

Restricting Viewing Rights: Comments on the *Copyright Amendment (Digital Agenda) Bill 1999*

**Submission to the Intellectual Property and
Competition Review Committee**

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1. Summary

The *Copyright Amendment (Digital Agenda) Bill 1999* seeks to, amongst other things, prohibit the use of “circumvention devices” and “circumvention services” to overcome “effective technological protection measures” of copyrighted materials.

It is the contention of this paper that this Bill fails to take into account a new technology for consumer video that is now beginning to make an impact in Australia, and around the world. The paper further contends that if the bill is passed in its present form:

- it will slightly reduce access to video material for Australians at this time and in the near future,
- it will significantly reduce access to video material for Australians in future years, and
- it will represent a reversal of the Australian Government’s policy of increasing access to foreign literary and other works, as demonstrated by limited provision for parallel importing of compact discs and books.

It is **recommended** that the Bill be amended to exclude from its purview the region coding system built into DVD.

For the same reasons, detailed in this paper, as the above recommendation, it is also **recommended** that current copyright restrictions on the import of video material, including DVDs, be eased and a similar standard as those applying to compact discs be applied.

2. DVD, the new video technology

A new home or consumer video format was introduced in Australia towards the end of 1997. Called DVD (which stands for Digital Versatile Disc), this technology allows the carriage of a full length movie on an optical disc that is the same physical size as a compact disc. This is achieved through new technologies that allow digital data to be recorded on the disc at much higher densities than previously possible.

Amongst the advantages of this format of pre-recorded movie distribution over the existing video cassette are:

- the picture quality of DVD offers about twice the resolution of which video cassette is capable,
- with reasonable care, repeated playing of DVDs will produce no degradation of quality, while video cassettes degrade slightly every time they are played,

- DVDs use an inherently simpler mechanism, thereby providing consumers with greater reliability for their equipment,
- DVDs offer higher digital audio standards than video cassettes, typically containing multi-channel cinema standard sound, compared with the two channels available on video cassettes,
- DVDs offer immediate access to particular points in a program, rather than the need for winding through a video cassette,
- nearly all DVDs offer user-selectable non-English subtitles as well as subtitles in English for the hearing impaired, and many offer the sound track in at least one additional language,
- DVD technology offers a wide range of other features, most of which depend upon implementation by the DVD producer.

It is the view of most people in the home entertainment press and in the home entertainment distribution industry that DVDs will increasingly take over from video cassettes as the primary distribution medium for pre-recorded movies. Further, it is likely that DVDs will entirely replace video cassettes in this role, in much the same way that after 15 years the compact disc has entirely supplanted the Long Play Record.

Already figures in the United States and Australia suggest that consumer take-up of DVD is exceeding that of the compact disc at a similar time in its history.

3. DVD Region Coding

The success of DVD technology was dependent upon program material being made available in the format by the major movie producing companies. Those companies indicated a desire to maintain their programs of staggered international movie releases. These programs necessitated controls over release times for downstream uses such as broadcast transmission and video sale and hire.

The response to this requirement by the developers of DVD was to provide a “Region Coding” facility. Under this feature, the world is divided into six zones. The United States is Region 1. Australia, New Zealand and South America are Region 4. Europe is Region 2.

The great majority of DVD video releases are encoded with the region for their intended play, thus movies to be played in Australia are encoded with Region 4. Under the licensing contracts for DVD technology, the makers of DVD players are not permitted to market within a country a player capable of playing DVDs region-coded for a different region. Thus all DVD players sold in Australia are capable of playing only DVDs that are Region 4 encoded, or not region coded at all. A person importing a Region 1 encoded DVD from the United States would be unable to play the DVD in an Australian player.

It must be noted that the purpose of DVD region coding is *not* to protect DVDs from copying. A separate technology, MacroVision (which is also used on video cassette recordings), provides for this.

4. Uses of Region Coding

The justification provided to the Australian press by the movie industry that region coding would be used to support staggered international release dates received a severe blow once titles began to become available. Amongst the titles now available in Region 4 versions are *The Wild Bunch* [1969], *One Flew Over the Cuckoo's Nest* [1975] and even *Metropolis* [1926]. Clearly the application of region coding to the majority of titles has nothing to do with controlling release dates.

In fact, every movie release available in Australia, barring a few Asian films, bears a Region 4 code. By contrast, virtually all music DVD releases in Australia are not region coded.

At the time of writing, 486 movie titles are available on DVD with Region 4 coding. The number available in the United States with Region 1 coding is estimated to be at least 3,500.

5. Overcoming Region Coding

DVD players marketed internationally are based upon a common platform for each model. The parts that are changed for different markets are power supplies (to deal with different supply voltages in different countries) and the circuitry (in some models, programming) that controls the Region capability of the player. Thus all players are inherently capable of being modified to play DVDs for other regions. In fact in Australia a thriving industry of DVD player modifiers has developed. The great majority of DVD players can be purchased from retailers in a modified version, at extra cost, that permits the playing of DVDs from other regions. In some cases these modifications involve changes to the players' circuitry (possibly invalidating warranty protection) while in other cases software changes can be loaded into the player to change its region playing abilities.

It is estimated that more than half of DVD player sales from specialist home entertainment retailers are modified players.

6. Place of manufacture of Region 4 DVDs

One major Australian DVD and video cassette distributor, Village Roadshow, masters (prepares the movie in the appropriate digital format) and manufactures the majority of its DVDs in Australia. The other two major distributors, Warner and Columbia TriStar, master and manufacture virtually all their DVDs in the United States, in the same facilities used to master and manufacture the Region 1 versions for the US market.

In fact, the only differences between US and Australian versions of the same movies from these distributors are:

- the different region coding, and
- the different television display format (NTSC in the US, PAL in Australia).

7. 'Natural' protection

The Australian market is partially protected from bulk imports of US DVDs by two factors beyond region coding. One is that the United States uses NTSC as its television standard while in Australia PAL is used. This difference is less important than it has previously been because all DVD players support both standards and the great majority of televisions sold in Australia in recent years have also supported NTSC as well as PAL, with automatic switching between the two.

The other protection is the movie houses' contractual controls that divide world markets. While these exist, inexpensive importing of foreign market DVDs is unlikely to become a major activity. Almost all movie DVDs are sold in Australia for \$29.95 or \$34.95, while Region 1 titles imported from the United States are in Australia for between \$60 and \$90.

Interestingly, individual purchasers can mail-order DVDs from US discount suppliers, their purchases costing approximately the same as purchases of Region 4 titles in Australia. The present writer purchased an order from Amazon.com. Delivery time was around 12 days.

Clearly there is a significant price discrepancy between directly ordered Region 1 titles and those purchased via Australian retailers. I speculate that this may be due to the inability of Australian retailers to purchase US DVDs at wholesale sources, due to US distribution controls, and thus their base-line costs amounting to US retail prices.

8. 'Unnatural' protection

In a recent conversation with the managing director of the Australian arm of Columbia TriStar, a major distributor of video tapes and DVDs, I was informed that the Australian industry is vigorously enforcing copyright law-derived protections against Australian retailers selling imported US DVD titles. This appears to be taking place in a manner similar to the way the same rules were previously implied to retailers selling imported compact discs prior to liberalisation of the copyright regime. She did indicate that the industry has no plans to interfere with personal importing of foreign DVDs by individuals.

The removal of current copyright restrictions on importing of legitimately produced foreign DVDs.

9. The affect of the *Copyright Amendment (Digital Agenda) Bill 1999* upon DVD availability

It is widely perceived in the Australian home entertainment industry that the legal protections afforded by the *Copyright Amendment (Digital Agenda) Bill 1999* will prohibit the modification of Region 4 DVD players to Region 1 compatibility.

To the extent that such a prohibition would be effective in destroying the DVD player modification industry, it will reduce the range of material that can be viewed by Australians in this format since they will be limited to only those titles released with Region 4 (or no) coding.

At the present time this would present no more than an irritation to early-adopters of the technology. While the United States presently has around ten times as many titles available as Australia, the ratio can be expected to improve as the adoption of the technology in Australia increases. In any case, DVD is still an *additional* technology – the great majority of video releases are in the video cassette format, admittedly of lower technical quality. This is likely to continue for several more years.

So long as video cassettes remain a strongly selling video distribution format, availability (or potential availability, through the ability of Australians to personally import video cassette material from foreign sources) of movies will remain wide.

However it is almost certain that DVD will, over a period of ten to 15 years, completely displace the video cassette as a movie distribution medium. At this point the region coding system will control all access to movies.

10. Niche and quality markets mostly affected

The control of movie distribution through the region coding system is unlikely to impact significantly upon mainstream movie viewers. Virtually all popular titles will be readily available once sufficient time has passed to allow their transfer to the new medium.

However there will always be a number of movies that Australian distributors consider to be unlikely to be profitable in the Australian market. Many of these are likely to be available in the US market due to its size (nearly twenty times the size of the Australian market). However these titles will be Region 1 coded, making them inaccessible to Australians should the proposed legislation prohibit DVD player modifications.

As a particularly poignant example of these problems, I note that as I write the following Australian movies are available in the United States as Region 1 titles, but not in Australia in a Region 4 version, and are thus unable to be played on unmodified Australian players:

- *Picnic at Hanging Rock*
- *Gallipoli*
- *Breaker Morant*

- *Mad Max*
- *The Castle*
- *Muriel's Wedding*
- *Sirens*
- *Tim*
- *Don's Party*
- *The Year Of Living Dangerously*

11. Three examples

To illustrate these problems, three real-life examples may be appropriate.

The writer has been informed by a movie distributor that the 1976 Dino de Laurentis movie *King Kong* has never been released in Australia in a home video format because no Australian distributor has been able to acquire its rights. While the writer does not consider this movie to be a great loss to Australians, it does demonstrate that closing direct consumer access to the United States market – which is what the proposed bill will achieve – will make some titles unavailable.

The writer has made somewhat of a study of the works of the US author Robert Heinlein. In 1996 and 1997 the writer sought to complete his collection and understanding of Heinlein works by acquiring the movie *Destination Moon* [1950], which Heinlein cowrote. This movie is of some small degree of historical importance because it won an Academy Award for special effects. The movie was not available in Australia. However in 1998 the writer was able to order it from the United States. Being on NTSC video tape it was capable of being viewed in Australia with a modern video cassette player and television. It is highly unlikely that this movie will ever be released on DVD in Australia, although it may be at some time in the United States. The passage of the present Bill would prevent Australians from obtaining copies which they could view.

The present writer also sought a copy of a compact disc by the 1970s Australian music group Sebastian Hardie. This CD was unavailable in Australia. However the group has remained popular in Japan and the CD remains in production in that nation. This writer was able to obtain a copy of this Australian music from the Japanese manufacturers via a United States retailer. Had this been a DVD, under the proposed legal regime, it would not have been practicably available.

12. Conclusion

Section 3 of the *Copyright Amendment (Digital Agenda) Bill 1999*, provides:

The object of this Act is to amend the *Copyright Act 1968* so as to:

(a) ensure the efficient operation of relevant industries in the online environment by:

- (i) promoting the creation of copyright material and the exploitation of new online technologies by allowing financial rewards for creators and investors; and
- (ii) providing a practical enforcement regime for copyright owners; and
- (iii) promoting access to copyright material online; and
- (b) promote certainty for communication and information technology industries that are investing in and providing online access to copyright material; and
- (c) provide reasonable access and certainty for end users of copyright material online; and
- (d) ensure that cultural and educational institutions can access, and promote access to, copyright material in the online environment on reasonable terms, including having regard to the benefits of public access to the material and the provision of adequate remuneration to creators and investors; and
- (e) ensure that the relevant global technical standards which form the basis of new communication and information technologies, such as the Internet, are not jeopardised.

In seeking to advance these objectives, particularly those in 3(c) and (d), in respect of online material, the Bill would appear to be jeopardising them in respect of offline video material. It is likely that those responsible for drafting this Bill were unaware of the implications of DVD technology which, at the time, was only beginning to be introduced.

The Bill would also seem, in its application to DVD, to be a reversal of the Australian Government's recent moves to promote diversity through permitting the parallel importing of compact discs and books in certain circumstances. While the Bill will not prohibit the parallel importing of DVDs, it will make any such DVDs effectively incapable of being viewed in Australia.

It is **recommended** that the Bill be amended to exclude from its purview the region coding system built into DVD.

Current Copyright controls preventing the parallel importing of video material will equally act to reduce the access of Australians to cultural materials. There would seem no reason to have different copyright controls applying to video material to those applying to compact discs. Accordingly it is **recommended** that the copyright regime applying to video material be amended to parallel that applying to compact discs.

I am available to give evidence to the Committee should it require clarification of any of the matters covered in this submission.

Appendix – About the Author

Stephen Dawson is one of the very few full-time freelance writers in Australia who specialises in home entertainment and computer equipment. He writes regularly for *Australian HI-FI*, *Sound and Image*, *Best Buys*, *PC @uthority*, *The Canberra Times*, and *The Institute of Public Affairs Review*. He is also commencing to contribute to *The Sydney Morning Herald*.