

October 30th, 2006

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

Dear Sir / Madam,

I wish to comment on the Provisions of the Copyright Amendment Bill 2006.

1. Market Segmentation Technologies

Schedule 12 - Technological protection measures

Part 1 - Main amendments

1 Subsection 10 (c)

5 Subsection 10 (b) (iii)

'but does not include such a device, product, technology or component to the extent that it:

...

if the work or other subject-matter is a cinematograph film or computer program (including a computer game)—controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia'

Firstly, I do note that the Bill is an improvement upon the Exposure Draft, because market segmentation technologies are excluded specifically and by legislation and they also do not have to be designed solely to effect market segmentation. This is very important as market segmentation access controls are rarely the sole form of access control present in cinematograph films or computer programs.

Secondly, why is this exclusion limited to cinematograph films and computer programs? Why is the market segmentation of electronic books and other Copyrighted works being protected and endorsed?

Thirdly, what does the 'acquired outside Australia' condition mean? Do you actually have to purchase the cinematograph film or computer program outside Australia? Or are you allowed to buy it here? What if you place an order in Australia but the purchased product is delivered from overseas?

Finally, and most importantly, what does the phrase ‘to the extent that’ mean?

What if a particular component in a technology does two things: it makes sure unauthorised people do not have access, and it also enforces market segmentation. In this case, it would seem:

1. A technology that circumvents only the market segmentation part is legal, but
2. A technology that circumvents the whole thing - with the purpose of evading market segmentation, but with the effect of circumventing all the controls, is illegal.

The problem here is that it is not physically possible to fall in the first category as in most cases market segmentation devices sit behind other layers of copyright protection related access controls. In almost all instances you cannot possibly bypass a market segmentation device without first circumventing some other of these access controls.

Arguably though, the other access control has the *effect* of enforcing market segmentation, and is therefore not protected to the extent that it does. So this should mean that you could circumvent it in order to achieve the effect of circumventing the market segmentation device.

This final ambiguity definitely requires clarification.

2. Format Shifting Technologies

Schedule 6 - Exceptions to infringement of copyright

Part 2 - Reproducing copyright material in different format for private use

‘109A Copying sound recording in different format for private use

1(1) This section applies if:

- (a) the owner of a record embodying a sound recording makes a copy (the main copy) of the sound recording for his or her private and domestic use instead of the record; and*
- (b) the record was not made by downloading over the Internet a digital recording of a radio broadcast or similar program; and*
- (c) the record is not an infringing copy of the sound recording, a broadcast or a literary, dramatic or musical work included in the sound recording; and*
- (d) the format in which sounds are embodied in the main copy differs from the format in which sounds are embodied in the record; 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 sounds in a format substantially identical to the format in which they are embodied in the main copy. For this purpose, disregard a temporary copy of the sound recording incidentally made as a necessary part of the technical process of making the main copy.’*

Firstly it is pleasing to note that, according to the Attorney-General, the law will be amended in order to ensure that it will achieve its objectives.

I have owned a Sony MiniDisc (MD) portable audio player for the past five years. This device employs a 'managed copy' system through its OpenMG and SonicStage computer software that allows the creation of up to four (4) semi-permanent copies of each audio track that the user provides. These four copies comprise of the first copy made on the computer (that can be played from there) and up to three copies on the portable device itself. It is important that this old technology device is legal to use - such Sony MD players have been sold in Australia for more than ten years.

As well as permitting the use of older technologies, it would be advantageous to cater for some future technologies in the drafting of this exception. The new Microsoft Zune portable audio player due for release later this year will permit owners to share songs with each other. The transferred song will be playable for up to three days or three plays (after which time the shared song is rendered unusable).

Consider that use in terms of the Exposure Draft. Assume that the song is copied from a legitimately purchased CD. The owner then sends the song to a friend (not a 'household' or family member) of the owner.

Under the Exposure Draft this would not be legal.

The drafting of this exception needs to be amended to allow regular, legitimate technology to be used legitimately. The law must not be written to accommodate one type of portable audio player and not others.

3. Strict Criminal Liability

Schedule 1 - Criminal Laws

We already have offences of strict liability in relation to offences regarding physical, tangible property. We even have 'strict civil liability' (in the sense that you can infringe copyright even though you do not know you are). However, the imposition of 'strict criminal liability' is unprecedented in any common law country in the entire world. I am therefore shocked by the idea that we will have strict criminal liability.

Why is that? It is because copyright is different from other property. It really is, despite what some people say. It is intangible. It is artificially constructed by law. You cannot see the boundaries of copyright to walk over them. You do not get some kind of sign post to the fact that you are infringing in many circumstances. Hop over a fence and you know that you are trespassing. Take an apple from someone and you know that you are depriving them of the apple. Instinctively, morally, we know that taking - or interfering with - the tangible property of another is a wrong.

It is just not the same with copyright. We do not necessarily know when we overstep the boundaries of this law. Do people really know that performing a song in public - or playing a legitimately purchased record at their office Christmas party is an infringement? That making a recording of their colleague singing in the shower - or in a public park - then putting it online could be an infringement of their colleague's performers' rights? The borders are not tangible,

nor are they are natural - they are artificial, and the law is not easy to understand. The level of misunderstanding is deep and pervasive.

One obvious counter to this is that education is the solution; that all we need to educate people better about what copyright entails. That it is simply a matter of education, in other words - not a justification for treating copyright differently from other property rights.

This is wrong, firstly because copyright law has become immensely more complicated. It is simply not possible to explain copyright in simple terms. Ordinary people shouldn't have to learn these complicated rules in order to avoid criminal liability.

And secondly, why should the order be criminalise first, educate later? Why try to 'educate' people by holding them over a barrel? Criminal law earns disrespect when it contravenes people's moral sense. Indeed, at the moment, people have quite a lot of disrespect for the copyright law. People are likely to have even more disrespect if told that you can be a criminal for contravening these artificial and intangible rights where you didn't know what you were doing was wrong. I think with copyright that, at least where we are talking about the general public (and not the counterfeiters), we need to tread a little softly. Copyright depends on goodwill for its enforcement, because it is so easy to transgress. We need to handle that goodwill with respect, and treat ordinary people with respect, in the way we draft the laws. Threatening them with criminal liability is not a good way to earn goodwill.

I think that over time a lot of people have come to realize that selling infringing CDs at the market really is a crime. Education in that respect is working. I think a lot of people think mass file-sharing is wrong. But when the law fails to differentiate between these and far less obviously morally wrong scenarios, we are in big trouble. As I outline below, I think the law now fails to differentiate at all.

It is also interesting because so far we have differentiated between morally culpable and other conduct - and we have done that in part by having a requirement of '*mens rea*', or intention. No longer. This is why there is a problem.

Sincerely,

Richard Bourke