

THE ELUSIVE 'LINK' TO INFRINGEMENT IN THE *COPYRIGHT AMENDMENT BILL 2006* Now You See It, Now You Don't.

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Anti-circumvention laws give legal protection to Technological Protection Measures (TPMs) which are used to protect copyright material. This legal protection is created by prohibiting commercial dealings in tools which can circumvent TPMs, and often by prohibiting the act itself of circumventing a TPM.

TPMs typically operate by controlling access to the protected material, or preventing copying of the protected material, or both. Because controlling access to copyright material is not an exclusive right of a copyright owner, and because TPMs prevent non-infringing as well as infringing copying, TPMs have given copyright owners a great deal of power, and the use of TPMs – as well as their legal protection – has caused much controversy.

The scope of access control protection

One of the key issues in the debate over the proper scope of anti-circumvention laws is this: should the laws protect access controls which are designed to prevent or inhibit the infringement of copyright (the so-called 'link' to infringement), or should the laws protect all access controls, regardless of purpose or function (a 'pure' access control)?

This issue is a divisive one. Copyright holders argue strongly in favour of protection for pure access controls. Groups representing users of copyright material argue equally strongly that access controls ought not to be protected; but if they are, then protection must extend only to access controls which prevent or inhibit an infringement of copyright.

The US experience – anti-competitive abuses of access controls

Much of the case law on the United States' anti-circumvention law (the Digital Millennium Copyright Act or DMCA) concerns the use of TPMs and anti-circumvention laws not to prevent infringement of copyright, but to suppress competition.

In *Chamberlain v Skylink*,¹ Chamberlain tried to use the DMCA to prevent Skylink from producing a remote control which was compatible with Chamberlain's garage door openers. Chamberlain claimed that the software which operated the garage door opener was protected by copyright, and access to that software was protected by a 'rolling code' encryption system (i.e. a TPM). Skylink's compatible remote

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¹ *The Chamberlain Group v Skylink Technologies* 381 F3d 1178 (Fed Cir 2004).

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controls circumvented the 'rolling code' encryption system to 'access' the software (i.e. to open the garage door).

This case highlights the distinction between a pure access control, and an access control linked to infringement of copyright. Even though Skylink's competing remote control did not reproduce or otherwise infringe the copyright in the garage door opener software,² if the DMCA protected pure access controls, Chamberlain could forbid competing remote controls from 'accessing' the software in the garage door opener.

Chamberlain's argument was summarised by the US Court of Appeals for the Federal Circuit:

Chamberlain contends that Congress empowered manufacturers to prohibit consumers from using embedded software products in conjunction with competing products when it passed [the DMCA]. According to Chamberlain, all such uses of products containing copyrighted software to which a technological measure controlled access are now per se illegal under the DMCA unless the manufacturer provided consumers with explicit authorization.³

The Court upheld a decision of a lower court rejecting this construction, holding that the DMCA did not create new property rights in copyright, and observing that:

Chamberlain's construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies – a practice that both the antitrust laws, and the doctrine of copyright misuse normally prohibit.⁴

The Federal Circuit concluded that on its proper construction, the circumvention device prohibition in the DMCA requires that post-circumvention, the copyright work can be accessed by unauthorised third parties in a manner that infringes or facilitates infringing a right protected by the Copyright Act.

This 'link' to infringement of copyright is not present in the DMCA – on its face the DMCA would protect a pure access control. However, the courts in *Chamberlain v Skylink* read down the relevant provisions of the DMCA to that extent, to better reflect what they believed to be the intent of Congress, and to avoid the adverse consequences which would flow from the construction advanced by Chamberlain.

Other similar unsuccessful cases include an attempt by a printer manufacturer to prevent their toner cartridges from being refilled by unauthorised third party remanufacturers (who would have competed with the manufacturer in the market for toner cartridges),⁵ and an attempt by a computer hardware manufacturer to prevent third parties from servicing their equipment (in competition with the manufacturer's services).⁶

Copyright Amendment Bill 2006

The *Australia-United States Free Trade Agreement* ('the FTA') requires Australia to extend its existing anti-circumvention laws (which protects technology which

² If the garage door opener software was, in fact, protected by copyright. Under US law this is unlikely.

³ *Chamberlain v Skylink*, above n 1, p 1193.

⁴ *Ibid* 1201.

⁵ *Lexmark International v Static Control Components* 387 F3d 522 (6th Cir, 2004).

⁶ *Storage Technology Corporation (doing business as StorageTek) v Custom Hardware Engineering & Consulting* 421 F 3d 1307 (Fed Cir 2005).

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'prevents or inhibits' the infringement of copyright) and give protection to technology which 'controls access to a protected work'.⁷ The *Copyright Amendment Bill 2006* ('the Bill') implements these obligations.

In the time which has passed since the signing of the FTA, there has been heated debate as to the proper construction of the relevant sections of the FTA – and particularly whether the FTA requires anti-circumvention protection for pure access controls.

The Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs considered this issue when conducting a review into what exceptions should be created to the anti-circumvention laws required by the FTA.⁸

The Committee heard testimony from a representative of the Office of International Law within the Attorney-General's Department on the construction of the relevant clauses of the FTA.⁹ That testimony supported a construction which would protect access controls with a link to infringement of copyright, but not pure access controls.

The Committee subsequently recommended that

in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the definition of technological protection measure/effective technological measure clearly require a direct link between access control and copyright protection.¹⁰

The Committee also recommended that an exception be created for interoperability between computer programs and computer data,¹¹ and that exceptions to the TPM regime should not be excludable by contract.¹²

This recommendation was subsequently accepted by the government without qualification,¹³ and the exposure draft of legislation to implement these changes appeared to follow this recommendation.¹⁴ The exposure draft required that a TPM or access control TPM (ACTPM) be

designed, in the normal course of its operation, to prevent or inhibit the doing of an act:

- (i) that is comprised in the copyright; and
- (ii) that would infringe the copyright¹⁵

⁷ Australia-United States Free Trade Agreement, art 17.4.7(b).

⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of Technological Protection Measures Exceptions*
<http://www.aph.gov.au/house/committee/laca/protection/report/fullreport.pdf>

⁹ Testimony of Mr Mark Jennings, 5 December 2005, p 25-26
<http://www.aph.gov.au/hansard/rep/commtee/R8971.pdf>

¹⁰ Above n 8, [2.61].

¹¹ Ibid, [4.43].

¹² Ibid, [4.239].

¹³ *Government Response to the House of Representatives Standing Committee on Legal and Constitutional Affairs Report "Review of Technological Protection Measures Exceptions"*
<http://www.aph.gov.au/house/committee/laca/protection/govresp.pdf>

¹⁴ Exposure draft, *Copyright Amendment (Technological Protection Measures) Bill 2006*
<http://tinyurl.com/ye2lt> - note that these provisions were introduced in an omnibus bill, the *Copyright Amendment Bill 2006*.

¹⁵ Ibid, p 3-4.

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Groups representing the interests of users of copyrighted material supported the wording of the exposure draft as a measured response which would implement Australia's FTA obligations in a manner consistent with the leading US judicial interpretations of the DMCA.¹⁶ Groups representing the interests of copyright owners vehemently opposed the wording of the exposure draft, on the basis that it did not comply with the FTA, would interfere with 'new business models',¹⁷ or both.¹⁸

In the relatively short space of time between the release of the exposure draft and the introduction of the Bill, the definitions of TPM and ACTPM underwent a diametric change – the link to infringement of copyright disappeared from the definition of ACTPM – without explanation or announcement. The definition of ACTPM in the Bill required merely that it be used 'in connection with the exercise of the copyright'. The new definition of a TPM required that 'in the normal course of its operation, [it] prevents, inhibits *or restricts* the doing of an act comprised in the copyright'.¹⁹ (Emphasis added)

The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs, who conducted a hasty inquiry and public hearing. The submissions made to the Committee were again generally predictable. Groups representing users of copyright material advocated a return to the wording of the exposure draft; groups representing copyright owners welcomed the change.

When questioned by the Committee about the apparent reversal of policy between the exposure draft and the Bill, representatives of the Attorney-General's Department denied there had been any such policy change, blaming a 'substantial misunderstanding of the government's intention behind those exposure draft provisions' for the change.²⁰

Many commentators have found this explanation less than convincing. The Committee report noted

the apparent divergence between the view expressed by the [Attorney-General's] Department in the course of the inquiry, and other previous interpretations of [the FTA] put forward by the Department and the Federal Government.²¹

The Committee report recommended that the definition of ACTPM be amended, replacing 'in connection with the exercise of copyright' with 'prevents, inhibits or restricts the doing of an act comprised in copyright', to harmonise the language used across the definitions of TPM and ACTPM.²²

¹⁶ See, for example, the submissions of the Open Source Industry Association p 27, the Australian Libraries' Copyright Committee and Australian Digital Alliance p 33, etc - <http://tinyurl.com/y26ok3> (page numbers are references to the linked PDF file)

¹⁷ It should be noted that some of the examples given of 'new business models' involve conduct which might be regarded as anti-competitive – e.g. tying the use of a computer game to a subscription-based online multiplayer gaming service offered by the game publisher, and preventing the use of any competing service.

¹⁸ See, for example, the submissions of Reed Elsevier p 65, Viscopy p 68, ARIA p 72, the International Intellectual Property Alliance p 83, Australian Visual Software Distributors Association p 115, Copyright Agency Limited p 142, above n 17.

¹⁹ The addition of 'or restricts' would seem to have little purpose other than legislating around the meaning of 'prevent or inhibit' endorsed by the High Court in *Stevens v Sony* (2005) 221 ALR 448. The widening of the definition in this way may have the effect of giving protection to technology which merely deters or discourages infringement rather than preventing it, such as was the case in *Stevens*.

²⁰ Testimony of Ms Kirsti Haipola, 7 November 2006, <http://www.aph.gov.au/hansard/senate/committee/S9857.pdf> at p 46-7.

²¹ http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/report/report.pdf at [3.139]

²² *Ibid* at [3.155].

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The Committee made further recommendations, mirroring those of the earlier House of Representatives Committee, that the interoperability exceptions be amended to ensure they allow for interoperability between computer programs and computer data, and prohibit contracting out of exceptions.²³

While no formal response to the Committee's report has yet been made available, the government did not give effect to any of these recommendations. Labor moved amendments in the Senate that would have implemented the recommendations, but those amendments were opposed by the government, despite their response to the earlier House of Representatives Committee report having accepted the need for a link to copyright protection, and the need for an exception to facilitate program-data interoperability.

The current state of play

Subject to two specific carve-outs, any technology which controls access to copyright material and is used 'in connection with the exercise of the copyright' will be protected as an ACTPM. The meaning given to this phrase will determine the scope of protection for ACTPMs in Australia.

While it is arguable that this phrase is intended to cover 'traditional' exploitation of copyright, and might not therefore extend to pure access controls (controlling access or use of copyright material not being an exclusive right of a copyright holder), for several reasons I think it unlikely that a court would adopt such a construction.

First, notwithstanding denials from the Attorney-General's Department, it seems obvious that a major reversal of government policy on the protection of ACTPMs occurred between the exposure draft and the Bill.

Secondly, the government has ignored the recommendations of two separate parliamentary committees – both of which had a government majority – on the linkage issue. This, plus the volumes of other extrinsic material which strongly suggests that the government intended to implement a broad protection for pure access controls, will make it difficult for a court to construe the scope of ACTPM protection narrowly.

Lastly, the two specific carve-outs – which appeared in the legislation at the same time that the link to infringement disappeared – are arguably redundant if the narrow construction is adopted. The carve-outs address certain situations involving region-coding or anti-competitive conduct. In these situations, infringement of copyright is unlikely to occur, and the carve-outs would seem only to be necessary if a broad construction of ACTPM had been intended.

The two carve-outs are that a device, product, technology or component is *not* an ACTPM or TPM *to the extent that it*:

- (c) 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; or

²³ Ibid at [3.156]-[3.157].

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- (d) If the work is a computer program that is embodied in a machine or device – restricts the use of goods (other than the work) or services in relation to the machine or device.

Similar carve-outs exist for the definition of TPM. The first carve-out is clearly intended to address the consumer welfare issue of DVD and computer game region-coding, and the price discrimination facilitated by region-coding.

The second carve-out is intended to address anti-competitive abuses of TPMs featured in well-known US cases such as *Chamberlain v Skylink* and *Lexmark v Static Control*. Indeed, the explanatory memorandum to the Bill makes specific reference to these and other cases.

In essence, the Government's approach has been to abandon a link to infringement of copyright, which would protect against misuse of TPMs now and in the future, in favour of narrowly drafted static exceptions which may address the misuses of TPMs which have happened to date, but provide no protection against new and innovative misuse of TPMs.

For example, the first carve-out applies only to computer software and cinematograph films. TPMs which control geographic market segmentation of any other type of copyright material, such as literary or artistic works, sound recordings, television and sound broadcasts, or published editions will enjoy legal protection.

The second applies only to a computer program embodied in a machine or device. Whether this would apply to any type of computer software, or only to computer software of an embedded nature, which is required for the machine or device to function, is uncertain. Barring a very broad and probably unintended interpretation of 'computer program' to include computer *data*, this exception would not apply to computer data protected by a TPM. Thus, for example, Apple will maintain its monopoly on production and authorisation of devices permitted to interoperate with TPM-protected music purchased from the iTunes Music Store.

Adopting such a carve-out with cases such as *Lexmark v Static Control* in mind also ignores the reality that due to significant differences between the US and Australia in the scope of copyright protection for functional computer code, and exceptions to copyright (these differences being unaddressed by the FTA), *Lexmark* and many other cases would almost certainly have been decided differently under Australian law.²⁴

Difficulties with these carve-outs will almost certainly ensue when the meaning of 'to the extent that' is considered by a court. The explanatory memorandum is clear that where a TPM has different functions, but each can be circumvented separately, each is to be treated as a separate TPM. What then will happen when one TPM has many functions, one of which is region-coding, but each function cannot be circumvented individually?

Clearly either the TPM as a whole must be protected, or not. The former would frustrate the intent of Parliament and the letter of the law, while the latter would outrage copyright owners who would almost certainly lobby for amendments to restore the protection for such TPMs. The ambiguity on this point may even act as

²⁴ See generally Dale Clapperton & Prof Stephen Corones, *Locking-In Customers, Locking-Out Competitors: Anti-Circumvention Laws in Australia and Their Potential Effect on Competition in High-Tech Markets*, forthcoming in the December 2006 issue of the Melbourne University Law Review.

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an incentive for copyright owners to design future TPMs so that their functions cannot be independently circumvented.

In conclusion, Australian law on TPMs has lost what little certainty²⁵ it achieved post *Stevens v Sony*,²⁶ and the precise scope of the new laws will only be known after another epic battle between the owners and users of copyright material.

²⁵ Note however that many aspects of the High Court's judgment in *Stevens v Sony* were bad law even before the judgment was given. *Stevens v Sony* was decided on how the *Copyright Act 1968* stood at the time the case commenced. By the time the High Court's judgment was handed down, the definition of 'material form' in the *Copyright Act* had already been amended as a result of the FTA – this change left the present application of those laws in doubt.

²⁶ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 221 ALR 448.