

SUBMISSION TO THE COMMERCE COMMITTEE
FROM CONSUMERS' INSTITUTE NZ INC ON THE

**COPYRIGHT (NEW TECHNOLOGIES AND PERFORMERS' RIGHTS)
AMENDMENT BILL**

Thank you for giving us the opportunity to make a submission on this very important topic.

Consumers' Institute is a broad-based national consumer organisation. On behalf of our 100,000 members we test products, compare the quality of services, research and comment on current consumer issues and expose exploitation of consumers by unscrupulous traders.

Our prime purpose is to inform and protect the interests of our membership. However, our work also has a benefit to all New Zealand consumers. This is particularly so when we take up an issue of broad public interest. Copyright, as it applies to new technologies and performers' rights is such an issue.

Introduction

The proposed changes to copyright law are important to both originators of intellectual property and users of the material produced. The interests of both have to be addressed and an equitable balance between the competing parties reached.

We note with interest in the explanatory note to the Bill, that the drafters seek to maintain the careful balance of objectives and interests reflected in the principal Act and to clarify the part of the legislation applying to the digital world. We agree with this approach.

We ask the Committee to consider the following points of specific interest to consumers.

Section 81a Copying Sound Recording for Private and Domestic Use

This section applies to sound recording only. It allows copying, for private and domestic use, if certain conditions are met. However, copyright owners can impose further conditions. This will lead to the prohibition or severe restriction of the copying of commercial recordings.

Condition (g) is of particular concern to the Institute. This states that the "owner" of the sound recording retains the ownership of any copy that is made under this section. This would place a prohibition on, for example, an MP3 player being sold second-hand with digital music files still embedded. This draconian, but largely unenforceable restriction seems curious given that second-hand CDs may be sold freely on the open market.

There is also a subsidiary issue in the definition of "owner". Is it one person, a couple or a family?

Section 84 Recording for Purposes of Time-Shifting

This allows the recording for the purposes of time-shifting provided four conditions are met. However, condition (c) states that the user must not be "able lawfully to access the communication work on demand". This raises the question of whether or not the consumer could record the news if it was also available as a download on perhaps TVNZ's website.

Subsection (2) of Clause 84 does provide an exemption provided a recording is not retained for longer than is reasonably necessary for viewing or listening of the recording at a more convenient time. However, we can foresee argument and debate developing around the word "reasonably".

Section 92 Internet Service Providers

Under the Bill, if an ISP receives notice of a copyright infringement by one of their customers, to protect themselves the ISP will immediately need to close down the site. The onus is then on the customer to prove their case and get their website access reinstated. We believe this responsibility is open to malicious abuse by parties who wish to close-down websites or disrupt in some way another person's business or enjoyment of the use of the internet.

As an alternative, Consumers' Institute supports the "notice and notice" approach where if an ISP is notified about a copyright infringement, they have a responsibility to forward the notice to the customer. If there is a response from the customer this should be forwarded to the copyright owner. If there is no response the ISP would then have an obligation to take-down the website. A time period of perhaps 10 days would be reasonable.

The "notice and notice" approach means ISP's do not have to play the role of policeman and it also provides a fairer redress for consumers.

Section 92a states that ISP's need to adopt, and reasonably implement, a policy that provides termination, in appropriate circumstances, of accounts of repeat copyright infringers. This raises issues of the proof required and a definition of "appropriate circumstances" and "repeat infringers".

Section 226a Prohibited Conduct in Relation to Technological Protection Measure

This new section makes it illegal to manufacture, distribute or use devices that can circumvent TPM's if it is known, or suspected that they may be used for illegal activities. This will, in effect, ban the devices. However, there are legal uses for such devices, for example, in the making of copies for back-up purposes. By effectively banning the devices, consumer's rights to make legal copies will be compromised.

There is the ability to circumvent the TPM for a permitted act, but consumers must first apply to the copyright owner. If the request is refused or a response is not received then the TPM device for permitted acts must be undertaken by a "qualified person" defined as a prescribed library, or a prescribed archive or an educational establishment.

In the Institute's view this is unworkable. Applying to the copyright owner would be nearly impossible in most cases, and the defined "qualified" people will either not have the skills to perform the task or would not be accessible to consumers living outside large cities.

The Institute believes the legislation is weighted in favour of companies as they can change TPM rules at any time. The legislation won't stop piracy or tech-savvy users, but will cost and inhibit access for ordinary consumers. It is our belief that content producers are already protected by copyright law so the prohibition of the devices is unnecessary.

Conclusion

Thank you very much for the opportunity to comment on this amendment to the Copyright Act.

If you wish to discuss any points made in this submission please do not hesitate to contact me.

David Russell
Chief Executive

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