

**Comments Regarding the Ministry of Development's
Digital Technology Position Paper on
Digital Technology and the Copyright Act of 1994**

I. Executive Summary

The Electronic Frontier Foundation (“EFF”) submits these comments in response to the Position Paper on Digital Technology and the Copyright Act of 1994 (“Position Paper”) released by the Ministry of Economic Development (“Ministry”) in December 2002.

These comments will address two aspects of one of the issues addressed in the Position Paper, namely the Ministry’s preferred policy position and proposed legislative implementation of the legal protection for technological measures (Part Five of the Position Paper). These comments supplement the comments submitted by EFF in October 2001, in response to the Ministry’s Discussion Paper on Digital Technology and the Copyright Act of 1994 (“EFF’s previous comments”) on this issue. For the Ministry’s information, EFF is also enclosing with this submission a copy of its White Paper “Unintended Consequences: Four Years Under the DMCA”, which describes the ways in which the United States’ provisions prohibiting the circumvention of technological protection measures have been used since their enactment in 1998.

In relation to the legal protection for technological measures, EFF generally supports many of the Ministry’s preferred policy position statements. However, EFF is concerned that the retention of the existing language in section 226 of the Copyright Act of 1994 does not address some of the concerns raised in EFF’s previous comments and does not achieve the Ministry’s preferred policy position that the scope of any prohibition should only cover circumvention for copyright-infringing purposes.

In particular, EFF is concerned that the current wording of section 226:

- A. May have the effect of banning the circumvention tools required to achieve the Ministry’s stated policy purpose; and
- B. May impair or preclude publication of scientific research in relation to technological protection measures, which may in turn have a detrimental effect on the development of the discipline of computer network security and the field of cryptography generally.

II. Proposals

In order to achieve the Ministry’s preferred policy positions and to address EFF’s concerns, EFF respectfully proposes that the Ministry:

1. Limits the scope of the prohibition in section 226 to manufacture and distribution of circumvention devices where circumvention is undertaken for the purpose of unauthorized copying or copyright infringement, as proposed.
2. Defines “circumvention device” narrowly, to ensure that the only circumvention

devices banned are those which are not capable of any non-copyright-infringing use.

3. Retains the current subjective knowledge requirement in sub-section 226 (2), as proposed.
4. Inserts a specific exception for scientific research in sub-section 226 (2)(b) to clarify the rights of publication of scientific researchers.
5. Adds protection for “innocent violators” of section 226.

III. Commenting Party

The Electronic Frontier Foundation is the leading non-governmental organization devoted to protecting free expression, civil liberties and individual rights in the digital world. Founded in 1990, EFF actively encourages and challenges industry and government to support free expression, privacy, and openness in the information society. EFF is a private, non-profit member-supported organization based in San Francisco, California, U.S.A. It has been involved in almost all of the major lawsuits considering the interpretation and scope of the anti-circumvention provisions of the Digital Millennium Copyright Act in the United States.

IV. Issues Raised in the Position Paper concerning legal protection for technological measures

1. The scope of the prohibition in section 226 should be limited to circumvention undertaken for the purpose of unauthorized copying or copyright infringement

Paragraph 106 of the Position Paper states that the Ministry’s preferred policy response is that section 226 retain its focus on copy control measures, and not provide legislative protection against the circumvention of technological protection measures (“TPMs”) which only control access. That section also states that the Ministry’s intention is that in order for section 226 to apply to a situation, two conditions must be met:

- (a) the TPM circumvented must prevent copying; and
- (b) the circumvention must be for the purpose of copying or the infringement of other restricted acts of the copyright owner in the Act.

Paragraph 109 of the Position Paper requests comments on possible definitions for the terms “TPM” and “circumvention device”.

EFF is concerned that the current wording of section 226 of the Copyright Act of 1994 does not achieve the Ministry’s preferred policy position in several respects.

First, section 226’s prohibition on tools (circumvention devices) is overly broad. As recognized in both the Ministry’s Discussion Paper and Position Paper, the key principles guiding development of New Zealand’s copyright policy are balance, broadly understood, and the enhancement of the public interest.¹ This involves a complex balancing exercise involving provision of incentives to “ensure creation, production and distribution of creative works that meet society’s needs and demands”, “minimising the costs to society of copyright protection” and “ensuring reasonable access to copyright

¹ Position Paper, paragraphs 24-27; Discussion Paper, paragraphs 21, 170.

material, both for creators as an input in cumulative creation, for special needs groups and for consumers in general.”²

In order to preserve the existing copyright balance, the law must provide for circumvention for non-infringing uses. To limit the prohibition to circumvention undertaken only for copyright-infringing purposes, individuals need to have access to tools that enable them to circumvent technological protection copy control measures for non-infringing purposes.

Section 226 currently bans the manufacture, sale and distribution of “devices” and “means” that are “specifically designed or adapted to circumvent the form of copy-protection employed”. If the Ministry seeks to prohibit circumvention of copy control TPMs only where the circumvention is done for the purpose of unauthorized copying or other copyright infringement, individuals may require tools which can circumvent copy control TPMs in order to make non-infringing uses of protected works. Although the current language of section 226 narrows the range of tools banned, (and by corollary, available to individuals), that language would not be sufficient to ensure that individuals have access to all the tools required to circumvent for non-infringing purposes. To achieve that outcome, the range of prohibited circumvention devices should be limited to devices which are not capable of any non-infringing use.

Banning tools which are “specially designed or adapted” for circumvention may preclude the tools required for circumvention of a copy control TPM for legitimate, non-infringing purposes. For instance, it would preclude tools such as DeCSS software and 321 Studios LLC’s DVD Copy Plus software, both of which can be used to circumvent Content Scrambling System encryption on content stored on DVDs, to copy the content to a user’s computer. Once copied to computer, an individual can make a range of uses of that content, including many desirable, non-infringing uses, as well as infringing uses.

For instance, it allows legitimate DVD purchasers to create a back-up of the movie in case the original gets scratched, enables film professors to show particular scenes from movies to film students, and permits travelers to load up a DVD on to a laptop for easier viewing. It also allows purchasers of foreign movies released on foreign region-coded DVDs to watch movies otherwise unavailable in their geographical region, and enables parents to fast forward through otherwise “unskippable” commercials that precede many Disney titles to control their children’s exposure to advertising. It could also be used to circumvent a copy control for the purpose of copyright infringement. These software tools are arguably specially designed to, or adapted for, circumvention of DVD encryption, but the purpose for such decryption may be non-infringing.

The current wording may also be too narrow to capture all tools that could be used for circumvention for copyright infringement. For instance, it has been widely reported that a felt-tip marker can be used to circumvent certain types of copy protection currently being used on audio CDs, the content of which could then be copied or otherwise infringed. However, a felt-tip marker would not meet the test of being “specially designed or adapted” for circumvention for an infringing purpose.

² Position Paper, paragraph 28.

Proposal:

Accordingly, the language of existing section 226, or the proposed new definition of “circumvention devices” foreshadowed in paragraph 109 of the Position Paper, should be limited to banning only those devices that are not capable of any non-infringing uses.

2. Subjective Knowledge Requirement and Publication of information intended to enable or assist circumvention

In relation to the knowledge requirement, paragraph 126 of the Position Paper states that the Ministry’s preferred policy position is to retain the existing subjective test in section 226 of the Copyright Act. EFF supports this proposal, but is concerned that the scope of sub-section 226(2)(b) as currently worded may impair or preclude publication of scientific research into copy control technological protection measures, which may, in turn, have a detrimental effect on the development of computer security generally.

Section 226 (2)(b) prohibits publication of information intended to enable or assist persons to circumvent copy control technological measures, if the publisher has knowledge or “reason to believe” that the information will be used to make infringing copies. A scientific researcher who publishes his or her own research with the intention that someone else will emulate or repeat the scientist’s tests to circumvent a technological measure, may meet the first prong of this test. However, in many cases, a scientist may not know or have “reason to believe” that the published information would be used by a third party infringer. Therefore, to the extent that there may be uncertainty about when a publisher could be said to have “reason to believe”, and hence potential liability under s.226, the current wording may have a chilling effect on the publication of scientific research.

A similar situation arose in the United States where a team of encryption researchers led by Professor Edward Felten of Princeton University, succeeded in a public challenge to circumvent particular audio watermarking technology. The team defeated the particular copy control TPM, and sought to publish their results in a paper at an academic conference. However, representatives of the Secure Digital Music Initiative who held the copyright in the copy control TPM claimed that the information in the paper was a circumvention technology banned by the DMCA.

The threat of litigation in such circumstances has had a significant chilling effect on the publication of scientific research in the areas of encryption and computer network security within the United States.

Proposals:

In order to address any potential chilling effect, EFF respectfully suggests that the Ministry could address this in one of three ways:

- A. Limit the definition of “information” in section 226, to information about circumvention which had no use other than to facilitate or enable copyright infringement. A researcher would not violate that section merely by publishing information if it could be used for a non-infringing purpose.

However, while this approach might encourage scientific research, it might prove difficult to implement in practice.

- B. Create specific exemptions for security research. Section 226 could include a specific exemption for publication in furtherance of scientific research. This would also encourage scientific research into computer security. EFF notes that the United States’ Digital Millennium Copyright Act contains specific exemptions from the circumvention prohibitions for security testing (section 1201 (j)) and encryption research (section 1201(g)). However, in practice, these exemptions have been too narrow to achieve their purpose, as evidenced by the case of Professor Felten and his team of researchers. EFF also notes that draft legislation including a proposed amendment to specifically permit scientific research into technological protection measures is currently pending in the United States’ Congress.³
- C. Innocent Infringer protection: As discussed in EFF’s previous comments, the Ministry could insert protection for first-time “good faith” or “innocent violators” who mistakenly violate section 226. Such infringers could be subject only to injunctions and monetary and criminal penalties could be reserved for situations where unlawfulness is clearly established.

V. Recommendations

For the reasons discussed above, EFF respectfully proposes that the Ministry:

- 1. limits the scope of the prohibition in section 226 to circumvention undertaken for the purpose of unauthorized copying or copyright infringement, as proposed;
- 2. defines “circumvention device” narrowly, to ensure that the only circumvention devices banned are those which are not capable of any non-copyright-infringing use;
- 3. retains the current subjective knowledge requirement in sub-section 226 (2), as proposed;
- 4. considers insertion of a specific exception for scientific research in sub-section 226 (2)(b) to clarify the rights of scientific researchers; and
- 5. adds protection for “innocent violators” of section 226.



³ 108 H.R. 107 – the Digital Media Consumer Rights Bill introduced by Representative R. Boucher and Representative Doolittle.

Thank you for your consideration.

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