

COMMENTS ON THE COPYRIGHT AMENDMENT (DIGITAL AGENDA) BILL 1999

SUBMITTED BY:

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Executive Summary

- Storage Technology Corporation (StorageTek) is a leader in the information storage and retrieval business. Australia is a key centre for generation of intellectual property as part of the corporation's software research and development efforts.
- StorageTek believes in the necessity for a balanced copyright system to assure adequate protection, while also ensuring access to ideas and the dissemination of information. Protection of intellectual property is important for StorageTek's business. We support the government's efforts to encompass digital issues within copyright.
- StorageTek believes that the provisions to ban circumvention devices or services are misguided and should focus upon the act of circumvention - not the means. We note that it is not a requirement of the WIPO treaty.
- StorageTek is concerned that the legislation concerning technological circumvention measures places unnecessary burdens of proof on legitimate businesses.
- StorageTek considers that the impact of the legislation will also act to inhibit the legitimate sale and usage of these systems to people exercising their exception rights, especially with regard to the proposed decompilation exceptions.
- StorageTek continues to support the broadening of definitions to reflect copying reality in the digital age. We also support the provisions to reflect the status of ephemeral copies with regard to copyright, however, we believe it should be implemented as an exclusion.
- StorageTek continues to support the introduction of the rights management information provisions, but the bill does not appear to address StorageTek's concern that technical processes may be seen as an infringement.
- StorageTek remains concerned that the explicit references to carriers and carriage service providers may leave StorageTek's legitimate businesses in a legally uncertain, and potentially harmful, situation with regard to backup services and equipment.

Introduction:

These comments on the Copyright Amendment (Digital Agenda) Bill 1999 (and associated Explanatory Memorandum) are submitted by Storage Technology of Australia Pty, Ltd. (STA). STA employs 123 people in offices in Sydney, Canberra, Melbourne, Adelaide, Perth and Brisbane, and has been operating in Australia since in 1979. STA also employs 9 staff in our New Zealand office.

STA established a Corporate Software Research & Development Centre in Canberra in 1988. The Centre is staffed by 10 people involved in development of products for the local and international market. STA undertakes its own R&D activities in Australia, funded from its own resources and commercialised from within Australia. The R&D centre has shown its strength through undertaking significant, path-breaking research projects which have commercial application within Australia and overseas. The focus of the R&D is on the core information storage and retrieval activities of the parent company Storage Technology Corporation (StorageTek)

Storage Technology Corporation (StorageTek) designs, manufactures, markets and services, worldwide, information storage and retrieval systems for enterprise-wide computer systems and networks. StorageTek's Network Systems Group helps organisations avoid risk through the application of data-protection technologies. In 1998, StorageTek reported revenue of US\$2.3 billion. The company has 8400 employees worldwide.

International intellectual property policies have a significant impact on StorageTek's business around the world. StorageTek has always sought a balanced intellectual property system. We advocate a system that provides adequate protection and strong enforcement of the protection afforded. At the same time, we also believe the system must allow access to ideas and the dissemination of knowledge to ensure a vibrant and competitive marketplace. We support the Australian Government's efforts to update the copyright act to reflect the realities of the digital environment.

StorageTek values the opportunity to comment on the provisions of the Digital Agenda Bill. We are concerned with a number of provisions within the Bill. We have indicated our overall position in our original submission on the Digital Agenda whitepaper, and our subsequent submission on the Exposure Draft. We stand by that position, and reiterate it in this submission. We do note that some of these concerns have been addressed, but we do not feel the government has fully taken account of our position.

We value the opportunity to help ensure that the government policies as presented are enforceable and reflected in the legislation. As such, StorageTek are concerned that the proposed amendments may leave some aspects of copyright open to dispute. At the same time, we are concerned that the specificity of some areas of the proposed amendments may impact legitimate business of StorageTek and other companies – an outcome clearly at odds with the Government's current policies encouraging technology businesses. These areas of concern are outlined below.

Technological Measures:

StorageTek is primarily concerned with the section of the Bill that deals with technological measures. We believe that an approach that targets technology, rather than illegal behaviour, is seriously flawed and potentially dangerous. Technology itself is neutral; it is how people use it, rather than its availability, that should be addressed. The WIPO treaty acknowledges this, and does not require signatories to outlaw circumvention devices, but instead for signatories to provide adequate legal remedies against the circumvention of protection measures - this remains independent of technology.

As we have stated in earlier submissions, we consider that attempting to outlaw or restrict certain technologies will only stifle innovation and deprive both copyright owners and consumers of the benefits that advances in information technology have to offer. Instead, the best approach would be to focus on the intent to infringe, not on the provision of technology that could be used to infringe. This element of intent is a crucial aspect. If devices are made illegal, or if the focus is on the act of circumvention itself, then the balance provided for under the current copyright system is greatly changed.

We remain concerned that broad language dealing with devices that could be used in the act of circumvention of effective technological protection measures could inadvertently implicate legitimate security devices and development tools. We note that the concept of "limited commercially significant purpose or use other than circumvention", is directed towards addressing those concerns, and that the Bill provides a three-part test for determining if the sanctions for "importing or making of circumvention device" apply.

Unfortunately, the third part of the test (ie knowledge that a device would be used to circumvent), reverses the onus of proof by establishing a presumption that the defendant (in an action under s.116A) knew, or ought reasonably to have known that the device or service would be used to circumvent an effective technological protection measure. This weakens a defendant's position in comparison with the earlier exposure draft. Under the proposed legislation defendants must prove that they did not know and that they ought not reasonably have known that a device or service would be used to circumvent. Under the earlier draft, defendants were only required to prove that they were not reckless as to whether a device would be used to circumvent.

StorageTek believe that, since there remains the possibility that legitimate products could be actionable under s.116A, the burden of proof should remain with those bringing the action. We consider that the complexities introduced here are further justification for targeting the act of infringing copyright and not the means. (We note that in ss.132 (5B) concerned with criminal sanctions, the looser burden of proof for the defendant remains.)

We note that the devices ban will be granting greater rights to copyright owners than currently exist, and are concerned that this is changing the balance of the system. We believe that changing the balance is not the intent of the government, and hope that the relevant clauses can be amended to address this. Although StorageTek is also a copyright owner, we do not perceive a benefit in disrupting the balance of rights in this context.

StorageTek have previously expressed opinions concerning the desirability of decompilation and reverse engineering exceptions for interoperability under the

copyright system. We were pleased to see that those provisions have been passed by parliament and are in the process of being made law. We note that s.47D (interoperability), s.47E (error correction) and s.47F (security testing) are "permitted purposes" for the use of circumvention devices and services, (and hence their importation or supply.)

StorageTek have previously outlined the importance of security and connectivity products in our product line. As there is potential for these devices to fall within the definition of "circumvention devices", we consider that the inclusion of s.47F as a "permitted purpose" is an important element in clarifying that the provisions of the technological protection measures do not encompass our equipment.

However, we do not believe that the broader balance of rights embodied in the copyright act are served by the introduction of "permitted purposes." The exceptions to copyright for fair dealing and other purposes should not have the potential to be restricted by technological protection measures - and hence the permitted purposes should not be limited to a defined list, but instead cover the exceptions granted under the act generally.

We note that within the s.116A, ss.(3) helps to clarify the steps that need to be taken to ensure that legitimate supply of equipment that could fall under the scope of this section is seen to be legitimate. However, we would still prefer to see the burden of proof on those bringing the action under ss.(5).

A further unfortunate consequence of the proposed legislation is that by claiming copyright protection, anyone planning or attempting unauthorised intrusion has a legal vehicle for banning the sale of a significant array of defences against him. This situation is exacerbated by the proposed rights management changes – as long as the software programs utilised for intrusion incorporates copyright notices, and attempts to display those notices on the target system, removing that code could also be seen as an infringement of copyright. (Note – StorageTek strongly support general thrust of the rights management changes.)

To counter this, we would like to see exceptions added that prevent copyright being used as a cover for malicious activity.

We believe that the anti-circumvention provisions will still act to reduce the supply of equipment for legitimate purposes under the Act, because no-one will be willing to take the risk to import and sell it. This will weaken the effective defences that can be erected against network intrusion and malicious attacks. It will mean that libraries and other legitimate users will not have access to circumvention equipment, and it will mean that exception rights such as those for decompilation for interoperability will have effectively been denied.

We consider that it places too much onus upon legitimate businesses to gather information on their customers activities (hence acting as an arm of government to help enforce the law), and not enough restriction on those who are breaking the law.

We submit that the House consider amendments to focus upon the act of circumventing effective technological protection measures, and not the means. However, should the House continue with the Circumvention Devices provisions currently in the bill, we would hope that amendments are considered to address malicious activity, and a wider definition of permitted purposes to cover all copyright exceptions under the Copyright Act.

General comments and Specific issues in the Bill:

StorageTek is concerned that the attempts to protect the existing rights of copyright users may have adverse effects.

We note that the Bill addresses the issue of what constitutes a copy in the digital age, and we hope that the efforts made within the Bill to reflect this enable the Act to effectively encompass rights in the digital world.

Item 25 of the Bill clarifies that a reproduction is made both by the process of compilation and of decompilation. StorageTek is a strong supporter of the Government's actions to create an exception for decompilation for the purposes of interoperability, error correction and security testing. We had believed that the changes encompassed in item 25 should be implemented at the same time as the decompilation exception. Since the decompilation exception has been passed by parliament, StorageTek believes that item 25 must be implemented as soon as possible.

As we have pointed out in earlier submissions, the amendments encompassed by Item 54 regarding ss.49(5A) should be an effective balance between the rights of copyright holders and copyright users. However, we note that validating the restrictions may be complex, and instead may result in restrictions on the power and currency of equipment available within libraries and archives. The facilities offered by modern networking, and standard computer software products such as internet browsers and operating systems may make implementing the restrictions required under ss.49(5A) problematic. The apparent aim of some U.S.-based companies is to blur the boundaries of the computer and make world-wide resources available from the desktop. More broadly, we believe that this is indicative of the need to legislate against the activity of breaching copyright rather than tools with multiple purposes that may be used by some parties for breaching copyright.

Similarly, Item 75 - ss.51A(3A) - refers to the use of computer terminals that are "installed within the premises of the library or archive". StorageTek is concerned that modern networking technology and software can blur the physical boundaries of the library or archive. StorageTek does not want to see the legitimate rights of libraries and similar groups compromised because they are unable to use technology due to its potential for enabling breaches of copyright.

StorageTek considers the clarification of the status of temporary copies as outlined in Item 45 - s.43A - and Item 94 - s.111A - to be a positive step. This is a significant step in bringing copyright in line with technological reality, as these temporary copies are not and should never be seen as breaches of copyright, and are not 'reproductions in material form' as required under the Act. However, as we have argued in earlier submissions, the making of temporary copies should not be an exception to copyright infringement, but instead that temporary copies should not be included within the scope of the reproduction right. This will ensure that temporary, ephemeral copies not explicitly mentioned are still covered, and that the definition of "technical process" within the scope of communicating does not present a difficulty here.

StorageTek is concerned that the rights management protection introduced in ss.132(5D) may be compromised by technical processes in the delivery of a copy of a work. We had pointed out in our earlier submissions on the Digital Agenda whitepaper and on the exception draft that "computers and other information technology devices may inadvertently 'circumvent' the protection. For example, data

transmitted over a computer network is broken down into packets. If the computers do not understand a copy protection signal, the system may not transmit it properly with the work, effectively 'circumventing' the protection." We hope that this is satisfactorily covered by the "state of mind" requirements, but still believe that some degree of protection from technical process should be incorporated.

StorageTek are concerned about the emphasis on carriers and carriage service providers in s.39B and s.112E, and note that the definition refers to the telecommunications act definitions. We believe that the drafters may not have considered wider interests such as companies providing computer backup services, and computer backup equipment – both areas being important to StorageTek. We would like amendments included to ensure that StorageTek and others who provide similar services have a similar level of protection to that of carriers and carriage service providers under these sections. Otherwise, the copyright changes leave us dangerously exposed to liabilities for copyright breaches by other parties over which we have no control through their use of services that we provide. As it is the expressed intention in the act that those that provide facilities for the circumvention of copyright (refer Item 98) be liable, and not the users of that facility, we are very concerned.

Conclusion:

We believe that, with the exception of technological measures, the Copyright Amendment (Digital Agenda) Bill provides balance, a system that protects copyright owners, and safeguards exceptions.

The introduction of the concept of "state of mind" and intent is a powerful element in safeguarding copyright, and hope that "state of mind" is interpreted in the manner it is intended by the enforcers of the act. However, we believe that the "state of mind" should include "is reckless as to whether", and not "ought reasonably have known", (as per s.132(5C)).

We would obviously be happier if the state of mind test was used more widely to cover copyright infringement, and the changes were less reliant on preventing access to potential means of subverting copyright.

We would welcome the opportunity to provide additional input which may be useful as the House considers the bill before it.

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