

Protecting the Copyright Balance in Cyberspace

Adam Sauer looks at the competing philosophies (protection/control vs access/freedom) at play in conventional copyright regulation and where TPMs fit in the mix.

Introduction

The digital form in which information exists on the internet and the communal way in which much of it is developed challenges the existing Australian copyright regime and, as usually happens when a system is challenged, concerns have been raised. A primary reason for concern is that technology is developing exponentially while the law is playing the "perpetual game of catch-up".¹ This being so, from the copyright owners' perspective there is a fear that the existing copyright regime cannot sufficiently protect their work in cyberspace. To bolster the protection provided under the *Copyright Act* 1968 (Cth) (**Copyright Act**) copyright owners are increasingly utilising Technological Protection Measures (**TPMs**) which are designed to control access to and the use of digitised works.² TPMs were initially given legislative support by the *Copyright Amendment (Digital Agenda) Act* 2000 (Cth) (**Digital Agenda Act**) which relevantly prohibits their circumvention; the need for this support which was supplemented in the amendments to the Copyright Act which came in effect on 1 January 2007, highlights the fact that just as a work can be protected, protective measures can be broken.

Depending on one's viewpoint, TPMs either reinforce existing copyright protection under the *Copyright Act* or extend it beyond its legitimate boundaries. From a user's perspective TPMs and the anti-circumvention provisions impinge upon their use of a copyrighted work and in some cases, override their rights under the *Copyright Act*. At the heart of the TPM debate is the extent to which the balance is maintained between copyright owners' and users' rights in relation to copyrighted works.

Australian law in its present state coupled with the extent to which TPMs can "lock-up" a work seriously threatens to tip the balance in favour of copyright owners and thus undermine copyright law.

The Internet: Construction, Culture & Content

The internet is "a decentralised, global medium...[which] no single entity... administers"³ and no one individual can claim to have invented.⁴ Information as it exists in cyberspace is in digital form; descriptions of digitised information highlight its "detach[ment]... from the physical plane" and have it floating, disembodied and "darting" to individual computers as requested.⁵ Barlow notes that prior to digital technology, by and large, "to express was to make physical" and "the value was in the conveyance...not the thought conveyed."⁶ Hence, the problems applying traditional copyright law, which protects the expression not the idea, to cyberspace and digital works.

The internet is an interactive medium where users are "active interpreters of what they find in culture and...continually exchange their ideas with [one another]."⁷ In a similar vein, Gibson notes that cyber-culture "no longer... use[s] words like appropriation or borrowing to describe those very activities", these terms are archaic now and the activities they describe are inherent in internet use.⁸ The practice of cooperative development and building upon knowledge has lead one writer to refer to the "cut and paste architecture of the internet."⁹ Thus the way information is developed in cyberspace also challenges traditional copyright law and its ability to restrict certain uses of works.

Technical Protection Measures Explained

The *Copyright Act* defines a TPM as

"...a device or product, or a component incorporated into a process...designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work...by either or both of the following means:

- (a) ...ensuring that access...is available solely by use of an access code or process... with the authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanism."¹⁰

The majority of the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment (Sony)* accepted the definition of "technological protection measure" given by Sackville J in the Federal Court:

"...a device or product which utilises technological means to deny a person access to...or limits a person's capacity to make copies of a [copyright] work...and thereby...prevents or inhibits... acts which, if carried out, would or might infringe copyright in the work."¹¹

A TPM can control the use of a work in a number of ways, such as: denying or restricting access; only allowing access via specific devices or programs; limiting the number of times and the time period of access; and inhibiting copying, modification, downloading or redistribution. In the context of denying user rights, aside from the practical denial of access, it is not so much TPMs that are the operative factor but the legislative prohibitions on circumventing TPMs.

Amendments to the *Copyright Act* to expressly prohibit the use of a circumvention device come into effect on 11 December 2006 and supplemented

earlier prohibitions on certain dealings with such devices, which in reality made obtaining a circumvention device difficult.¹²

The Need for TPMs and Anti-Circumvention Provisions

Prior to the *Digital Agenda Act* the *Copyright Act* protected works on the internet just as it protected works in the "real world", so one may question the need for any further protection. In regards to TPMs, one reason these are being used is that the copying and dissemination of information is far easier and faster on the internet than it is in the real world. The key reason for their use though is that the internet and associated technologies have developed at a pace that far outruns the law. Cornish believes

"technical control...seems the only hope for preserving...copyright industries [as they exist on the internet] in something resembling their present form."¹³

This is because in cyberspace law is defined not through a statute but through the code that governs the space¹⁴; quite simply in cyberspace code is law.¹⁵

TPMs are an example of code at work and are an attempt to fight technology with technology. It may be said that she who controls the code controls the work. This is very true in respect of technologically protected works, works which in the physical world would have primarily been protected by copyright law but in the digital domain are protected by code. The law plays a supporting role by inhibiting circumvention of TPMs but ultimately protection of digital works is "not so much [by] copyright law as copyright code."¹⁶

The anti-circumvention provisions arise from the simple fact that technology can also be employed to circumvent or disable TPMs.¹⁷

Problems with TPMs & the Anti-Circumvention Provisions

The Assumption of Illegitimate Use and Restrictions on Legitimate Use

Anti-circumvention provisions imply that users will infringe copyright, however not every user has illegitimate motives. Concerns have been raised by both the Federal Government and international bodies regarding the extent to which TPMs and anti-circumvention legislation curtail non-infringing use of works.¹⁸ Legitimate use, but also access generally, is a major issue given that information is increasingly being transmitted in digital form. It is widely acknowledged that illegitimate use of copyrighted works, especially those in the digital domain, occurs and owners should be able to protect against this. It is the responsibility of the legal system to regulate TPMs so illegitimate uses can be minimised whilst legitimate use can be maximised.

"Übercopyright"

Copyright law involves the balancing of the rights of owners and users of copyrighted works, the respective interests are essentially protection/control and access/freedom. This balance is a delicate one¹⁹ which some fear the *Digital Agenda Act* and subsequent TPM legislation has upset to the extent that it created a "paracopyright" or 'übercopyright' in favour of copyright owners.²⁰ Copyright holders are able to limit or prevent the exercise of users' full enjoyment of the protected work and their rights under the *Copyright Act*. That TPMs and anti-circumvention provisions create too strong a body of rights for owners and go beyond the existing protections under the pre-amended *Copyright Act* is a major concern.

The majority of the High Court in *Sony* warned that in defining TPMs:

"it is important to avoid an over-broad construction which would extend the copyright monopoly rather than match it."²¹

However, the current state of the law arguably does extend the monopoly. As the eBook example illustrates, there is the risk of private bodies co-opting shared works via technological methods and effectively claiming proprietorship over works in the public domain. It also illustrates that TPMs do not just give copyright owners the power to protect their interests but the power to infringe the public's statutory rights.

Control in the hands of copyright own-

ers is also a cause for concern because owners owe no responsibility to the public in terms of the copyright balance and are thus free to outstretch the provisions of the *Copyright Act*. Unlike laws, codes are developed and applied by private individuals or corporations and unlike legal control mechanisms, for the most part code is not subject to any external review or curtailment. Inherently "unlike law, code has no shame"²² and while a state of total control, via TPMs and supporting law, is not foreseeable (some checks exist) the level of control may still reach an unacceptable level.

Locking-up Culture: The Impact on Creativity

Daryl Williams, then Attorney-General, stated in his second reading of the *Copyright Amendment (Digital Agenda) Bill 1999* that its

"central aim...is to ensure...copyright law continues to promote creative endeavour and, at the same time, allow reasonable access to copyright material in the digital environment."²³

The creative endeavour referred to is that rewarded by copyright protection, not that which utilises the copyrighted material.

There is no general exception to the anti-circumvention provisions in the *Copyright Act* for creative exploitation or research and while there are some exceptions, none apply to the general private user.²⁴ The anti-circumvention provisions in their current state come dangerously close to giving copyright owners (who are often corporations and whose ultimate concern is commerce not culture) undue "control over the use of culture."²⁵

Creativity, to an extent, is spurred by inspiration from pre-existing works (witness the cut-ups), thus present copyright law and TPMs may be seen as a form of creative censorship; the eBook example illustrates how fair dealing rights may be negated. This is worrying in its impact on artistic creativity and education, which also plays a part in the development of art.²⁶ A negative impact on society in general will also occur if cultural items are under technical lock and key, both in

terms of restrictions to access and the potential for owners to inflate prices for access.

The Limits of Control & Alternatives to TPMs

Justifying Circumvention of TPMs

Motivations for circumventing TPMs are not all illegitimate, for example it may be done in the name of "justice" where users are denied their legal rights in respect of a work.²⁷ There is perhaps also an argument that it is ethically permissible to circumvent TPMs in order to "level the playing field" given that TPMs and anti-circumvention laws strengthen owners' rights. Some inhabitants of cyberspace may further justify circumvention on the basis that they develop their own norms and "laws" and governments have "no moral right" to regulate cyberspace.²⁸ However, cyberspace has not been "inhabited...long enough or in sufficient diversity to have developed a Social Contract"²⁹; this seems to undercut the idea of a cohesive "cyber society" which since "commercialisation" of the internet has arguably failed to exist on any meaningful level.

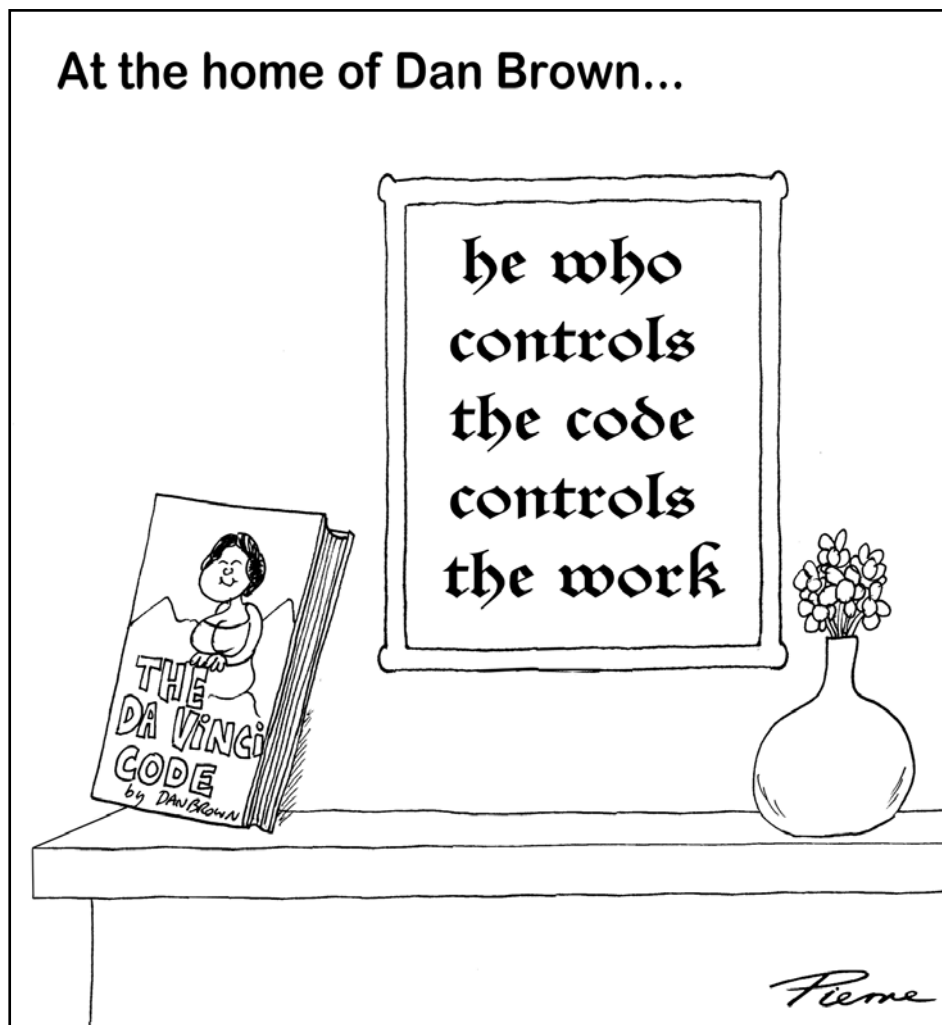
It is difficult to give credence to circumvention based on outmoded notions of a cyber community, whereas until the law recognises the legitimate user's dilemma, it is justifiable for them to (illegally but not immorally) circumvent TPMs.

Fair Use?

For Barlow, existing copyright laws cannot accommodate the internet since they are predicated on notions of physical property, whereas the digital domain is incorporeal.³⁰

One obvious solution is that new laws are developed, though the idea that the internet is such a novel medium that it requires its own specific legislative regulation has not found favour with the High Court.³¹

It may be that Australia needs to widen the current "defence" of fair dealing as it exists under the *Copyright Act* so it is more akin to the fair use provisions under United States copyright law. This proposal was the subject of a Federal Government Issues Paper but was not adopted in the reforms that have been



implemented based upon it.³²

The US defence is an "open-ended" and more flexible exception which "allow[s] the courts to determine whether a particular use of copyright material is "fair" and...lawful."³³ However, the US concept of fair use is grounded in legislatively implemented doctrines and rights which are not as explicit in Australia, therefore it may be artificial to graft it onto Australian law.³⁴

Further, Australian law regarding fair dealing is not entirely settled, so it is prudent to resolve the problems in our own jurisdiction before turning to alternatives in other jurisdictions.³⁵

Alternatives to Copyright

The internet community is developing alternatives to the traditional copyright regime. The Free Software Foundation (FSF), copy left licences and Open Source all allow open access to the source code of particular programs and unrestricted rights to copy, adapt, improve and distribute the works.

Burroughs' approach to the written word as regards the cut-ups is akin to the philosophies behind the aforementioned licences. These licences are not completely user-sided, for instance under a FSF licence the creator can charge a licence fee but cannot limit the uses to which the purchaser subjects the software to. Under a copy left licence users are granted rights on the basis that if they redistribute the code or versions thereof they do so under the same licence. A similar regime is a Creative Commons licence which again grants more user rights than the traditional copyright system. The aim of all these licences is to ensure "democratic access to information and technologies."³⁶

It remains to be seen to what extent these approaches are adopted, whilst they are appealing to creators in cyberspace it is unlikely they will be embraced by large scale commercial owners of copyright who in reality control access to the majority of and most commercially valuable copyrighted works.

Conclusion

The impact of the internet and digital information once more sees the law trying to balance the interests of two opposing groups. There is a struggle to find some common ground where copyright owners can protect their work from unlawful use, while at the same time not preventing legitimate users accessing such works and exercising their rights in relation to them. With the implementation of the *Digital Agenda Act* and *Copyright Amendment Act 2006* it seems the law has sided with the copyright owners. There is no valid reason why users should have fewer rights in respect of digital works than they do physical works.

If the current state of affairs continues, user rights will foreseeably be further diminished by TPMs. Furthermore, owners will gain more power as TPMs become more advanced and are applied to a greater variety of digital works and will thus also obtain greater control over culture in general.

The law can no longer afford to remain "two steps behind" the evolution of technology, for it risks becoming less relevant in an increasingly technological society and being subsumed by TPMs and the like. Licensing regimes proposed by some in cyberspace will not adequately safeguard the user given that they are unlikely to be widely embraced. Rather than forcing users of copyrighted works to illegally circumvent TPMs to exercise their rights, the *Copyright Act* should be for the amended to allow legitimate users their legitimate access to works.

Adam Sauer commenced his Articles of Clerkship in October 2006 at Norton White Lawyers Melbourne. Adam would like to that Dr Melissa de Zwart, Senior Lecturer Monash University for her support and guidance in writing this article and wishes to acknowledge the assistance of David Sauer.

(Endnotes)

¹ William Gibson, 'God's Little Toys: Confessions of a cut & paste artist' (2005), *Wired* <<http://www.wired.com/wired/archive/13.07/gibson.html>> at 14 April 2006

² All references to a "work" include "other subject matter".

³ *American Civil Liberties Union v Reno* 929 F

Supp 824 (1996) (District Court) at 831-832. Kirby J makes similar observations in *Dow Jones v Gutnick* [2002] HCA 56 at 80.

⁴ Lawrence Lessig, *Free Culture* (2004), p. 7

⁵ John Perry Barlow, *The Economy of Ideas* (1993) Electronic Frontier Foundation

<<http://homes.eff.org/~barlow/EconomyOfIdeas.html>> at 14 April 2006

⁶ John Perry Barlow, *The Economy of Ideas*

⁷ Jack M Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 *Sydney Law Review* 5, p. 14

⁸ Gibson

⁹ Lessig, *Free Culture*, p. 105

¹⁰ s.10(1)

¹¹ [2005] HCA 58. Gleeson CJ, Gummow, Hayne and Heydon JJ at 38.

¹² See generally s.116A. Sections 132(5A) & (5B) of the *Copyright Act* create offences in respect of the prohibitions in s.116A. Under Australia-United States Free Trade Agreement (AUSFTA) Australia was required to include in the *Copyright Act* a prohibition on the use of circumvention devices to circumvent TPMs by 1 January 2007 (Australian Copyright Council, *Information Sheet: Digital Agenda amendments* (2006), p. 3).

¹³ W R Cornish, *Intellectual Property: Omnipresent, Distracting, Irrelevant?* (2004), p. 54

¹⁴ Lawrence Lessig, *Code: and Other Laws of Cyberspace* (1999), p. 20

¹⁵ Lessig, *Code: and Other Laws of Cyberspace*, p. 6

¹⁶ Lessig, *Free Culture*, p. 145

¹⁷ The provisions also satisfy Australia's obligations under the WIPO Copyright Treaty 1997 (article 11) and AUSFTA (article 17.4.7(a)).

¹⁸ See Ian A Kerr, et al., 'Technical Protection Measures: Tilting at Copyright's Windmill' (2002-2003) 34 *Ottawa Law Review* 7, pp. 33-34 in relation to the discussion of TPM at the 1997 WIPO conference; and Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, pp. 87-88; and 90; Kimberlee Weatherall, 'Submission to House of Representatives Legal and Constitutional Affairs Committee Inquiry into technological protection measures exceptions' (2005), p 8; US Senators have raised similar concerns in relation to the DMCA.

¹⁹ Commonwealth, *Hansard*, House of Representatives, 2 September 1999, 9730 (Daryl Williams, Attorney-General), p. 9748. See also Kirby J in *Sony* at 169.

²⁰ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Review of Technical Protection Measures Exceptions* (2006), p. 12

²¹ Gleeson CJ, Gummow, Hayne and Heydon JJ at 47. This concern is echoed in the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, see for example p. 12.

²² Lessig, *Free Culture*, p. 148

²³ Commonwealth, *Hansard*, House of Representatives, 2 September 1999, 9730 (Daryl Williams, Attorney-General), p. 9748. This philosophy has been enunciated numerous times by the Coalition Government; see for example Attorney-General Philip Ruddock's press releases at the time of the release of the *Review of Technical Protection Measures Exceptions* and subsequent speeches.

²⁴ ss.116A(2), (3) and (4)

²⁵ Lessig, *Free Culture*, p. 169

²⁶ In the context of rights associated with education, see *Copyright Act* ss.40 and 44, and also ss.49 and 50.

²⁷ Ian A Kerr, et al, p. 25. Section 3 of the *Digital Agenda Act* states one of its objects is to "provide reasonable access...for end users of copyright material online", arguably this is not achieved if user's cannot exercise their rights under the *Copyright Act*.

²⁸ See for example John Perry Barlow's 'A Declaration of the Independence of Cyberspace', which begins: "Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone...You have no sovereignty where we gather." (John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996) Electronic Frontier Foundation

<<http://homes.eff.org/~barlow/Declaration-Final.html>> at 14 April 2006). See also John Perry Barlow, *The Economy of Ideas*.

²⁹ John Perry Barlow, *The Economy of Ideas*

³⁰ John Perry Barlow, *The Economy of Ideas*

³¹ See generally *Dow Jones v Gutnick*.

³² Attorney-General's Department, Parliament of Australia, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005); The Copyright Amendment Act 2006 received Royal Assent on 11 December 2006.

³³ Attorney-General's Department, p. 2

³⁴ Such rights and doctrines include free speech and Constitutional powers of Congress regarding copyright related laws (Response to Attorney-General's Department, Parliament of Australia, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005) (Melissa de Zwart), p. 1).

³⁵ Response to Attorney-General's Department, Parliament of Australia, *Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the Digital Age* (2005) (Melissa de Zwart), pp. 1-2

³⁶ Henning Wiese, 'The Justification Of The Copyright System In The Digital Age' (2002) 24(8) *European Intellectual Property Review* 387, p. 388