

# Copying DVDs — is that legal?

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A consumer might be forgiven for thinking it is legal, at least in some circumstances, to make a copy of their favourite Hollywood movie on DVD where that DVD has been legitimately purchased. After all, the cost of a DVD burner has fallen to below \$500<sup>1</sup> and you can buy a software program over the internet (for example, DVD X Copy at [www.dvdxcopy.com](http://www.dvdxcopy.com)) for about \$175 that allows you to easily copy DVD content.<sup>2</sup> The DVD X Copy program even tells the user that the copy disk is made for personal use only and it will not allow the user to make a copy from a copy.<sup>3</sup>

However, in Australia it is not ordinarily legal for the legitimate purchaser of music or a movie on DVD (or CD) to make a copy, even if that copy is made as a backup for the original or for some other personal use.

## A question of content

There are some circumstances where it is legal to make copies of DVDs. Whether it is legal or not will depend first on the content of the DVD and second on whether the copying falls into one of the fair dealing exceptions<sup>4</sup> to copyright infringement contained in the *Copyright Act 1968* (Cth) (the Act).<sup>5</sup>

It goes without saying that it is legal to copy the content of a DVD where the copier owns copyright in the content. So, for example, the creator of a home movie on DVD, as the copyright owner, is able to legally copy that content. However, there are other situations too where the content of a DVD will permit the making of a backup copy for personal use in certain circumstances.

## Backup copies of computer programs

Section 47C(1) of the Act allows the owner or licensee of a 'computer program' to make a backup copy of the work for that person's use in lieu of the original, provided the purpose of making the backup copy is to ensure that the computer program is not lost or destroyed.<sup>6</sup> The section acts in a similar fashion to the fair dealing exceptions to

copyright infringement in the Act, in that it carves out an exception to the general prohibition on copying literary works.<sup>7</sup> However, the s 47C(1) exception does not *explicitly* apply to cinematograph films or to recorded music.<sup>8</sup>

Nevertheless, to determine just how far the s 47C(1) exception extends, we need to know what constitutes a computer program. The issue is important because, in the digital age, computer instructions, recorded music and motion pictures are all stored electronically as electronic impulses or in binary code (0s and 1s) on a DVD (or other digital storage medium). Computer instructions interact with the original video content on motion picture DVDs to give consumers the visual and aural experience of watching the DVD together with all the added features. If music and film are properly classified as computer programs (and hence literary works) when stored as electronic impulses on DVD, then s 47C(1) would allow consumers to make a backup copy of their favourite movie in case the original was lost or damaged.

The extent to which copyright protection in computer programs extends to the original motion picture content of DVDs was considered in *Australian Video Retailers Association Ltd (AVRA) v Warner Home Video Pty Ltd*.<sup>9</sup> In that case, Justice Emmett found in effect that the content of DVDs (that is, the film or music) could not be classified as part of a computer program. The copyright protection of computer programs extends only to program instructions that are capable of reproducing the original content and not to the original content itself.<sup>10</sup> The *AVRA v Warner* decision therefore supports the proposition that s 47C(1) does not allow the owner or licensee of music or film stored on DVD to make a backup copy for personal use, as music or film cannot be classified as computer programs.

Consequently, if you make a copy of your favourite DVD or CD that contains music or film, without the licence of the owner, you will be in breach of the Act

unless a fair dealing defence applies. You will breach copyright law because a person in Australia who, without the consent of the copyright owner, makes a copy of a sound recording or cinematograph film,<sup>11</sup> does an 'act comprised in the copyright' and is therefore in breach of the Act.<sup>12</sup>

## Fair dealing

In Australia, the defence of fair dealing — unlike the US fair use defence — is limited to defined circumstances. The fair dealing defence allows a person to do an act comprised in the copyright (for example, make a copy of a film) if that act is done for a specific purpose. In relation to sound recordings and cinematograph films (which ordinarily comprise the content of DVDs), a person who does an act comprised in the copyright for the purpose of:

- criticism or review (s 103A);
- reporting news (s 103B);
- research or study (s 103C); or
- a judicial proceeding or for giving legal advice (s 104),

does not infringe copyright.<sup>13</sup>

These fair dealing defences are fairly restrictive and there is no broad, malleable, overarching fair use exception to copyright infringement as there is in the US.<sup>14</sup>

The point is that the Australian legislation does not allow the purchaser of a CD or DVD to make an additional copy — unless the purpose for making the copy is one that falls within a fair use defence, or unless the CD or DVD contains a computer program and the s 47C(1) defence applies.

## Fair use — but only in the US

As suggested above, the US does have a broad 'fair use' defence to copyright infringement. This defence, contained in s 107 of the *Copyright Act 1976* (US), provides that:

... fair use of a copyright work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.<sup>15</sup>

This list is an inclusive list, so it does not limit the types of uses that may fall within the fair use exception to copyright infringement.<sup>16</sup>

Factors to be considered in determining if a use is a fair use under s 107 include:

- the purpose, character and commercial nature (if any) of the use;
- the nature of the copyrighted work;
- the amount and substantiality of the portion used; and
- the effect of the use on the potential value of the copyrighted work.

Because the list of exceptions is not exclusive<sup>17</sup> and as the four relevant factors provide significant scope for argument, the fair use exception to copyright infringement in the US *Copyright Act* is adaptable enough to allow for commendable uses of copyright material to fall within the defence.<sup>18</sup> In each case — and regardless of whether the particular use was for one of the specific purposes listed in s 107 of the US Act — each of the factors listed above will be considered by a US court to determine whether the use in question is a fair use.<sup>19</sup>

Applying the factors above to the making of a backup copy by the legal purchaser of a copyright film on DVD, it is arguable that under US copyright law the legal purchaser would have a fair use defence to a charge of copyright infringement.

### Conclusion

The fair use defence in the US is an overarching general defence to copyright infringement that may apply in any particular circumstance, whereas in Australia the defence of fair dealing is a specific purpose defence.<sup>20</sup> Therefore, US case law which deals with the fair use defence to copyright infringement will only have limited application in Australia. ●

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### Endnotes

1. Davidson J 'Mr Ass and the cracking of DVD copyright' *The Australian Financial Review* 7 January 2003 p 36.
2. Wildstrom S 'Movie copying a legal quagmire' *The Australian Financial Review* 7 January 2003 p 37.

3. Above note 2.

4. *Copyright Act 1968* (Cth) ss 103A, 103B, 103C and 104.

5. There are also a number of other limited exceptions to the general prohibition on copying copyright audiovisual items (which includes films and recorded music). The fair dealing and s 47C exceptions are not the only exceptions under the Act.

6. The definition of 'literary work' includes a computer program.

7. See s 36(1).

8. Section 47C(2) provides that the copyright in cinematograph films and sound recordings held together with the computer program 'on the same computer system' is not infringed if a copy is made as 'part of the normal back-up copying of data for security purposes'. This section is not likely to allow a person to ordinarily make a backup copy of their CD or DVD for personal use — see *Sony Computer Entertainment v Edmunds (t/as Channel Technology)* (2002) 55 IPR 429 at 432-3 (UK).

9. (2001) 53 IPR 242.

10. At [83] and [84].

11. The sound recording or cinematograph film having been either made in Australia or in a country specified in Pts 1, 2 or 5 of Sch 1 of the *Copyright (International Protection) Regulations 1969* (Cth) (pursuant to s 184 of the Act), which includes the US, UK, many European countries and indeed most countries of the world.

12. See ss 85(1)(a), 86(1)(a) and s 101(1).

13. See also ss 104A and 104B in regard to further exceptions to infringement in relation to parliamentary libraries and libraries generally.

14. *Lahore J C Copyright and Designs* (looseleaf) LexisNexis Butterworths Sydney at [40,030].

15. Contained in Title 17 of the US Code.

16. *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1510 C A 9 (Cal 1992) at 1569.

17. At 1569.

18. Copyright Law Review Committee *Copyright and Contract* (2002) at 223.

19. *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1510 CA 9 (Cal 1992).

20. Above note 14 at [40,030].