup>27</sup> or that by paying for Internet one has already expended a sufficient amount to warrant downloading copyrighted material.<sup>28</sup>
2. Similar in nature to this category are those respondents who based their response on personal use, comprising 7.7% of the sample. These respondents similarly asserted that if one does not make a profit from the downloading then no-one is harmed.<sup>29</sup>
3. A small portion of the sample (2.8%) asserted that the only purpose of downloading copyrighted material was to sample works. Thus, allowing someone to sample the work increases the chance that they would actually purchase it, and so downloading copyrighted material benefits both artists and publishers.<sup>30</sup> Though many asserted that the laws favour artists and publishers too much, the rationale seems to be centred on the idea that, if such downloading was legalised it would benefit consumers, artists and publishers.
4. The last substantive justification, comprising 8.2%, was based on the fact that copyrighted material is readily accessible and that this justifies illegal downloading. Some of these respondents pointed out that some copyrighted material is rare and unavailable in Aus-

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<sup>26</sup> Respondent 396: "People who download and watch are not depriving artists of any rightful income – those who download and do not sell for a profit never intend in the first instance to purchase the material"

<sup>27</sup> Respondent 439: "Entertainment is for everyone, not just those who can afford..."

<sup>28</sup> Respondent 5809: "[We] pay enough for Internet access, we should get some value from it"

<sup>29</sup> Respondent 9690: "As long as it is for personal use and not for further distribution for profit..."

<sup>30</sup> Respondent 93712: "Although it is illegal to download copyrighted material, sometimes it is nice to get a few samples of the material before dishing out money for trash".

Respondent 1665: "I do not buy a book or magazine without flicking through it, or purchase a new car without taking it for a test drive. But the movie/music industry expects me to pay for a product before I can determine if I like it.

tralia and therefore downloading is the only way to obtain it.<sup>31</sup> Others simply targeted the fact that it was “there.”<sup>32</sup>

5. Another small portion of the sample (2%) justified downloading copyright material by arguing that “everyone else does it.”<sup>33</sup>

**Commentators** were in two minds about these results, especially the industry experts. One strand of thinking was that consumers were “fooling themselves” and really did know that downloading was illegal, hence there was an element of bad faith about the 45% legal answers.

However, equally clear were views that the question was a little ambiguous, the law complex and most people unaware of the details, so the answer could be a fair and honest explanation.

Although legal theory notions of *de minimis* and “fair use” in the US mould were raised to explain the thinking, more commentators thought in particular that many people did believe, without any technical legal awareness, that it was fair to download a little bit on the basis of morality and perceived limited harm, or of risk assumptions that there was no enforcement.<sup>34</sup>

### 3.5.4 Question 4: “Why?” [do you hold your attitude to downloading unauthorised material]

This question refers back to the answer to the earlier question 3, and asks why that earlier answer was given. Table 3.1 sets out the bare figures, not divided according to answer.

The two largest reasons for any answer were that “it’s stealing” and then it “undermines artists’ rights to income”; together these were half of all responses. This should be some solace for the copyright owning and investing community, for it shows quite a popular motivation was resonant with industry messages seeking to encourage respect for the property aspects of information products.

However in this overall form the data does not support understanding why the views expressed in answer to Q3 were justified by particular reasons. For that we need a different formulation which attributes these reasons to different answers in Q3.

<sup>31</sup> Respondent 34934: “If you are looking for something special that is hard to find elsewhere...”

<sup>32</sup> Respondent 33715: “Because it’s available and easily accessible”

<sup>33</sup> Respondent 95886: “Same old story – everyone else is doing it”

<sup>34</sup> [14], [19].



|      | <b>Answer</b>                              | <b>Number</b> | <b>%</b>     |
|------|--|---------------|--------------|
| 4-1  | <i>"It's stealing"</i>                     | 357           | 23.8         |
| 4-2  | <i>Undermines Artists rights to income</i> | 388           | 25.9         |
| 4-3  | Not done for profit, not otherwise buy     | 137           | 9.1          |
| 4-4  | Sampling                                   | 42            | 2.8          |
| 4-5  | Contempt for the industry                  | 34            | 2.3          |
| 4-6  | Easy, convenient, or rare items            | 123           | 8.2          |
| 4-7  | Everyone does it                           | 30            | 2.0          |
| 4-8  | No reason, doesn't hurt                    | 113           | 7.5          |
| 4-9  | Personal Use                               | 117           | 7.8          |
| 4-10 | Misc                                       | 10            | .6           |
|      |  | <b>1,500</b>  | <b>100.0</b> |

Table 3.1: Why [do you hold the attitude you gave in Q3 to downloading unauthorised copyrighted material, like movies and music, from the Internet]?

These second level tables were created for this purpose out of the raw data.

### Responses

Despite the fact that in Q3 only 55% of respondents thought that downloading material from the Internet was legal, the Q4 responses reveal that the percentage that acknowledge some ethical issues of doing so is larger. This, in part, reflects that some misinterpreted the question as the downloading of "authorised" copyrighted material.

Of these respondents the three main groups were those who compared this type of downloading to stealing, those who recognised it as illegal and those who asserted that it undermined the artists/creators' rights to income or royalties.

Characteristic responses recognising illegality/immorality:

- *"Because it is stealing from someone else."*
- *"If it's illegal it's illegal."*
- *"The law is there to be obeyed."*
- *"People that have copyright have invested their own money and do not receive anything from illegal downloads."*

|      | <b>Answer (grouped by Q3: how much is OK?)</b> | <b>Number</b> | <b>%</b>     |
|------|--|---------------|--------------|
|      | None   | 836           | 55.7         |
| 4-1  | <i>"It's stealing"</i>                         | 346           | 23.1         |
| 4-2  | <i>Undermines Artists rights to income</i>     | 380           | 25.3         |
| 4-3  | Not done for profit, not otherwise buy         | 6             | 0.4          |
| 4-4  | Sampling                                       | 1             | 0.1          |
| 4-6  | Easy, convenient or rare                       | 7             | 0.5          |
| 4-8  | No reason, doesn't hurt                        | 44            | 2.9          |
| 4-9  | Personal Use                                   | 18            | 1.2          |
| 4-10 | Misc   | 34            | 2.3          |
|      | A little                                       | 495           | 33.0         |
| 4-1  | <i>"It's stealing"</i>                         | 10            | 0.7          |
| 4-2  | Undermines Artists right to income             | 6             | 0.4          |
| 4-3  | <i>Not done for profit, not otherwise buy</i>  | 88            | 5.9          |
| 4-4  | Sampling                                       | 39            | 2.6          |
| 4-5  | Contempt for the industry                      | 19            | 1.3          |
| 4-6  | <i>Easy, convenient or rare</i>                | 83            | 5.5          |
| 4-7  | Everyone does it                               | 24            | 1.6          |
| 4-8  | No reason, doesn't hurt                        | 51            | 3.4          |
| 4-9  | Personal Use                                   | 74            | 4.9          |
| 4-10 | Misc   | 101           | 6.7          |
|      | As much as you want                            | 169           | 11.3         |
| 4-1  | <i>"It's stealing"</i>                         | 1             | 0.1          |
| 4-2  | Undermines Artists right to income             | 2             | 0.1          |
| 4-3  | <i>Not done for profit, not otherwise buy</i>  | 43            | 2.9          |
| 4-4  | Sampling                                       | 2             | 0.1          |
| 4-5  | Contempt for the industry                      | 15            | 1.0          |
| 4-6  | <i>Easy, convenient or rare</i>                | 33            | 2.2          |
| 4-7  | Everyone does it                               | 6             | 0.4          |
| 4-8  | No reason, doesn't hurt                        | 18            | 1.2          |
| 4-9  | Personal Use                                   | 25            | 1.7          |
| 4-10 | Misc   | 24            | 1.6          |
|      |  | <b>1,500</b>  | <b>100.0</b> |

Table 3.2: Why do you hold your attitude you gave in Q3 to downloading unauthorised copyrighted material like movies and music from the Internet? (the most common two are shown in italics)

- *“The owner of the material is entitled to be paid for their artistic endeavours.”*

The remainder of the respondents, most of whom either believed it was OK to download copyrighted material from time to time or as much as one would want, provided a wide range of justifications.

A number provided justifications based on economic rationality. These included the assertion that downloading copyrighted material *“doesn’t hurt anyone”* or that it is a *“victimless crime.”* Others fell into this category as they asserted that since they *“[were] never going to purchase it anyway, it’s not taking profit from anyone”* which could be interpreted as a justification based on the Harm Principle. A number of others simply asserted that the cost of purchasing legit material was *“too expensive”*. There were also those who asserted that payment for Internet services (being *“excessive”* [4008]) in Australia constituted a sufficient rationale to download copyrighted material.

Characteristic responses based on economic rationality:

- *“If I was never going to purchase it anyway, it’s not taking profit from anyone.”*
- *“People who download and watch are not depriving artists of any rightful income – those who download and do not sell for a profit never intend in the first instance to purchase the material.”*
- *“Content providers have failed to supply their product appropriately as society demands, and as such are now accusing us of ‘stealing’ the content as a means of making up for their shortcomings in content delivery. While it may be illegal, it’s a pretty victimless crime. Music and movie industries are making record profits despite it. Frankly, they deserve the lesson in humility.”*
- *“Entertainment is for everyone and not just for those who can afford to go to a venue such as a picture theatre.”*
- *“Pay enough for Internet access, should get some value from it.”*

Akin to these were responses based on *“personal use.”* Some justified this on the basis that they were not making any profit from it while others relied on a general assertion.

Characteristic responses based on personal use:

- *“I think it’s ok if it’s purely for your own use.”*

- *“If it is for personal use and not for distributing to make a profit.”*
- *“If you are only using it for personal use and not selling it or making money from copying it isn’t a problem.”*

Others justified downloading copyrighted material as a means to sample works. Many of those who relied on this justification asserted that without the opportunity to sample they would not otherwise buy copyrighted material, some comparing it to the ability to sample a book by reading it before purchase. Others thought that this also provided justification for downloading only one song from an album where one does not like the others and thus would not pay for everything.

Characteristic responses based on sampling:

- *“Although it is illegal to download copyrighted material, sometimes it is nice to get a few samples of the material before dishing out your money for trash.”*
- *“I use the download to see if I really like the movie or music. If yes I purchase a legal copy, if no I destroy the download.”*
- *“People maybe like only one song and don’t want to buy the CD.”*
- *“I do not buy a book or magazine without flicking through it first, or purchase a new car (sic) without taking it for a test drive. But the movie/music industry expects me to pay for a product before I can determine if I like it. . .”*

A number of those who believed it was OK to download as much copyright material as they wanted expressed some contempt for either the revenue-earning capacity of the industry or towards the artists responsible for the works. Of these a number expressed discontent at being “ripped off” or asserted that artists were paid “too much”. Other niche responses included that copyright law was too overarching.

Characteristic responses evidencing a degree of contempt:

- *“The mark-ups and profits made by the recording artists and actors is outrageous. How can it be justified that an actor makes a fee from one movie which would eclipse the GDP of many small nations.”*
- *“Copyright laws are getting too stringent and ridiculous, even the smallest, least original thing is being copyrighted these days.”*
- *“The people responsible take all your money without giving back – I’m just taking back.”*

- *“Because when I see what happens, when people like Britney Spears get paid what they do and act like they do. This means to me the entertainment industry can kiss my arse!!!!!!”*

Another category was those who regarded the accessibility of copyright material as a reason to download works. These responses can be split into two categories – those who regarded the fact that it was “available” as sufficient justification and those who targeted the fact that certain copyrighted materials are not available in Australia.

Characteristic responses targeting availability:

- *“Because it’s available and easily accessible.”*
- *“If you are looking for something special that is hard to find elsewhere but not to download anything and everything.”*
- *“The items that I have downloaded in the past are television shows that are not available within Australia either for viewing on free-to-air network television or for purchase (have not been distributed on DVD).”*

A final category were those who did not provide any justification but rather found support from the fact that “everyone else does it”:

- *“Same old story – everyone else is doing it !!”*
- *“Why not, everyone else is doing it?”*
- *“I don’t know anyone who doesn’t download music... It seems to be the norm.”*

#### **Part 2: Consumer Attitudes towards the Act**

Questions 5 and 6 together targeted public knowledge of the 2006 amendments, and whether or not knowledge of the amendments increased, decreased, or did not affect the propensity of individuals to engage in copyright infringing activities. Question 5 revealed that the vast majority of respondents were unaware of the 2006 amendments (74%).

By and large the parts of question 6 concerning time- and format-shifting revealed what was considered to be a known fact at the time of the changes: the enactment of the *Copyright Amendment Act 2006* had legalised what the majority of the public was already doing. However, 23% and 24% of respondents asserted that the amendments made them more

likely to time-shift (to watch at a more convenient time) and format-shift, while 6% and 8% said it would make them less likely to do so.

On the other hand, 32% and 30% of respondents asserted that awareness of the change in the law made them less likely to download unauthorised TV shows and music respectively, while only 6% and 7% said that they would be more likely to do so. Once again the survey revealed an age-dimension to the results. Knowledge of the amendments were more likely to affect the behaviour of older respondents to make it closely aligned with the law – 37% and 42% in the 55-64 and 65+ age groups for TV shows and 40 and 42% of the same age groups for music, as compared with 19% and approximately 22% of those aged 18-34 for the same activities.

The latter half of the survey demonstrates once again a failure of public education as to the state of copyright law. Yet it generally shows positive results for public reaction to the changes, with only a small portion of the respondents disagreeing in substance with the general state of copyright law and the direction of the amendments. The results could potentially reveal that knowledge of the amendments is may in some cases have some influence to divert individuals from unlawful activity to lawful activity; knowing that time and format-shifting are legal, people may be more inclined to use these methods to view TV and listen to music that they might otherwise have downloaded illegally.

Still, there are large numbers whose attitudes are not affected so the real impact may be harder to assess.

### **3.5.5 Question 5: “Were you aware of this change in the law in 2007?”**

Australian copyright law generally prevents you from downloading or sharing copyrighted material. However, in 2007 some parts of the law were changed. These changes made it legal to: 1) copy music from a CD you own to your digital media player; and 2) record a TV show at home to watch at a later time. Were you aware of this change in the law in 2007?

Most people are not aware of the 2007 changes. Was there failure of public education about the changes? Or was it as some commentators suggested, because there was in fact no reason for an ordinary person to do anything, the law was just catching up with what they were doing anyway – so no need for any change or attention?

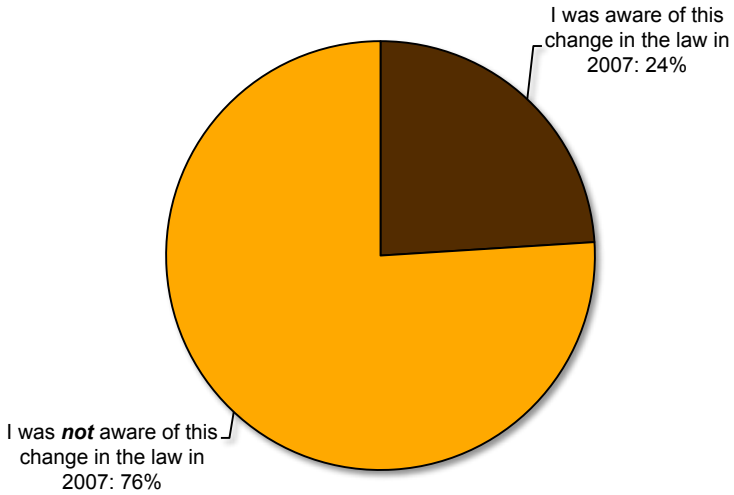


Figure 3.4: Question 5. Aware of the changes?

### 3.5.6 Question 6: “Does being aware of this change in the law affect your likelihood to do any of the following?”

This question includes some preliminary background, and then asks whether knowing this makes any difference.

As discussed above, changes to the law in 2007 made it legal to:

1. Copy music from a CD you own to your digital media player.
  - a) Record a TV show at home to watch at a later time.

Does being aware of this change in the law affect your likelihood to do any of the following?

Older respondents were more likely to believe that knowledge of the laws made them less likely to download an authorised TV show. For example, 37% of 55-64 year olds and 42% of those aged over 65 believed this knowledge made them less likely to do this. This compares to 19% of those aged 18-24 and 19% of those aged 25-34.

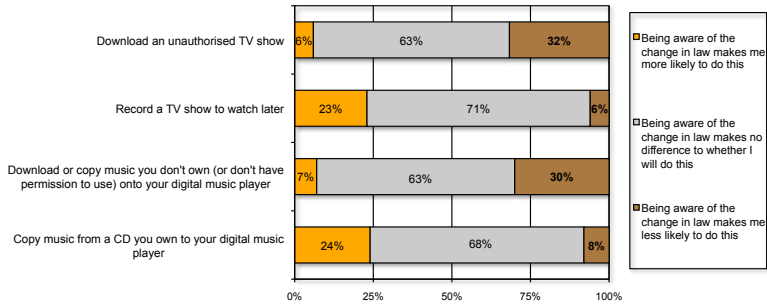


Figure 3.5: Question 6. Awareness affect likely behaviour?

Older respondents were also more likely to believe that knowledge of the laws made them less likely to download or copy music that they don't own. For example, 40% of 55-64 year olds and 42% of those aged over 65 believed this knowledge made them less likely to do this. This compares to 21% of those aged 18-24 and 23% of those aged 25-34.

When made aware, most say no change, but a significant proportion say they are more likely to do the legal acts and less the illegal acts (eg some limited but significant evidence that the change has increased respect for law).

**Commentators** largely agreed with this interpretation.<sup>35</sup> “Consumers want to do the right thing”.<sup>36</sup> This was also seen to be disproving the assumptions around the “floodgates” concerns: most commentators agreed it was consistent with the idea that the changes had increased respect for the law and appreciation of what is properly legal and what is piracy, rather than that consumers now see copyright material as fair game by whatever means.<sup>37</sup>

“The more informed people are the better they behave”.<sup>38</sup>

Commentators generally also thought the question was well framed and the answers likely to be a reasonable reflection of the surveyed sample, unlike some of the other questions whose implications were queried.

This then is one of the most significant outcomes of the survey. Fears about floodgates or a free for all do appear to be unfounded, and some

<sup>35</sup> [2], [3], [4], [11], [14], [15].

<sup>36</sup> [19].

<sup>37</sup> [9] “once we know what the rules are we are willing to comply.”

<sup>38</sup> [14].



small but real positive impact is likely to be felt in a direction welcomed by most commentators interviewed.<sup>39</sup>

#### **3.5.7 Question 7: “Do you think this law is fair or unfair to consumers as well as artists and their publishers?” [respondents say “fair”]**

The final two questions ask respondents whether or not they thought copyright law (specifically in response to the provisions regarding time- and format-shifting, press/educational use and the length of copyright) was in favour of consumers, or artists and publishers, or whether there was a fair balance between the interests of the two groups, and why.

Question 7 again includes some preliminary background, and then asks for a judgement.

Australian copyright law prevents people from copying or sharing creative material (including written work, music, film and software), without the author or owner's permission, for around 70 years from first publication or the author's death. However, it is legal to use this material for educational purposes and press reporting without charge. It is also legal to copy music to different formats and record a TV show to watch at a later time as described above. Do you think this law is fair or unfair to consumers as well as artists and their publishers?

At face value, 81% thought that the balance between consumers, artists and publishers was fair – once again revealing an age dimension with 73% of those aged 18-24 falling in this category compared with 80-83% in the higher age brackets (25-64) and 88% of 65-84 year olds. This may reflect both the increasing propensity of younger aged people to purchase copyrighted material and their lower income levels. 14% of respondents thought that copyright law favoured artists and publishers too much – within these results there was also a gender dimension; 20% of men falling into this category while only 8% of women. A small portion of respondents (5%) thought that the laws favoured consumers too much.

A large group of respondents (25.1%) justified their answer with an assertion that the laws were self-evidently fair or reasonable;<sup>40</sup> while

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<sup>39</sup> [13].

<sup>40</sup> Respondent 98966: “It's a compromise”

Respondent 99049: “I think it is fair to both parties”

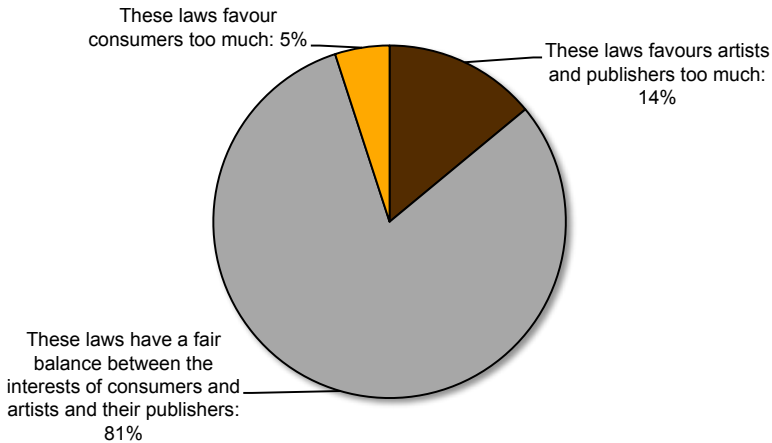


Figure 3.6: Question 7. Law fair to consumers and artists?

14.5% of the sample asserted that the amendment adequately protected or served the rights of both consumers and artists/publishers.<sup>41</sup>

A further 9.3% of this group believed that either time and/or format shifting were the chief reasons that copyright law was fair since it did not substantively affect the rights of the authors and creators<sup>42</sup> while others (1.3%) targeted time shifting specifically as it allowed for both the convenience of consumers but also publicity for producers through increased exposure and higher ratings.<sup>43</sup> 5.6% of the sample targeted the educational and press exemptions as striking the balance in copyright law, mainly as a matter of necessity,<sup>44</sup> while a few had problems with press use but agreed with use for educational purposes.<sup>45</sup>

<sup>41</sup> Respondent 76107: "It protects artists whilst recognising the public's interests"

Respondent 78810: "[it allows] access of works to the public, as well as protecting the intellectual property and income of the artist"

<sup>42</sup> Respondent 93168: "I don't think it makes any difference to the suppliers of a TV show if one records it to watch at a more convenient time"

Respondent 90447: "If you own it you should be able to use it the way you want"

<sup>43</sup> Respondent 4157: "Artists and performers are getting free publicity"

Respondent 6902: "[time shifting] still makes ratings happen. The owners will still get paid to copy films and music... bit of give and take works well."

<sup>44</sup> Respondent 3729: "There needs to be room for compromise in regards to education and news so that we are educated and informed"

<sup>45</sup> Respondent 15808: "I can support educational use but I don't see why the press should be allowed to use it"

Of the small portion of the sample who thought that the laws favoured consumers; 3.9% targeted either the now lesser potential for artists to benefit from income,<sup>46</sup> or deficiencies in the copyright law that could be exploited.<sup>47</sup>

Those who thought that copyright law favoured artists and publishers too much did so because of a belief that artists are excessively protected either because of the length of copyright (3.9%)<sup>48</sup> or because artists already earned enough anyway (2.7%).<sup>49</sup> 1.9% of this sub-sample believed that consumer suffered from rights-restrictions which made copyright law unfair.<sup>50</sup>

Most respondents now seem to think the balance is reasonable.

**Commentators** were a little surprised by this result. Some noted the quite low levels of knowledge and interest in the details of copyright law, and suggested this assessment may not be very well informed. Others were comforted by the relatively positive attitude revealed.<sup>51</sup>

Many raised doubts about the framing of the question<sup>52</sup> and thus the validity of the responses (in one case drawing a parallel with a court ordered survey<sup>53</sup> that was discounted for some its flaws): the potential for the introductory incomplete summary to omit key issues<sup>54</sup> but influence views, the order of the options with the 'balanced' in the middle, favouring that answer, and the detailed phrasing of the summary were all criticised.

On balance it seems likely that these factors do reduce the weight that should be given to the figures in this question, although many commentators thought that even with these concerns there was some support for the view that this sample group were generally well disposed to the bal-

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<sup>46</sup> Respondent 1386: "The artists lose royalties doing it this way"

Respondent 1419: "Stealing money from artists"

<sup>47</sup> Respondent 9136: "Pirating is rife due to these loopholes in the copyright law"

Respondent 79414: "It is very hard to catch people doing the wrong thing"

<sup>48</sup> Respondent 227: "Why does a dead person need protection"

<sup>49</sup> Respondent 69590: "Artists and publishers are overpaid immoral hams whose drug fuelled excess lifestyles are out of touch with reality"

<sup>50</sup> Respondent 92068: "It still makes it illegal to download"

Respondent 99709: "CDs are very expensive comparatively"

<sup>51</sup> Eg [11] "better than expected – fabulous!"; also [19]. [2] was surprised even 14% said it favoured artists too much. [14] had assumed there was more anti-copyright industry sentiment.

<sup>52</sup> Eg [12] "the question is difficult to ask. You can't draw much from this."

<sup>53</sup> [11] referred to *AVCS v Foxtel & Ors* [2006] ACopyT 2, <http://www.austlii.edu.au/au/cases/cth/ACopyT/2006/2.html>

<sup>54</sup> Eg., [3] noted the omission of libraries from those permitted to take advantage of these new entitlements.

|      | <b>Answer</b>  | <b>Number</b> | <b>%</b>     |
|------|--|---------------|--------------|
| 8-1  | Creator's Rights   | 58            | 3.9          |
| 8-2  | Length of time   | 58            | 3.9          |
| 8-3  | Ownership – artists/publishers already<br>get enough     | 40            | 2.7          |
| 8-4  | Time shifting  | 20            | 1.3          |
| 8-5  | Time/Format shifting                                     | 139           | 9.3          |
| 8-6  | Educational Purposes                                     | 84            | 5.6          |
| 8-7  | <i>Fair and reasonable</i>                               | 376           | 25.1         |
| 8-8  | <i>Unsure/personal/no reason given</i>                   | 395           | 26.3         |
| 8-9  | Miscellaneous  | 83            | 5.5          |
| 8-10 | Sufficiently protects creators and/or<br>consumer rights | 218           | 14.5         |
| 8-11 | Consumers need more rights                               | 29            | 1.9          |
|      |  | <b>1,500</b>  | <b>100.0</b> |

Table 3.3: Why do you hold the attitude you gave in Q7 to whether the law is fair or unfair to consumers as well as artists? (The most common two are shown in italics)

ance of copyright law. The concerns focused on the potential impact of influences in the questions given the likely unreliable level of awareness of relevant issues.

### 3.5.8 Question 8: Why [do you hold the attitude you gave in Q7]?

**Consumer Responses:** The final free form question gave the respondents the opportunity to comment on first, whether they think copyright law in the wake of the amendments favours artists or consumers or whether it struck the balance between the rights of both, and then asked why. Many respondents took this opportunity to target a certain aspect of the law (the question itself outlined the length of copyright protection, free use for educational and press reporting purposes and time- and format-shifting) and comment on why that particular part of the law shifted or maintained the balance in a particular way. Yet the vast majority of respondents asserted that the law was fair and reasonable with-

|      | <b>Answer (grouped by Q7: who<br/>copyright favours)</b> | <b>Number</b> | <b>%</b>     |
|------|--|---------------|--------------|
|      | Fair balance   | 1,217         | 81.1         |
| 8-1  | Need to protect creator's rights                         | 15            | 1.0          |
| 8-2  | Excessive duration                                       | 16            | 1.1          |
| 8-3  | Artists/publishers already get enough                    | 5             | 0.3          |
| 8-4  | Publicity is valuable in itself                          | 17            | 1.1          |
| 8-5  | Time-/format-shifting required                           | 128           | 8.5          |
| 8-6  | Educational users cannot afford it                       | 81            | 5.4          |
| 8-7  | <i>Fair and reasonable</i>                               | 371           | 24.7         |
| 8-8  | <i>Unsure/no clear reason</i>                            | 316           | 21.1         |
| 8-9  | Miscellaneous  | 50            | 3.3          |
| 8-10 | Sufficiently protects creators and/or<br>consumer rights | 215           | 14.3         |
| 8-11 | Consumers need more rights                               | 3             | 0.2          |
|      | Favours Artists  | 206           | 13.7         |
| 8-2  | <i>Excessive duration</i>                                | 41            | 2.7          |
| 8-3  | Artists/publishers already get enough                    | 35            | 2.3          |
| 8-4  | Publicity is valuable in itself                          | 3             | 0.2          |
| 8-5  | Time-/format-shifting required                           | 10            | 0.7          |
| 8-6  | Educational users cannot afford it                       | 2             | 0.1          |
| 8-7  | Fair and reasonable                                      | 1             | 0.1          |
| 8-8  | <i>Unsure/no clear reason</i>                            | 59            | 3.9          |
| 8-9  | Miscellaneous  | 27            | 1.8          |
| 8-10 | Sufficiently protects creators and/or<br>consumer rights | 2             | 0.1          |
| 8-11 | Consumers need more rights                               | 26            | 1.7          |
|      | Favours Consumers  | 77            | 5.1          |
| 8-1  | <i>Need to protect creator's rights</i>                  | 43            | 2.9          |
| 8-2  | Excessive duration                                       | 1             | 0.1          |
| 8-5  | Time-/format-shifting required                           | 1             | 0.1          |
| 8-6  | Educational users cannot afford it                       | 1             | 0.1          |
| 8-7  | Fair and reasonable                                      | 4             | 0.3          |
| 8-8  | <i>Unsure/no clear reason</i>                            | 20            | 1.3          |
| 8-9  | Miscellaneous  | 6             | 0.4          |
| 8-10 | Sufficiently protects creators and/or<br>consumer rights | 1             | 0.1          |
|      |  | <b>1,500</b>  | <b>100.0</b> |

Table 3.4: Why do you hold the attitude you gave in Q7 to whether the law is fair or unfair to consumers as well as artists? (The most common two are shown in italics)

out any particular justification. Another similar group of respondents thought that the laws strike the balance correctly by adequately protecting the rights of both consumers and creators (*“it protects the artists whilst recognising the public’s interests [76107], allowing access of works to the public, as well as protecting the intellectual property and income of the artist” [78810]*).

A small group of respondents asserted that copyright laws are still well in favour of consumers – one asserting that the artists *“lose royalties this way”* and another that *“pirating is rife due to these loopholes in the copyright law.”* Others in this category expressed concern for creator’s rights in general; saying that although the laws were fairly balanced, the profit-making capacity of some of these activities (presumably time-shifting) should be cautioned against or policed.

On the flip side others argued that consumers still suffered because of a lack of rights in the market. Some of these included the fact that consumers still have to pay too much to obtain copyrighted material (96738, 99709) or that what is now considered illegal downloading should not be (*“what’s the use of the Internet then” [93656]* and *“it still makes it illegal to download [92068]*) or even that Internet prices are so high that they justify illegal downloading (*“Internet prices are high – much higher than other countries. So I think we need to get something for our money”*).

Two other groups made more specific remarks against restrictive rights against consumers; one of these groups targeted the fact that 70 years after the death of the author was far too long for copyright to subsist (*“why does a dead person need protection” (227)*, a number of others suggested time frames [15802, 27290]. Another group alleged that copyright law was unfair because artists already earn enough anyway (*“they earn too much anyway” [47547]* *“because they could afford to sell at a reasonable price instead of profiteering [52943]* *“artists and publishers are overpaid immoral hams who drug fuelled excess lifestyles are out of touch with reality” [69590]*).

Certain individuals also (mainly referring to time-shifting) thought that the amendments and current state of the law is fair because it leads to increased publicity and exposure for artists (*“artists and performers are getting free publicity [4157]*, *“the consumers may not otherwise purchase the material and therefore the exposure for the artists etc. Would not exist [99646]*) and even higher ratings for programmes ([6902]).

A reasonable group of the sample thought that time- and format-shifting was self-evidently fair either because it did not substantively effect the rights of the authors and creators (*“I don’t think it makes any difference to the suppliers of a TV show if one records it to watch at a more*

*convenient time*" [93168]) and also because of a belief that purchase entitled them to use material as they pleased (*"If I have bought... I should be able to put my... songs on my MP3"* [48653], *"if you own it you should be able to use it the way you want"*) or because free-to-air is by nature free (*"free to air, it's free"* [85903]).

Others targeted the fact that it was free for educational purpose as the chief reason for which the laws were fair, however a small sample of these respondents disagreed with the use for press reporting warranting the same exemption.

**Commentator observations:** The numbers in this table were not thought to say very much, since so many of them effectively were in categories of "don't know" or "it's fair because it's fair."

This was perceived by many commentators to be a reflection of a relative lack of awareness and analysis of the underlying copyright law and its balance or lack thereof amongst the general (online) population, confirmed by the very high proportion (75%) of those in Q5 who were not aware of the changes until told.

However, while overall of limited value, the comments were felt to be of some value in explaining the thinking on particular responses.

## 3.6 Commentary from experts and stakeholders

This section sets out some of the general predictions, concerns and observations from a range of commentators noted in Appendix 3.9.5. Comments on the specific questions are included above in the relevant section.

### 3.6.1 Predictions and concerns, perceived outcomes

A common prediction was in fact that there would be no external change as a result of the changes to the law.<sup>55</sup> The changes were seen to be aimed at "decriminalising" or "legitimising" certain ordinary use, existing consumer behaviour.<sup>56</sup> It was seen as the law "catching up,"<sup>57</sup> although the technologically specific provisions are seen as likely to diminish over time.<sup>58</sup>

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<sup>55</sup> [2], [3], [4], [18], [19].

<sup>56</sup> [4], [13], [18]. See also the *Explanatory Memorandum* for the Amendment bill for s109A.

<sup>57</sup> [13] noted the law is slow in Australia to catch up with technology, previously seen with the Betamax case.

<sup>58</sup> [10].

Indeed, one complaint was that the amendments, although touted as “opening the way for new technology,”<sup>59</sup> in fact represented the legalisation of the last generation of digital technology, not the next.<sup>60</sup>

Another strand of thinking lamented that the changes did not go far enough, and noted the effect of “Technological Protection Measures” (extended under the umbrella of the US Free Trade Agreement) and contract to restrict or negate some the benefits of the amendments.<sup>61</sup>

There was some hope that the changes would “appease or take the heat out of the debate,” or reduce advocate concerns.<sup>62</sup> This generally was not seen to have occurred,<sup>63</sup> although some pro-consumer advocates suggested that copyright had returned to the marginal specialist interest category, after briefly taking a more prominent place in public affairs.<sup>64</sup>

Some thought the changes would make the law harder to explain,<sup>65</sup> due to the complexity, while others thought the opposite, because “the law is no longer an ass” in banning popular activities perceived to be harmless.<sup>66</sup> In practice both effects were seen to have occurred to some extent.

In practise there was very little perceived change in consumer behaviour that could be traced to the amendments.<sup>67</sup> Some observers suggested there might be some impact in reducing unit price of certain items, but did not consider they had any subsequent evidence to tie any of the continuing price pressures directly to the amendments. Others suggested that the primary driver was technology itself, and what it permitted or prohibited, not the details of the amendment.

There was seen to be some confusion, and the complexity drew adverse comment.<sup>68</sup> Some even thought it was so bad as to be a nonsense, almost impossible to comply with.<sup>69</sup> It was seen also as a missed opportunity to simplify the law in this area.<sup>70</sup>

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<sup>59</sup> [18].

<sup>60</sup> [3].

<sup>61</sup> [9], [17], [18]. Several noted that you are not permitted to bypass a TPM if it prevents you from taking advantage of one of the new exceptions.

<sup>62</sup> [12], [13].

<sup>63</sup> [13]

<sup>64</sup> [12].

<sup>65</sup> [14], [17].

<sup>66</sup> [12], [14].

<sup>67</sup> See above: most of those predicting no effect felt vindicated.

<sup>68</sup> [15], [18].

<sup>69</sup> [11].

<sup>70</sup> [14].



One aspect some industry figures regretted was the perceived passing of the moment when a royalty scheme for blank media could have been introduced, and thus the industry were worse off.<sup>71</sup> However, the continuing rapid per unit sales revenue from digital music and content, in particular for the iPod were seen to be a counter influence potentially tending to swamp this fading hope. “Cheap and convenient still works” for iTunes sales, an echo of the convenience justifications in question 4.<sup>72</sup>

Many observers noted the great departure from “technological neutrality” in the changes and their very detailed conditions of application.<sup>73</sup> This suggested to some that the benefit would recede as technology changed yet again.

There was some concern that institutions would be adversely effected, both because the changes were largely for “personal” use, excluding libraries etc. for doing the acts on behalf of their clients, and also because the restrictions for staff meant that they would have to learn different rules for home and work copying.<sup>74</sup>

The main concern for a small number of industry experts, though in practice not voiced actively by many (and rejected by others),<sup>75</sup> was that there would be a “floodgates” problem, once the copyright rules were relaxed then consumers would assume anything was fair game. Also expressed in the saying “give them an inch, they take a mile,” this was in fact ultimately not seen as having been realised: both in terms of anecdotal consumer views reported by many experts, and the consumer answers to survey question 6, the conclusion appears to be that this has not happened.<sup>76</sup>

#### **3.6.2 Figures don't reveal identifiable impacts**

In light of the relative lack of public discussion since the amendments, one of the few forms of potential information regarding consumer behaviour (before our survey) might have been from industry statistics and data. Although this is “indirect” (ie, not directed towards assessing impact of the provisions or the time-/format-shifting activities themselves), it may give some idea of patterns of consumer activity regarding copyright material.

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<sup>71</sup> [10], [11].

<sup>72</sup> [6], [9].

<sup>73</sup> [3], [17], [18].

<sup>74</sup> [3], [11], [19].

<sup>75</sup> [4], [14].

<sup>76</sup> [10], and see comments around question 6.

Publicly available statistics and data for Australian industries – music, film, video and the like – do however give little indication of any direct correlation between the amendments and macro business results. This was a major theme of our investigations. One commentator also noted that the US Government Accountability Office had reported no reliable data,<sup>77</sup> in relation to attempting to disaggregate the impact of P2P services; one had to make assumptions and industry assumptions were often wrong.<sup>78</sup>

For instance the ARIA data in Schedule 2.9.6 for 2005 – 2009 show dramatic falls in certain physical media sales in 2005 and 2006, with some declining further 2007 to 2009 while others stabilise. At the same time, digital sales figures start from a low base and increase regularly in the range of 30-40% per year. RIAA figures and those from various movie sources tell a similar though equally patchy story. It seems clear that dramatic forces are at work on the business models of both music and movie industries.

The consistent view of many commentators was that the data did not and would not reflect any direct impact of the time- and format-shifting amendments.<sup>79</sup> The larger forces were considered likely to swamp any effect, and no-one was expecting any significant change in any case. No commentator pointed to data to contradict this, and most thought that there was no such data.<sup>80</sup> Industry efforts at data collection were presumed to focus on piracy, the “main game”.<sup>81</sup> One observer noted a New York Times story suggesting that even here that downloads did not markedly affect sales of CDs, which were under challenge by other online models, though some industry figures did not go this far.<sup>82</sup>

### 3.6.3 Developments in other jurisdictions

Publicly available statistical data for industries – music, film, video etc – do not support an obvious causal link with the two amendments here, or with the overseas equivalents.

More work needs to be done on comparisons with Australian data. Reasons for similarities and differences may emerge which take into account the 2006 amendments.

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<sup>77</sup> [18].

<sup>78</sup> [10], [3].

<sup>79</sup> Eg, [4].

<sup>80</sup> See for instance views expressed by commentators [2], [3], [9], [11], [14], [15], [19].

<sup>81</sup> [14]: “no one is worried” about format shifting having a direct impact on sales.

<sup>82</sup> [3].

#### USA

The first jurisdiction to introduce time-shifting exceptions to copyright law was the United States through the common law doctrine of “fair use” later codified in the Copyright Act of 1976 and interpreted to include time-shifting within its scope in *Sony Corp. of America v Universal City Studios Inc.* And later in *RIAA v Diamond Multimedia* the scope of the doctrine was also extended to format-shifting.

Both the United Kingdom and New Zealand slowly after have moved in the same direction as the US. In 1988 and 2008 respectively, each country introduced their own time-shifting exceptions through legislation.<sup>83</sup> However the UK is yet to introduce an exception for format-shifting; though it was recommended in the Gowers Review of Intellectual Property.<sup>84</sup> New Zealand on the other hand introduced both time- and format-shifting simultaneously “as part of a wider reform process to ensure that our intellectual property legislation is up to date, relevant and takes account of international developments”.<sup>85</sup>

#### New Zealand

The New Zealand Government’s position paper proposed a narrow exception that would permit the owner of a legitimate copy of a sound recording to make one copy of that sound recording (and the music it contains) in each format for his or her personal use. It notes that remunerated statutory licences operating in other countries (such as in Europe and Canada) generally have broader private or personal copying rights than its proposed exception. It is understood that a levy scheme was not pursued because of the assessment of administrative costs of establishing such a system, as well as the cost to consumers who are purchasing blank media for the purpose other than copying copyright material. The New Zealand proposal would not allow copying of borrowed or hired sound recordings.

#### ***Copyright (New Technologies and Performers’ Rights) Amendment Act***

The First Reading speech indicates:

The permitted acts or exceptions to the exclusive rights of copyright owners contained in the Act provide an impor-

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<sup>83</sup> In the UK this is found in the *Copyright, Designs and Patents Act 1988* s70(1) while in New Zealand it is found in the *Copyright (New Technologies) Amendment Act 2008* s84

<sup>84</sup> Under Recommendation 8

<sup>85</sup> *Copyright (New Technologies) Amendment Bill 2006* First Reading

tant balance between protection of copyright, and access for users. The bill clarifies and amends the exceptions to copyright owners' exclusive rights, particularly in relation to fair dealing, library archival and educational use, and time shifting. It also introduces new exceptions for format shifting of sound recordings for private and domestic use, and for de-compilation and error correction of software.

Today the popularity of MP3 players, iPods, and other portable digital music players means that people want to transfer music, which they have legitimately bought, on to these devices to take advantage of the new technology or to enjoy music in different places. Yet, despite the fact that this activity is common practice, it is an infringement under the Copyright Act – a fact that most music lovers do not know. This makes otherwise law-abiding New Zealanders into unintentional lawbreakers. The bill amends this situation to reflect both fairness and reality. The exception does not legitimise clearly damaging behaviour like copying CDs for friends or selling them, or authorising online file sharing of music.

## **3.7 Conclusions and recommendations**

The implications of the survey and related investigations into other data sources and expert opinion is summarised below, and recommendations drawn from that commentary and our analysis follows.

### **3.7.1 Conclusions**

Based on the observations regarding the effects upon consumers and industries, and the attitudes to consumer-oriented copyright limitations and exceptions, it appears that the following observations can be made:

- A large number of people are not well informed about the changes, or the law before them. Misconceptions about what is legal and what is illegal abound. Education projects should be considered.
- Complexity in the legislation is not helpful; simplicity would be preferred. (Though some industry advocates say the law does not need to be, or cannot be made to be, understood or be understandable for ordinary people.)

- The changes have most likely made little impact on most or all consumers. In general the negative scenarios considered in Section 3.3 have not been observed in any significant degree.
- Where consumers are aware of the changes, a majority generally say there has been little impact on their attitudes or behaviour. There are a small but potentially significant number who have had both their respect for copyright law and their intention to use legal options improved.
- There is acceptance among a majority of consumers that there is a reasonable balance in the currently achieved model (although they generally appear poorly informed and uninterested in the detailed operation of the legislative scheme). This positive attitude appears to be somewhat improved by the changes. Industry and creator advocates tend to share this view, while consumer and institutional advocates are conscious of many shortcomings and difficulties in the entitlements of users, and tend to feel the balance is less fair.
- Some people aware of the previous situation (iPods and PVRs often illegal) had a low respect for copyright law and its balance, and the changes appear to have improved their opinion.
- There is no significant indication that the changes have encouraged greater levels of unauthorised Internet transactions.
- There is minor evidence that the changes have had a slight discouraging effect on unauthorised Internet transactions.

#### **3.7.2 Recommendations**

Recommendations for the adoption of similar legislative flexibility about time-, format- and space-shifting elsewhere in light of the Australian experience can be made on the basis of this survey.

- On the basis of the interim analysis and work to date there is little reason for concern about ill effects for consumers or the industries affected, and some indication of benefits for many stakeholders. It appears the risk of action to bring laws into compliance with certain low impact consumer behaviour are unlikely to generate the worst effects feared by creator advocates, and considerable potential for improvements.

- The law in this area should be simplified. The complexity may be responsible for poor awareness and poor compliance. Industry advocates have a range of views about consumers just having to learn about it, and the virtues of complex finely targeted permissions preserving other controls over related non-permitted uses, but the easier it is the more likely it will happen. Many commentators interpreted the survey and other material as showing that there is widespread ignorance of what is permitted and not under the new format-shifting rules.
- Compliance should be made as easy as possible.<sup>86</sup> Industry needs to develop ever more flexible and accessible means to purchase compliant content in ways that are at least as convenient, ubiquitous and straightforward as non-compliant sources, if not better. After early delays there is some improvement in Australia, but anything that slows for instance the availability of material on platforms like the iTunes Music Store is an obstacle to apparent consumer willingness to do the right thing if it is convenient and simple.
- There is scope for education about the right way to behave, but it cannot necessarily make up for overly complex legal schemes.
- Future consultations on policy in this area should make more vigorous attempts to encourage stakeholders to look for common ground; the polarisation of the discussion with entrenched positions on either side may have contributed to sub-optimal legislative outcomes.<sup>87</sup> Some industry groups may need to consider that there appears to be a somewhat wider than assumed willingness of consumers to comply with well understood straightforward regimes, protecting artists rights while not overly complicating use. The fight against piracy, working at extremes, may have distracted attention from the more reasonable mainstream consumer behaviours, which need to be accommodated to some extent.
- While many think that a remunerated exception is no longer possible, it remains attractive to some in industry seeking a simple solution to the conflict between widespread copying and artists' rev-

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<sup>86</sup> Interviewee [19]

<sup>87</sup> Interviewee [11]

enue. Whether this is a desirable issue to reopen is unclear. It might be in the form of a new statutory licence.

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### **Canada**

Canadian Recording Industry Association (CRIA)

Sales (physical; digital from 2008), comparative month year-to-year, 2005-2008.

### **New Zealand**

Recording Industry Association of New Zealand (RIANZ)

Sales – total industry revenue (physical 2003-07; digital 2006-07); retail sales; digital value by format (2007-08), [http://www.rianz.org.nz/rianz/rianz\\_about\\_marketstats.asp](http://www.rianz.org.nz/rianz/rianz_about_marketstats.asp).

### **US**

Recording Industry Association of America (RIAA), 2007/2008 Comparative Shipment and Retail value – Digital and Physical products

Motion Picture Association of America (MPAA), 2008 Theatrical Market statistics.



MPAA, "The Cost of Movie Piracy" (Report for MPAA by LEK, 2005)

[including comparative/global piracy data re: US film products].

IIPA, "Copyright Industries in the US Economy: 2003-2007 Report" (International Intellectual Property Alliance, 2009)

[Statistics and data on growth and employment, foreign sales and exports of copyright industries as a whole; BUT includes scientific/manufacturing/etc industries as well as creative and secondary industries.]

#### **UK**

2009 Entertainment Retailers Association Yearbook <http://www.eraltd.org/attachments/Resources/yearbook.pdf>

[Statistics covering music, video and game software spending/retail values, with breakdown for music and(home) movie formats, including CD, digital, DVD, VHS, BluRay etc.]

#### **International**

International Federation of the Phonographic Industry (IFPI),

2006, 2007 and 2008 Recorded Music sales and comparative sales: physical and digital; covering US, Europe, Asia, Latin America, Global.

IFPI "Digital Music Report" for 2008 and 2009.

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- OECD
- WIPO
- WTO

### 3.9 Appendices

#### 3.9.1 Samples of Responses – Q3 and Q4: attitude to downloading

| # | Summary category                             | Examples  |
|---|--|---|
| 1 | “It’s stealing”<br>Illegal, Immoral or wrong | <p>If it is unauthorised then that makes it not OK [record no. 33]</p> <p>It’s just wrong. [9]</p> <p>Illegal. [38]</p> <p>Pirating deprives the owner/creator of the copy-right material, their rights to royalties from sales etc, while others using the material unlawfully, could profit from that. [36]</p> <p>The law is there to be obeyed. [636]</p> <p>I think it is stealing. [229]</p> <p>Because the people that own the rights to the movie/music are unable to collect royalties (their income) from the sale of the movie/music. I only watch TV shows on the net that I have missed on the TV station website. They are not downloaded for future watching, just streamed to watch live. [397]</p> |
| 2 | Undermines Artists rights to income          | <p>The creators don’t get paid for their product. [9]</p> <p>Someone is losing out. [19]</p> <p>Artists don’t get royalties. [174]</p> <p>It’s other people’s work. [505]</p>   |

|                 |   |   |
|-----------------|---|---|
| <p><b>3</b></p> | <p>Economic<br/>OK if it isn't for profit/<br/>wouldn't otherwise buy</p> | <p>People who download and watch are not depriving artists of any rightful income – those who download and do not sell for a profit never intend in the first instance to purchase the material. [12]<br/>You are not doing this so you can sell it later. It's for your own personal use. [52]<br/>Because sometimes that is the only way some people can afford music or movies, like people on a pension who just afford to have a computer etc, can't afford to buy CDs or DVDs and therefore wouldn't be buying them even if they couldn't get them off the net, I object to those people that download to make money from it by making multiple copies and selling them off or people that can afford to buy them downloading them. [345]<br/>Why pay full price? [541]</p> |
| <p><b>4</b></p> | <p>Sampling<br/>Try before you buy/wouldn't buy unless you can sample</p> | <p>Because if I don't then I never get to sample the product and am less likely to purchase the CD or DVD. [11]<br/>It assists in making a decision about making a purchase. I do not buy a book or magazine without flicking through it first, or purchase a new car without taking it for a test drive. But the movie/music industry expects me to pay for a product before I can determine if I like it... [79]</p>  |

|   |                           |   |
|---|---------------------------|---|
| 5 | Contempt for the industry | <p>Copyright laws were introduced to protect the rights of a creator to the material they created. These days, copyright is just big business. Most (c) holders don't care about the material, they just care about the \$. [24]</p> <p>The prices that are charged for the purchase of new or old movies, DVD music, or games on DVDs are basically robbery for the makers. The materials to make the discs are anywhere from a tenth to ten times less than what they are to produce. Being charged anywhere beyond a twenty dollar price range and the profit margins of the companies making these discs is wrong. Yes, they need to make a profit but how much of a profit against how much of sheer greed to rip off the consumer? [309]</p> <p>The owners of the material make obscene amounts of money. I haven't heard any stories about the author of the material going bankrupt because of pirating. [496]</p> <p>I think big corporations charge too much for CDs and DVDs... At the same time I firmly believe that smaller record labels etc should be supported as much as possible. [1378]</p> <p>They rip us off so time for a bit of payback. [1267]</p> <p>Artists get a glorified wage anyways and squander it on 17 cars... So I think its fair that us middle class people get a break... If they are a one hit wonder then I feel its ok to only download that song and not have to pay \$20 for the album... If the artist/ actor/actress is good... Then I buy their movie/album, I think that's fair. [1424]</p> |
|---|---------------------------|---|

### 3. SHIFTING SANDS?

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|   |   |   |
|---|---|---|
| 6 | Accessible<br>Ease of access/convenience and rarity                     | <p>Because sometimes we do not have time to see it at the time they put it on television. [147]</p> <p>Because the people that own the rights to the movie/music are unable to collect royalties (their income) from the sale of the movie/music. I only watch TV shows on the net that I have missed on the TV station website. They are not downloaded for future watching, just streamed to watch live. [397]</p> <p>If you miss some shows, that are shown free to air anyway. [459]</p> <p>Only download music that are rare or hard to find. [61]</p> |
| 7 | Everyone does it  | <p>Everyone does it – it would be to hard to stop. [13]</p> <p>I don't know, everyone does it, it's everywhere and it's free... everyone should be able to share! [198]</p> <p>Everyone does. [313]</p> <p>Because everyone does it and nothing has really been done about it. [515]</p> <p>Everyone does it. [536]</p> <p>All do it. [669]</p>   |
| 8 | No particular reason given or reason makes little sense or adds nothing | <p>I download it legally from the new Foxtel site. [44]</p> <p>Have no reason. [192]</p> <p>A little doesn't hurt. [362]</p> <p>For obvious reasons. [370]</p> <p>Don't know. [499]</p> <p>Just do. [572]</p> <p>We are downloading Indian language movies. [1319]</p> <p>If people didn't download movies, we wouldn't have to sit and watch a 2min spiel every time we hire a DVD on why you shouldn't download pirate stuff (man, it gets really annoying after a while). [6]</p>  |

### 3.9.2 Sample responses – Q8: Why do you hold the attitude in Q7 about whether law is fair or unfair to consumers as well as artists?

| # | Description  | Examples: (Code: (response to q7) response to q8 [number])  |
|---|--|---|
| 1 | Creators' Rights<br><br>Protect creators' rights to income           | (3) Performers must have their income protected. [38]<br>(2) Because that person paid for their item to be copyrighted so it is theirs. [50]<br>(2) Artists have the right to financial returns for their work. [131]<br>(2) There needs to be some laws in place to safeguard the copyright of artists and their publishers or there would be mayhem in the publishing sector, and it would severely affect the income of these sectors. [167]<br>(1) The artists lose royalties doing it this way. [64]<br>(2) As long as you do not make a profit from this it should be ok. [141]<br>(2) I think these laws are fair as long as they are not for commercial gain. [194] |
| 2 | Sufficiently protects creators' and/or consumers' rights             |   |
| 3 | Consumers need more rights   |   |
| 4 | Length of time<br><br>Duration too long (70 years, dead people etc.) | (2) I think it is a reasonable system, but would like to see the 70 years reduced to say 20 years unless some sort of renewing process is undertaken. [90]<br>(1) 70 years is a loooooong time. [125]<br>(1) Because as stated in the blurb above we cannot use it for 70 years from inception or death of writer but media can and educational user can as well. [148]<br>(1) Why does a dead person need protection? [227]  |

|          |   |  |
|----------|---|--|
| <p>5</p> | <p>Ownership – artists already get enough</p> | <p>(2) Well known artists and publishers in my opinion do very well from sales etc. [1395]<br/>         (1) The publishers have had a good time for too long overcharging consumers and exploiting artists for their own lazy gain! It's like I demanded to be paid again for work I did last week that I'd already been paid for, how ridiculous is that? [1156]<br/>         (1) Some people just want more money and don't care about fans. [1217]</p>  |
| <p>6</p> | <p>Publicity is valuable to creators</p>      | <p>(2) The more “exposure” an artist gets the more “sales” this should translate into. So the old adage “any publicity is good publicity” may be appropriate under these changes to the law. [30]<br/>         (2) I might add some music to a video I make to put on YouTube. I am showing someone how to do something with their horse. If I edit in a comment showing the name of the singer/band, that would be free advertising for that singer/band. As long as I give proper credit to the artist, that should be enough. After all, the music is not the main focus of my video. The horsemanship is. The music is to make the video happier and I have acknowledged the artist. [644]</p> |

|   |   |   |
|---|---|---|
| 5 | Time-/format-shifting<br>“more convenient time” and format shifting is required | <p>(2) Not sure about the music part, but for the TV shows, some of the shows are shown at inconvenient times and being able to copy and then watch later is fair. [100]</p> <p>(2) Consumers shouldn't have to pay more than once to store a song in different media formats, nor should they be restricted in watching the shows they want to watch when they want to watch them. On the flip side, artists and publishers still get their royalties for the initial download/purchase of the music or viewing/recording of the show. [249]</p> <p>(2) I believe for students all should be free if you own a product you should be able to make a back up or save it to another format to watch or listen to later. [290]</p>  |
| 6 | Educational Purposes  | <p>(2) Schools and educational institutions would be unable to afford to use much copyright material if they had to pay full price. This would be detrimental to both students and teachers and also the copyright owner as students would in many cases remain ignorant of their work. Recording a TV show to watch later makes no difference to copyright if it is just for personal use to watch once. [121]</p> <p>(2) I believe for students all should be free if you own a product you should be able to make a back up or save it to another format to watch or listen to later. [290]</p> <p>(2) I use educational material and it needs to be free. [137]</p> <p>(2) I am a teacher who uses materials from TV and the Internet for my students. Without this facility it would dramatically retard the way I could deliver content to my students. [162]</p> |



### 3. SHIFTING SANDS?

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|   |  |   |
|---|--|---|
| 7 | Fair and reasonable                          | <p>(2) Equal. [1]</p> <p>(2) It is good. [7]</p> <p>(2) We should all benefit in some way without too much cost. [14]</p> <p>(2) The answer says it. [17]</p> <p>(2) It sounds reasonable. [21]</p> <p>(2) Have to have some mix. [45]</p> <p>(2) The high costs of recordings, concerts, books etc warrants downloading to offset some consumers costs. [73]</p> <p>(2) 70 years is long enough. [272]</p>   |
| 8 | Unsure/no reason given/reason makes no sense | <p>(3) Too many loop holes! [43]</p> <p>(2) No reason, I have no opinion. [59]</p> <p>(2) It is fair people should be able to view material. [12]</p> <p>(2) Again if you can't sample the work then I am less likely to buy it. It's like a car dealer to saying buy a car without ever seeing it. [11]</p> <p>(2) There has to be a bit of flexibility on the part of both artists and consumers. Some CD's are way over priced so it is no wonder that they are downloaded through the net. [169]</p> <p>(2) Don't know. [182/184]</p> <p>(1) The cost is high comparatively to afford... [1226]</p> |

### 3.9.3 The relevant exceptions in Copyright Amendment Act 2006 (Cth)

#### “Time-shifting”: section 111 (broadcasts – cinematograph films and sound recordings)

- Section 111 applies as an exception to copyright infringement where a person makes a recording of a cinematograph film or sound “solely for private and domestic use” for the purpose of watching or listening to the recording “at a time more convenient than the time when the broadcast is made.” However, creating a library of such recordings becomes infringing at some time after the undefined point where it is no longer retained merely for this transient purpose.<sup>88</sup>
- The Section broadens the scope of the copyright infringement exception for recording broadcasts for personal use. It is a repeal and substitute of the previous s 111, which was limited in scope and practical benefit because it applied to the broadcast only and not to any work, film or sound recording included within the broadcast. New s 111 aims to clarify that making a recording of a broadcast in certain circumstances does not infringe copyright in the broadcast, or any work or other subject matter included in the broadcast.
- According to the Explanatory Memoranda:

new s 111 reflects the intention that copyright law should ensure appropriate exceptions are provided to allow common domestic practices that do not unreasonably affect the copyright’s owner’s interests, such as video taping or recording television and radio programs in the home to watch or listen to at a later time.

The relevant text of the Amending Act is set out below:

---

<sup>88</sup> [17] suggests that the intended result, deprecation of library building, has come about due not to the law but to the change in recording technology from tape and DVD, whose recordings are slow to make and permanent, to PVR and TiVo-style devices, whose hard disks fill up unless periodically purged but are also quick and convenient enough to use for time shifting.

## Schedule 6—Exceptions to infringement of copyright

### Part 1—Recording broadcasts for replaying at more convenient time

#### *Copyright Act 1968*

...

#### 1 Section 111

Repeal the section, substitute:

#### **111 Recording broadcasts for replaying at more convenient time**

- (1) This section applies if a person makes a cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made.

Note: Subsection 10(1) defines *broadcast* as a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*

#### *Making the film or recording does not infringe copyright*

- (2) The making of the film or recording does not infringe copyright in the broadcast or in any work or other subject-matter included in the broadcast.

Note: Even though the making of the film or recording does not infringe that copyright, that copyright may be infringed if a copy of the film or recording is made.

#### *Dealing with embodiment of film or recording*

- (3) Subsection (2) is taken never to have applied if an article or thing embodying the film or recording 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; or
  - (e) used for causing the film or recording to be seen or heard in public; or
  - (f) used for broadcasting the film or recording.

Note: If the article or thing embodying the film or recording is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the article or thing but also by the dealing with the article or thing.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the article or thing by the lender to a member of the lender's family or household for the member's private and domestic use.

**2. Subsection 248A(1) (after paragraph (a) of the definition of *exempt recording*)**

Insert:

or (aaa) an indirect cinematograph film or sound recording of a performance, being a film or recording that:

- (i) is made from a communication that is a broadcast of the performance; and
- (ii) is made in domestic premises; and
- (iii) is made solely for private and domestic use by watching or listening to the performance at a time more convenient than the time when the broadcast is made;

**“Format-shifting”**

Part of Schedule 6 of the Amending Act created sections 43C (literary works), 47J (photographic works), 109A (sound recordings), and 110AA (cinematograph films) which introduce limited new technology-specific exceptions to the general prohibition against unauthorised copying and related dealings, generally turning on the involvement of a “format” conversion stage in the copying. The type of “format” involved appears to vary and is in some cases uncertain (for instance, encoding format cf. physical media format cf. digital file format, etc.). One key feature is that digital to digital format-shifting is permissible for music (eg AIFF on CD to MP3 on iPod), while it is not for “film” – only analogue video tape to “electronic” (a strangely ambiguous term, since analogue is electronic too, and one which has been assumed to mean digital).

Rather than a single general “format-shifting” exception, as some have assumed now exists as a result of this attempt to legalise certain entrenched consumer behaviours, the specific application of each new provision varies by technology and other circumstances, and creates a complex array of conditions and limitations on each. Within the context of each use the conditions make a certain sense, but this fine tuning comes at the expense of simplicity, comprehensibility, and consistency.

In turn this increases the burden and risk on those trying to advise ordinary users of their “rights” and obligations, and may create a new range of relatively trivial technical infringements which many go unenforced.

The text of the amendments are set out below. Rather than summarise their effects here, it is useful for the reader to attempt to understand the specific conditions applicable to each new entitlement individually and together, as well as to compare similarities and differences with those offered for the other technologies.

## **Part 2—Reproducing copyright material in different format for private use**

### ***Copyright Act 1968***

#### **6 After section 43B**

Insert:

#### **43C Reproducing works in books, newspapers and periodical publications in different form for private use**

- (1) This section applies if:
- (a) the owner of a book, newspaper or periodical publication makes from it a reproduction (the *main copy*) of a work contained in the book, newspaper or periodical publication; and
  - (b) the main copy is made for his or her private and domestic use instead of the work as contained in the book, newspaper or periodical publication; and
  - (c) the main copy embodies the work in a form different from the form in which the work is embodied in the book, newspaper or periodical publication; and
  - (d) the book, newspaper or periodical publication itself is not an infringing copy of either the work or a published edition of the work; and
  - (e) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the work in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the work incidentally made as a necessary part of the technical process of making the main copy.

- (2) The making of the main copy is not an infringement of copyright in the work or a published edition of the work.

*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.

*Reproducing work from main copy may infringe copyright*

- (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of another reproduction of the work from the main copy.

*Disposal of book etc. may make the main copy an infringing copy*

- (6) Subsection (2) is taken never to have applied if the owner of the book, newspaper or periodical publication disposes of it (in the form from which the main copy was made) to another person.

*Status of temporary reproduction*

- (7) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary reproduction of the work as a necessary part of the technical process of making the main copy, then:

- (a) if the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy—the making of the temporary reproduction does not infringe copyright in the work or a published edition of the work; or
- (b) if the temporary reproduction is not destroyed at that time—the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the work and the published edition of the work from which the main copy was made.

**7 After Division 4A of Part III**

Insert:

**Division 4B—Acts not constituting infringements of copyright in artistic works**

**47J Reproducing photograph in different format for private use**

- (1) This section applies if:
  - (a) the owner of a photograph (the *original photograph*) makes a reproduction (the *main copy*) of it for his or her private and domestic use instead of the original photograph; and
  - (b) the original photograph itself is not an infringing copy of a work or published edition of a work; and
  - (c) either:
    - (i) the original photograph is in hardcopy form and the main copy is in electronic form; or
    - (ii) the original photograph is in electronic form and the main copy is in hardcopy form; and
  - (d) at the time the owner makes the main copy, he or she has not made, and is not making, another reproduction of the original photograph that embodies the original photograph in a form substantially identical to the form of the main copy.

For this purpose, disregard a temporary reproduction of the original photograph incidentally made as a necessary part of the technical process of making the main copy.
- (2) The making of the main copy is not an infringement of copyright:
  - (a) in the original photograph; or
  - (b) in a work, or published edition of a work, included in the original photograph.

*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.

*Reproducing main copy may infringe copyright*

- (5) Subsection (2) does not prevent the main copy from being an infringing copy for the purpose of working out whether this section applies again in relation to the making of a reproduction of the main copy.

*Disposal of original may make the main copy an infringing copy*

- (6) Subsection (2) is taken never to have applied if the owner of the original photograph disposes of it to another person.

*Status of temporary reproduction*

- (7) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary reproduction of the original photograph as a necessary part of the technical process of making the main copy, then:

- (a) if the temporary reproduction is destroyed at the first practicable time during or after the making of the main copy—the making of the temporary reproduction does not infringe copyright in the original photograph or a work, or published edition of a work, included in the original photograph; or
- (b) if the temporary reproduction is not destroyed at that time—the making of the temporary reproduction is taken always to have infringed copyright (if any) subsisting in the original photograph or a work, or published edition of a work, included in the original photograph.

## 8 After section 109

Insert:

### 109A Copying sound recordings for private and domestic use

- (1) This section applies if:
- (a) the owner of a copy (the *earlier copy*) of a sound recording makes another copy (the *later copy*) of the sound recording using the earlier copy; and
- (b) the sole purpose of making the later copy is the owner's private and domestic use of the later copy with a device that:



- (i) is a device that can be used to cause sound recordings to be heard; and
  - (ii) he or she owns; and
  - (c) the earlier copy was not made by downloading over the Internet a digital recording of a radio broadcast or similar program; and
  - (d) the earlier copy 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 later copy does not infringe copyright in the sound recording, or in a literary, dramatic or musical work or other subject-matter included in the sound recording.
- (3) Subsection (2) is taken never to have applied if the earlier copy or the later 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; or
  - (e) used for causing the sound recording to be heard in public; or
  - (f) used for broadcasting the sound recording.

Note: If the earlier or later copy is dealt with as described in subsection (3), then copyright may be infringed not only by the making of the later copy but also by a dealing with the later copy.

- (4) To avoid doubt, paragraph (3)(d) does not apply to a loan of the earlier copy or the later copy by the lender to a member of the lender's family or household for the member's private and domestic use.

## 9 After section 110

Insert:

### **110AA Copying cinematograph film in different format for private use**

- (i) This section applies if:
  - (a) the owner of videotape embodying a cinematograph film in analog form makes a copy (the *main copy*) of the film in electronic form for his or her private and domestic use instead of the videotape; and

- (b) the videotape itself is not an infringing copy of the film or of a broadcast, sound recording, work or published edition of a work; and
- (c) at the time the owner makes the main copy, he or she has not made, and is not making, another copy that embodies the film in an electronic form substantially identical to the electronic form in which the film is embodied in the main copy.

For this purpose, disregard a temporary copy of the film incidentally made as a necessary part of the technical process of making the main copy.

- (ii) The making of the main copy is not an infringement of copyright in the cinematograph film or in a work or other subject-matter included in the film.

*Dealing with main copy may make it an infringing copy*

- (iii) 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.

- (iv) 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.

*Disposal of videotape may make the main copy an infringing copy*

- (v) Subsection (2) is taken never to have applied if the owner of the videotape disposes of it to another person.

*Status of temporary copy*

- (vi) If subsection (2) applies to the making of the main copy only as a result of disregarding the incidental making of a temporary copy of the film as a necessary part of the technical process of making the main copy, then:

- (a) if the temporary copy is destroyed at the first practicable time during or after the making of the main copy—the making of the temporary copy does not infringe copyright in the film or in any work or other subject-matter included in the film; or

- (b) if the temporary copy is not destroyed at that time—the making of the temporary copy is taken always to have infringed copyright (if any) subsisting in the film and in any work or other subject-matter included in the film.

**9AA Review of new sections 47J and 110AA**

- (1) The Minister must cause to be carried out by the end of 31 March 2008 a review of the operation of sections 47J and 110AA of the *Copyright Act 1968*.

Note: Those sections are inserted in that Act by this Part.

- (2) The Minister must cause a copy of the report of the review to be laid before each House of the Parliament within 15 sitting days of that House after the report is completed.

### 3.9.4 Questions raised in expert interviews

The following issues were the basis of the interviews with the experts, stakeholders, commentators and academics whose views were sought.

- How do you want to be attributed: anonymous, personal opinion, or view of the organisation?
1. Do you know about the 2006 Copyright changes we are focusing on – format-shifting and time-shifting?  
[Only those answering Yes were interviewed in full. Most were involved either in making submissions on behalf of their constituents or organisations, or providing advice to those preparing such submissions, or assessing the relevance of the proposed changes.]
  2. Did you have any predictions about what would happen, whether from business/creator, consumer, or commentator perspectives, after the changes? Who (which group) did you think it would most affect, if any?
  3. In particular, did you have any concerns about their possible impact?
  4. What do you think has actually happened, from business/creator end or consumer end?
  5. See the summary of our survey, the eight questions, answers, extracts from qualitative explanations by respondents. Are you surprised by any of the results? Anything out of kilter with your expectations?
    - level of practices, awareness and beliefs
    - reasons for beliefs
    - likely impact on behaviour
    - attitudes to copyright balance
  6. We have not been able to locate any data series which shows any impact in eg sales volumes, turnover etc. attributable to the format- and time-shifting changes. (Maybe there was no effect distinguishable from other factors, maybe there is no data specific enough to detect such a change, maybe we have missed something.) Are you aware of any such data which indicates any identifiable effect from the changes?

7. What if any impact do you see in the future? Any concerns?
8. Any comments about our online survey? Methods, flaws etc.  
[The limitations or implications of some of the questions were remarked upon by some of the interviewees. No critical flaws were identified, subject to caution about the viability of extrapolating the results to precise proportions of the wider population. Quantitative answers to question 8 were generally considered of little assistance, although they were broadly consistent with expectations and earlier answers.]

#### **3.9.5 Interviewees**

The following experts and stakeholders agreed to be interviewed in relation to their observations and opinions about both the legal changes and the content of the survey. Unless otherwise indicated, their views were personal opinions not attributed to their organisations. Some preferred to remain anonymous. Numbers in square brackets, like this [12], in the text refer to observations made by a particular interviewee.

##### **Not attributed by name**

- [1.] Anti-piracy body executive
- [2.] Musician, music industry body director
- [3.] Institutional librarian and industry body
- [4.] Creators' and producers' legal adviser (partner)
- [5.] Video industry body executive
- [6.] Music industry body executive
- [7.] Visual arts industry body counsel

##### **Personal views only**

- [8.] Bill Cullen, artist manager (One Louder Entertainment)
- [9.] Colin Jacob, consumer advocate (Electronic Frontiers Australia)
- [10.] Ian McDonald, adviser (formerly of Copyright Council, advocate for creator collecting societies and peak organisations)

- [11.] James Dickinson, Screenrights, film industry body executive
- [12.] Kimberlee Weatherall, law lecturer
- [13.] Lindy Morrison, musician (member of Music Council)
- [14.] Louise Buckingham, industry body (formerly Copyright Council, now PhD candidate)
- [15.] Richard Letts, music industry body executive (Music Council of Australia)
- [16.] Sabine Heindl, anti-piracy body executive (Music Industry Piracy Investigations)
- [17.] Stephen Young, University copyright officer (Melbourne University)

**Organisation attribution**

- [18.] Matt Dawes, Australian Digital Alliance, spokesperson, consumer and education institution advocate
- [19.] Robyn Ayres, ArtsLaw Centre of Australia (principal)

### 3.9.6 Sales figures for Australian music 2005-2009

Table 3.7: Australian wholesale music sales for the years 2005 to 2009.  
Source: ARIA.

| VALUE \$000's           | 2005           | 2006           | 2007           | 2008           | 2009           |
|-------------------------|----------------|----------------|----------------|----------------|----------------|
| <b>PHYSICAL</b>         |                |                |                |                |                |
| <b>CD Singles</b>       | 20,353         | 12,002         | 6,712          | 3,570          | 1,314          |
| <b>Vinyl Albums</b>     | 346            | 256            | 199            | 392            | 1,050          |
| <b>Cassette Albums</b>  | 421            | 181            | 54             | 8              | 12             |
| <b>CD Albums</b>        | 444,729        | 421,941        | 362,061        | 323,800        | 320,900        |
| <b>Music Video/DVD</b>  | 53,699         | 49,192         | 53,030         | 43,576         | 43,160         |
| <b>Other</b>            | 719            | 343            | 192            | 102            | 432            |
| <b>TOTAL</b>            | <b>520,267</b> | <b>483,915</b> | <b>422,248</b> | <b>371,448</b> | <b>366,868</b> |
| <b>DIGITAL</b>          |                |                |                |                |                |
| <b>Digital Track</b>    | 2,471          | 11,560         | 18,695         | 27,087         | 38,534         |
| <b>Digital Album</b>    | 940            | 4,149          | 6,778          | 13,150         | 21,846         |
| <b>Mobile Ringtones</b> | 3,729          | 10,280         | 9,976          | 8,249          | 6,306          |
| <b>Digital Other</b>    | 767            | 1,868          | 4,515          | 5,704          | 12,558         |
| <b>TOTAL</b>            | <b>7,907</b>   | <b>27,857</b>  | <b>39,964</b>  | <b>54,190</b>  | <b>79,558</b>  |
| <b>TOTAL</b>            | <b>528,174</b> | <b>511,772</b> | <b>462,212</b> | <b>425,638</b> | <b>446,112</b> |