

The background is a purple-tinted collage. On the left, a clock face shows the number 4. In the center, a calculator is visible. On the right, a computer keyboard is shown with keys labeled 'L', 'G', and 'O'. The overall image has a monochromatic purple color scheme.

Recent Developments in Copyright

Computer Science
22 September 2004

- Copyright Principles
- The Digital Challenge
- The Digital Copyright Review
 - Transient Copying
 - Technological Protection Measures
 - Technological Protection Measures and Permitted Uses
 - Australian Recommendations
 - New Zealand Recommendations
- Concluding Remarks

© Copyright Principles ©

- Copyright reserves certain rights in original works to an author
- Set out in s.16 Copyright Act 1994
- Include copying, issuing, performing, playing and adapting the work
- There are certain exceptions called permitted uses (fair dealing)
- If a copying or dealing is not authorised by the copyright owner or as a permitted use it is infringement

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The Good News

- Copyright owners can copy material with greater ease
- New digital means of distribution
- New markets and business models
- More \$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$\$

The Bad News

- EVERYONE can copy material with greater ease
- Digital copies are superior to analog copies
- No quality loss
- Ease of distribution



And then – the REALLY BAD NEWS

PIRACY



Digital Copyright Review

- Government Discussion Paper - July 2001
- Internal Working Paper - July 2002
- Position Paper - December 2002
- Policy Recommendations – June 2003
- Amending Legislation ?????

Transient Copying

- An aspect of the Reproduction Right
- Demonstrates a challenge from the Digital Paradigm
- Digital processes require copying to function
- In the digital environment copying “is”
- Runs up against right reserved to copyright owner

How to Deal With Transient Copying

- Absent legislation either by specific or implied licence
- Should legislation define transient copying and permit it; or
- Redefine the reproduction right and provide a special exception for transient copying
- Australia has adopted a “definitional” approach

The Exception Based Approach

- Amend reproduction right to ensure that reproducing or recording material in any form includes
 - Digital format
 - Incidental copying in RAM
- Provide a limited exception to allow transient copying as the result of an automatic or inevitable technical process
- Technical purpose copying – no economic implications

Transient Copying Issues

- Proposal allows operation of computer programs and Web browsing
- May include copying as part of making or receiving a communication
- Transient copy will not be a “single copy” for the research and study permitted use.
- What about caching?

Format Shifting

- Proposed amendment to s. 84 which deals with time shifting
- What is format shifting?
- A limited exception is proposed
 - Original copy must be legitimately acquired
 - One copy of the original may be made
 - If there is more than one format, one copy per format
 - For personal use – not for sharing or a copy for a friend

Impeding Format Shifting

- Content providers are opposed to format shifting
- They may use technology to impose a solution
- Copy-protected CDs
 - Secure Digital Music Initiative (SDMI)
 - Using technology to ensure CDs work on one type of CD player
- These are called Technological Protection Measures (TPMs)
- So why not get a program or a modification to the CD player to circumvent the TPM and thereby allow format shifting?

Section 226, Copyright Act 1994

- Section 226 refers to “copy protection” (CP) – not defined – a form of TPM
- Section 226 does not prohibit the act of circumvention of CP
- The provisions target:
 - Distribution of circumvention devices
 - Information that assists or enables circumvention of copy protection

So What is Copy Protection

- References in the section include
 - Any device or means intended to prevent or restrict the copying of a work; or
 - Impair the quality of the copies made

What is Prohibited

- Rights are vested in the copyright owner or distributor
- Rights are against those who:
 - Make
 - Import
 - Sell
 - Let for hire
 - Offer or expose for sale or hire
 - Advertise for sale or hire
- A device specifically designed or adapted to circumvent CP
- Knowing (or having reason to believe) that the device will be used to make infringing copies
- Similar right against those who provide information intended to assist CP circumvention knowing that the information will be used to make infringing copies

Local Copying or Any Copying?

- Is the device limited to circumventing copying in the local machine?
- Sony v Owen
- Broad interpretation of the words “*any device or means intended to prevent or restrict the copying of the work*”
- In England and NZ there is no exception for transient copying at the moment

The Australian View

- Australian legislation restricted the effect of the TPM to copying in the machine
- Transient copying permitted in Australia
- Full Court overturned this approach
- Legislation designed to cover any infringing copying anywhere



Copy Protection and Permitted Uses

- Can I circumvent CP to exercise a permitted use
- S. 80 allows me to backup a computer program
- Unless the copyright owner makes an **express** direction when I purchase the software
- Thus Parliament has specifically defined the circumstances in which a permitted use may be abrogated
- In England a backup copy may be made irrespective of any terms and conditions accompanying purchase (s.50A(3) Copyright Designs and Patents Act 1988)

Copy Protection and Accessing Content

- DVD Region Coding
- Not copy protection but access protection
- Jacob J in Sony v Owen suggests that matter is covered by licence
- Fails to recognise the issue of “infringing copy” where the DVD has been legitimately obtained
- According to Jacob J those who sell region free DVD players risk action from copyright owners.

Circumvention and Permitted Uses

- No suggestion that there will be a provision similar to s.80(3) for format shifting
- To allow protection of digital content by CP devices backed by s.226 would defeat the purpose of the permitted use
- Consideration should be given to the issue of CP devices in the context of all permitted uses

Australian Recommendations

- Australia regularly reviews its “Digital Agenda”
- Phillips Fox report
- Suggests the narrow interpretation of a technological protection measure in Sony v Stevens be adopted
- Supply of TPMs for permitted uses or exceptions, as well as accessing legitimately acquired material should be allowed
- Copyright owners should not make it a condition of licences prohibiting the use of circumvention devices to enable exercise of permitted uses

New Zealand Recommendations

- Circumvention should be linked to infringement and not access
- Circumvention of a CP device should not be actionable where user is
 - Exercising a permitted act
 - Viewing or executing a non-infringing copy of a work
- Access controls and region coding are inconsistent with parallel importing regime

Conclusions

- It is still not clear whether the future of copyright lies in contract
- There should be a provision to restrict the use of licences to interfere with permitted use exercise
- In the Digital Paradigm should the extent of protection be defined by the Legislature (utilitarian-social contract) or the Copyright Owner (law and economics-greater protection=greater incentive)