Submission on Digital Enforcement Measures in ACTA

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> *"What enforcement measures should ACTA contain for remedying and deterring the circumvention of a TPM used to control access to, or prevent unauthorised copying, playing or distribution of, a copyright work?"*

Summary

It is morally and economically indefensible to define circumvention of TPMs as a criminal act in and of itself. The 2008 Copyright (New Technologies) Amendment Act wisely refrained from doing so. It is important that ACTA should not be allowed to sneak in such a provision by the back door.

One who circumvents TPMs for the purpose of copyright infringement should be defined as an accessory to the unlawful act of infringement itself. But there are a great many circumstances in which an innocent user may seek to circumvent protections for reasons that do not infringe on copyright holders' rights. It would be a tragic error to allow ACTA to enforce provisions, like the US DMCA, that would criminalise all these people.

Argument

As I argued to the Commerce Committee in 2007,[1] the issue with TPMs is that they are commonly (indeed, almost universally) used to enforce 'rights' that go far beyond any granted by copyright law. For instance, copyright law does *not* grant any right:

- to limit the range of devices by which a lawfully obtained copy of a work may be used;[2]
- to deliberately (maliciously) impair the normal operation of any device owned by the user (such as by installing software on their computer that prevents them from using a disc drive, emulator, or any other software or hardware they own);[3]
- to publish original research on the weaknesses of a commercially marketed software solution;[4]
- to limit how many times, or by how many different users, a work may be used.[5]

However, these perversions of copyright are by far the most common applications of TPMs.

This has several damaging effects - damaging to consumers, to the market, and ultimately to copyright holders themselves. The only beneficiaries are *publishers*, because they raise barriers to entry and thus reduce competition in their industry. It is *publishers*, not content creators, who use TPMs and who push for laws to protect (enforce) them.

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[1] http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/8/3/4/8349468aa5dc4ba298475dbae6e89225.htm

[2] This is the designed aim of the region coding used on almost every commercial DVD.

[3] http://en.wikipedia.org/wiki/Sony_BMG_CD_copy_protection_scandal

[4] A researcher who published information on how to (trivially) circumvent copy protection on a CD was immediately faced with legal action not from the copyright holder, but the company that developed the protection mechanism. http://www.out-law.com/page-3969

[5] This has become a very common practice among games publishers. See http://www.shacknews.com/onearticle.x/53210 for one example.

1. It reduces the utility of copyright products to consumers, and thereby reduces consumers' respect for copyright holder's rights. (This argument was made persuasively by Apple Computer, in its submission to the 2008 Act.[6])
2. It makes a nonsense of laws that are meant to protect the consumer. For instance, the 1994 Copyright Act specifically permits software users to make backup copies; but TPMs invariably make such backups useless. The protection of TPMs by law is a license for publishers to unilaterally revoke any and all rights that the law seeks to grant to their consumers.
3. It absolves rights holders of the obligation to support consumers who find that a TPM is blocking their legitimate use of a product. Since TPM limitations are entirely arbitrary (and seldom if ever published at the point of sale), there is no way to tell whether the product is not working because it is defective, or because it is *designed* not to work in a particular case. Publishers argue that sales of PC games are declining because piracy is destroying their market, but an equally plausible interpretation of declining sales is that consumers are fed up with buying products that are *designed not to work*.
4. It gives rights holders a *de facto* right to license all manufacturers of players/users of their work. Anyone who wants to manufacture a DVD player, for instance, has to pay a steep licensing fee for the right to decode commercial DVDs. There is no good reason for this - computationally the decoding is trivial - but it is simply illegal to do it without a license. Moreover, a license may be revoked if the holder does something that the licensor (in this case, the DVD Copy Control Association - a coalition of big media companies) doesn't like. This restriction limits competition and inflates the price of consumer electronics.

As long as TPMs are used in these ways, it is unreasonable to criminalise consumers for trying to "circumvent" them.

Request

For these reasons, I suggest that the legal protection of TPMs should be closely tied to the *use* of the protected work.

If someone aids another person in circumventing a TPM, in the knowledge that the other person is making unlawful copies, that should make them an accessory to the act of copyright infringement. However, the mere act of helping someone else to circumvent a TPM should not be an offence in itself.

Similarly, the publication of information that *may* be useful to pirates should never be an offence, unless the prosecution is able to show that the information has *no* substantial non-infringing use, since this information may (in many cases) be essential to let consumers exercise their normal rights.

If publishers argue (and they will) that such measures will render a lot of their TPMs so easily circumvented as to be effectively useless, the remedy is in their own hands: **stop using TPMs to restrict legitimate uses**. As long as publishers persist in violating consumers' rights, it will remain hard to make any moral or rational case why consumers should respect publishers' rights.

[6] http://www.parliament.nz/en-NZ/PB/SC/Documents/Evidence/1/0/3/103f974890774a3a8de09d77faaee061.htm