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Dear Sir/Madam

Submission on applicability of theft offence in s131.1 Criminal Code and State Fraud offences to Copyright Act

In order for a breach of copyright to fall within the theft offence in s131.1 ***Criminal Code*** 1995, a number of elements must be proved. Elements requiring that the copyright belonged to another, that it was breached without consent, and that it was done dishonestly do not raise specific problems in relation to copyright and so are not discussed in this submission. However, characterisation of the copyright as property, the nature of the appropriation, and the intention to permanently deprive are more difficult and are discussed below.

Property

It is generally accepted that copyright can be characterised as a chose in action, and thus would fall within s130.1's definition of property as including "choses in action and other intangible property". However, the fact that copyright is a form of property does not necessarily mean that it is the copyright ***per se*** that may be subject of theft. Instead it is likely to be an aspect of the copyright that will be interfered with. Specifically, it is likely to be the right to licence copying that is seen to be the subject of the theftuous activity. This can be seen as a distinct aspect of the bundle of rights contained in copyright, and the ability to enforce a licence in court means that it can be characterised as a chose in action.[1]

Thus when one considers the theft of copyright, what is in issue is more precisely the theft of the right to authorise or licence copies of copyright material.

[1] The English Court of Appeal in ***Marshall*** [1998] 2 Cr App R 282 has held in obiter that rights created in a contract are choses in action and may be the subject of theft. (For criticism of this decision see eg JC Smith Stealing Tickets [1998] Crim LR 723; Reid and Macleod "Ticket Touts (or theft of tickets and related offences) (1999) 63 J Crim L 593).
The argument would seem stronger for rights to assign and licence. See also AG of Hong Kong v Nai Keung (1987) 86 Cr App R 174 where a right to apply for a quota was held to be form of "other intangible property".

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Appropriates

Appropriation has been the subject of extensive judicial elaboration in England. In a series of cases culminating in the House of Lords decision in ***Morris***[2] and affirmed by the House in decisions[3], the English position is that appropriation need only amount to the interference with ***any one of*** the bundle of rights that the owner of property has in that property.

The approach in ***Morris*** has been followed in Victoria in ***Roffel***[4] and ***W (a child) v Woodrow***[5]

If interference with only one of the rights of the owner of copyright amounts to an appropriation, it is therefore arguable that any unauthorised copying amounts to interference with the right to deny or licence the right to copy. As noted above, it is also arguable that this right can in itself be the "property". Either way, appropriation can be found to have occurred in any unauthorised copying.

Intention to permanently deprive

Section 131.1 requires that the appropriation be done with intent to permanently deprive. However, s131.10 defines this to be:

> ***131.10 Intention of permanently depriving a person of property***
>
> (1) For the purposes of this Division, if:
>
> (a) a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and
>
> (b) the person's intention is to treat the thing as the person's own to dispose of regardless of the other's rights;
>
> the person has the intention of permanently depriving the other of it.

Thus the key issue is not one of intention to permanently deprive, and arguably not even one of intention to deprive. It is whether an unauthorised copying amounts to an interference with a right of the copyright owner that can be characterised as an intention on the part of the copier to deal with the right to copy as if they were the copyright owner.

It is axiomatic that only the copyright owner would have the right to authorise copies of the work. Thus any person copying the work would need to be either the holder of a licence or the owner. A person making a copy who was in neither of these categories would appear to be treating the right to authorise copies as if it was their own, regardless of the rights of the copyright holder.

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2 [1984] AC 320.

3 In ***Gomez*** [1993] AC 442 the idea the usurpation had to be adverse to the owner was rejected. In ***Hinks*** [2001] 2 AC 241, lack of consent was also held to be irrelevant to the proof of appropriation (though under the ***Criminal Code*** it is required: 131.3(1))

4 [1985] VR 511, and see also ***R v Baruday*** [1984] VR 685.

5 [1988] VR 358. This appears to have been approved by the Victorian Court of Criminal Appeal in ***R v Marijancevic*** (1991) 54 A Crim R 431.

In such circumstances an intention to permanently deprive would have been proven without the need to establish any permanent deprivation – or in fact any deprivation at all.

To my knowledge, no case has yet raised these points specifically in relation to intellectual property. Indeed, such a use of the offence I would argue is against the spirit of the offence in that theft was originally about taking all of the (physical) property, and thus denying use of it to others. Copyright infringement, by contrast, does not in any way deny use of the property – but does impact on the financial gains that can be made by its exploitation.

It is submitted the ***Copyright Act*** should expressly enact that the theft provisions of the ***Criminal Code*** do not apply**,** that in order to avoid the possibility that the ***Copyright Act'***s provisions might be undermined by use of the theft provision.

State Fraud offences

Increasingly, state jurisdictions are enacting general fraud offences that dispense with the need for proof of deception in preference for general dishonesty. The required outcome of the fraud is now also often described as the gaining of a benefit or the causing of a detriment. For example in the ***Queensland Criminal Code***:

408C Fraud
(1) A person who dishonestly—

…
(d) gains a benefit or advantage, pecuniary or otherwise, for any person; or
(e) causes a detriment, pecuniary or otherwise, to any person;…
commits the crime of fraud.

This is subject to a maximum penalty of 5 years (or 10 years of the benefit or loss can be valued at over $5000). Similar provisions apply in s333 Criminal Code (ACT) and Criminal Code (Commonwealth) if the victim is a government entity. A more complex provision is contained in s409 ***Criminal Code (WA)***, but appears to operate to similar effect (see attached paper).

In such circumstances, it may be possible that a person who makes an unauthorised copy of a work for which they would otherwise have had to pay, knowing that ordinary people would consider it the wrong thing to do (ie that is is done dishonestly) would be guilty of a fraud offence.

As with the theft issue, it would be preferable for the Copyright Act to explicitly set out that the penalties contained within it are intended to cover the field to avoid the possibility of media industry advocates pressuring State prosecutors to use state criminal law to prosecute copyright breaches instead of the Copyright Act, and to thereby substantially increase the criminal liability to which persons are exposed.

Yours sincerely

Alex Steel