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DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING**

**HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS**

INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES (TPM) EXCEPTIONS

OCTOBER 2005

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Executive Summary

1. The Technological Protection Measures (TPM) regime required under the Australia - United States Free Trade Agreement (AUSFTA) will shift the existing balance significantly in favour of copyright owners, and against institutional and other users, by:
 - prohibiting *use* of circumvention, as well as *dealings* in circumvention devices and services;
 - extending the reach of criminal sanctions for both use and dealings;
 - allowing exceptions in respect of *use* of circumvention, but not *dealings*;
 - imposing several criteria on the exceptions which may be granted in that area.
2. Stakeholders in the education and research sectors are keen to ensure that there is no reduction of their existing legal rights.

The Department of Education, Science and Training (DEST) therefore recommends circumvention of a TPM should be allowed to ensure that a TPM does not inhibit the exercise of copyright exemptions and statutory licences, especially those applicable to institutions, which are currently 'permitted purposes' under section 116A(3) of the *Copyright Act 1968*.

3. Furthermore, the approach to granting exceptions to the TPM measures, in the limited area where exceptions are possible, must be a flexible one, in order to moderate the shift in the copyright balance.
4. The House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee) should avoid applying interpretations based on the US Digital Millennium Copyright Act (DMCA) precedents (including rulemaking under US DMCA). The only requirement is to implement Australia's treaty obligations as stated under AUSFTA.
5. The LACA Committee should be guided by the government's stated intentions in relation to implementation of a TPM framework, in particular the intention to combat commercial piracy, not to upset the delicate balance struck by the legislature between copyright owners and users exercising legitimate copyright exemptions and statutory licences.
6. A proper understanding of the LACA Committee's terms of reference, and the scope for exceptions, is crucial to the inquiry process. Accordingly, DEST has taken pains to set out its understanding about the nature of the issues to be examined by the Committee.

7. DEST makes a number of recommendations for specific exceptions to permit circumvention of technological protection measures (TPMs). However DEST notes that this area is rapidly evolving, and thus a further Inquiry would be warranted earlier than the 4-year time frame envisaged.
8. In addition to exploring possible exceptions, the LACA Committee should take this opportunity to establish some principles by which any exceptions are to be assessed. DEST suggests a number of interpretative and policy principles of that kind.
9. In general, where the substantive operation of an existing copyright exemption is preserved against attempts to exclude its operation by contract, it should follow:
 - that circumvention of a TPM in order to exercise the exemption should be permitted;
 - that a contract clause purporting to exclude the use of circumvention is similarly invalid.
10. The following criteria are to be met by any exception permitting circumvention under Article 17.4.7(e)(viii) of AUSFTA:
 - it must relate to non-infringing uses of a particular class of works, performances and phonograms [the *particular class criterion*];
 - an actual or likely 'adverse impact' on the non-infringing use must be 'credibly demonstrated' [the *adverse impact criterion*];
 - it must apply only where it does not impair the adequacy of legal protection or the effectiveness of legal remedies against circumvention of the TPM [the *no impairment criterion*]
11. DEST submits that any class of copyright subject matter (other than *all* subject matter) that is meaningful having regard to the rationale of the exception is a '*particular class*'.
12. DEST submits that the '*adverse impact*' criterion is met wherever users can credibly demonstrate a likely adverse impact on non-infringing use - even if that is manifest only occasionally.
13. DEST submits that the '*no impairment*' criterion would generally be met as a matter of course in those cases where the exception applies only to institutional users (libraries, educational and cultural institutions, archives and research organisations).
14. In particular the statutory licence contained in Part VB of the Copyright Act should be preserved because of its importance to educational institutions.
15. If additional institutional exemptions are included in the Act, a case could be made for an exception to permit circumvention for the 'permitted purpose' of exercising the exemption. This might be relevant to future exemptions for:
 - format shifting;

— orphaned works.

16. DEST also recommends that, in the event that 'regional playback controls' (RPCs) are regarded in future as TPMs (which DEST does not support), a consumer should be permitted to circumvent an RPC on an imported article where the importation does not infringe copyright.
17. A licensee should be permitted to circumvent an ACM applied to a licensed product, where the ACM is defunct or un-usable in the ordinary manner.
18. Consideration should be given to exceptions to allow circumvention so that the Crown can avail itself of its privileges under section 183. Further inquiry may be necessary to identify of the sorts of article embodying particular types of work *etc.* that government agencies may wish to copy or communicate under section 183.

Introduction

Preliminary

1. The Department of Education, Science and Training (DEST) notes that on 24 August 2005, the Attorney-General, the Hon. Philip Ruddock MP, announced that the House of Representatives Standing Committee on Legal and Constitutional Affairs (**the LACA Committee**) would conduct an *'Inquiry into Technological Protection Measures (TPM) Exceptions'* (**the Inquiry**).
2. DEST welcomes the opportunity to provide this submission to the LACA Committee.
3. DEST has reviewed relevant materials located on the LACA Committee website, including the [Media Release](#), the [Terms of Reference](#) for the Inquiry, the [Background Paper](#) and the guidelines for [preparing a submission](#). DEST has also taken account of material relating to the Inquiry which appears on the Attorney-General's Department (**AGD**) website, including Issue 37 of the [AGD e-NEWS on Copyright](#) which reproduces most of the content of the Background Paper and contains some additional guidance for persons wishing to make a submission.
4. In preparing this Submission DEST has consulted with relevant interest groups representing educational institutions, libraries and research institutions, to the extent possible in the time allowed. DEST notes that public hearings are to be held in October and November, and that the Committee will receive supplementary submissions. DEST may wish to lodge a further submission if new information comes to hand, or in order to respond to proposals made in other submissions. DEST notes that the LACA Committee has been asked to report by the end of February 2006.
5. In this Submission DEST makes a number of recommendations for specific exceptions to permit circumvention of TPMs. However DEST notes that this area is rapidly evolving, and thus a further Inquiry would be warranted earlier than the 4-year time frame envisaged. As this is the first Inquiry of its type, DEST considers that, in addition to exploring possible exceptions, the LACA Committee should take this opportunity to establish some principles by which any exceptions are to be assessed. In this Submission DEST suggests a number of interpretative and policy principles of that kind.
6. This Submission is accompanied by an Annex which is contained in a separate A3-size document (**the Issues Matrix**), to which reference should be made while reading the Submission.
7. Confidentiality is not sought by DEST for this Submission (or the Annex). Copyright in the Submission vests in the Commonwealth, as represented by DEST. Consent is given for anyone to use and reproduce the text of the Submission in connection with the conduct of the Inquiry, and for any non-commercial purposes reasonably flowing from the Inquiry, in whole or in part,

provided that any material so used is properly attributed and that the material is not presented in such a way as to mislead or deceive any person.

Role of DEST

8. DEST provides national leadership and collaborates with the States and Territories, industry, other government and non-government agencies and the community to support the Government's objectives in education, training and science. This support is provided through:
 - funding to universities, State and Territory Governments and other agencies;
 - advice to the portfolio Ministers on policy and programme management issues;
 - research or the commissioning of research which will help develop education and science policy options; and
 - administering programmes which assist clients.
9. In this context, DEST has an interest in protecting and promoting the rights of its clients, both as creators and consumers of considerable copyright resources.
10. DEST is accountable for its performance to the Government and the Ministers and, through them, to Parliament and the Australian community.
11. DEST provides advice to the Government and administers programmes to achieve the Commonwealth's objectives for education, science and training. The department works in partnership with the States and Territories, education and training providers, industry, the Australian Research Council (ARC) and Publicly Funded Research Agencies¹ towards achieving three long term *Outcomes*. They are:
 - *Outcome 1*: Individuals achieve high quality foundation skills and learning outcomes from schools and other providers.
 - *Outcome 2*: Individuals achieve relevant skills and learning outcomes from post school education and training.
 - *Outcome 3*: Australia has a strong science, research and innovation capacity and is engaged internationally on science, education and training to advance our social development and economic growth.

DEST's Stakeholders

12. In the course of preparing this submission DEST consulted with stakeholder interests, to the extent that was feasible given the short time frame of the Inquiry. Stakeholder groups include schools, vocational education and training (VET) and higher education sectors, research and science organisations.

¹ The Publicly Funded Research Agencies are the Commonwealth Scientific and Industrial Research Organisation (CSIRO), the Australian Institute of Marine Science (AIMS) and the Australian Nuclear Science and Technology Organisation (ANSTO).

13. DEST's stakeholders comprise:
- more than 3 million school students in Australia, in 9,600 schools with more than 250,000 teachers. The Australian Government contribution to school education is \$33 billion for 2005-2008;
 - a student population in the order of 1.7 million in the Vocation Education and Training sector, at more than 1,900 institutions including community providers, delivering training at more than 9,000 locations;
 - approximately 944,000 students in higher education, including post-graduate study and more than 85,000 staff involved in a combination of teaching and research activities in the Australian higher education institutions; and
 - research agencies such as CSIRO and ANSTO and researchers in the higher education sector funded directly from DEST and from the ARC. In 2004/05, the Australian Government spent more than \$3.5 billion on research through funding to these sectors.
14. The submission seeks to identify a broad consensus view of these stakeholder groups, but ultimately reflects the views of DEST.
15. DEST's stakeholders are both creators and users of copyright. As significant users of copyright materials, the education sector paid more than \$79 million to copyright collection agencies for its use of copyright materials in 2003-04. This represents 93% of the revenue of Copyright Agency Limited (CAL) and 88% of Screenrights².
16. DEST also has an interest in maximizing the commercialisation and national return on research through the collaboration of industry, universities and CSIRO.
17. One example of DEST's stakeholders being both creators and users of copyright material is the Cooperative Research Centres (CRC) Programme. A critical component of the CRC program is to train new research students in collaborative research and development. Hence, CRCs' main interest in copyright relates to the need for exceptions to facilitate (rather than inhibit) the research and study that are essential for success in their internationally competitive research. Consequently, DEST supports a copyright system that minimises restrictions on free inquiry in research and study.

DEST's general approach to copyright reform

18. DEST supports the broad objectives of the copyright system. There is an acceptance on the part of education and research interests of the need to safeguard the rights of copyright owners and creators. Indeed a substantial volume of copyright material originates within the education and research communities. Organisations within that community may themselves be copyright owners, and teachers and researchers may enjoy moral rights.

² Copyright Agency Limited Annual Report 2003-04, Screenrights Annual Report 2003-04.

19. There is also an important public interest in encouraging innovation, and in ensuring effective access to copyright materials for education and research purposes. Such access determines the opportunities for students, teachers and researchers to take their place in a competitive global information economy. In this sense education and non-commercial research should be looked at differently to most other industry sectors, because there are important positive externalities flowing from those activities.
20. As well as seeking an appropriate balance between different interests, any reforms to the copyright exceptions in the Act should seek:
 - to maintain technological neutrality between the operation of copyright law in the digital and non-digital environment;
 - to maintain neutrality and consistency of treatment as between different categories of subject matter;
 - to balance flexibility and certainty;
 - to avoid arbitrary, technical distinctions;
 - to maximise the simplicity of the provisions; and
 - to lower compliance costs for creators and users.

Background to the Inquiry

21. DEST understands the background to the Inquiry to be as follows.
22. Provisions relating to technological protection measures (**TPMs**) were first introduced into the *Copyright Act 1968* (**the Act**) in 2001. They were part of a package of measures (**the Digital Agenda reforms**) contained in the *Copyright Amendment Digital Agenda Act 2000* (**the Digital Agenda Act**), which commenced on 4 March 2001. The TPM provisions prohibited circumvention of a TPM, but also provided exceptions to permit institutions to circumvent TPMs where the purpose is to perform acts of copyright that are permitted under specific copyright exemptions or statutory licences, such as Part VB of the Act.
23. The TPM provisions were in part a response to the US Digital Millennium Copyright Act (**DMCA**).
24. Subsequently the Digital Agenda reforms were the subject of a review (**the Digital Agenda review**) to which the government had committed itself at the time of passage of the Digital Agenda Act. As part of that process the law firm Phillips Fox was commissioned to undertake a public inquiry into certain aspects of the Digital Agenda reforms. We refer to that inquiry as '**the Phillips Fox Inquiry**' to distinguish it from the broader Digital Agenda review, which remains the responsibility of the Attorney General's Department (**AGD**).
25. It is worth remarking that the Phillips Fox Report contained recommendations to *extend* the exceptions relating to TPMs to include supply and use of circumvention devices and services for *any* non-infringing purpose, including fair

dealing and the various institutional exemptions and statutory licences under the Act.

26. However these recommendations have not received full policy consideration because of the supervention of the Australia - United States Free Trade Agreement (**AUSFTA**).
27. Article 17.4 of the AUSFTA deals with copyright. In particular, Article 17.4.7 deals with what is described as '**effective technological measures**'. This requires the parties to create a liability scheme for certain activities relating to the circumvention of what is described as 'effective technological measures'.³ However in this area Australia was not required to implement its AUSFTA obligations immediately, but must do so within 2 years, that is, by 1 January 2007 - see Article 17.12.
28. There were two Parliamentary inquiries established in the latter half of 2004 to examine the then-proposed AUSFTA. The following reports were produced from those inquiries:
 - Parliament of the Commonwealth: Joint Standing Committee on Treaties - Final Report on the Australia United States Free Trade Agreement, June 2004 ('**JSCOT Report**') which is available at:
<http://www.aph.gov.au/house/committee/jsct/usafta>.
 - Senate Select committee on the Free Trade Agreement between Australia and the United States of America - Final Report, 5 August 2004 ('**Select Committee Report**') which is available at:
http://www.aph.gov.au/Senate/committee/freetrade_ctte/report/final/index.htm.
29. DEST is aware of fairly robust debate about the AUSFTA TPM provisions in the context of those two Parliamentary inquiries. In the course of the Parliamentary process officials gave some assurances, including:
 - that the purpose of the TPM scheme was to 'assist copyright owners to enforce their copyright and target [commercial] piracy, not to stop people from doing legitimate things with legitimate copyright material';
 - that the AUSFTA contained sufficient flexibility to allow adoption of exceptions suited to the Australian copyright system;
 - that there would be extensive consultation with stakeholders in advance of framing TPM exceptions;

³ DEST notes that the purpose in referring to TPMs as '*effective technological measures*' is unclear. Inclusion of the adjective 'effective' follows a pattern in international treaties and national laws. However it is certainly not the case that an effective TPM must be impervious to circumvention in order to qualify as such, so it is not clear what purpose is served by the term. See Ginsburg, *Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the US Experience*, at <http://ssrn.com/abstract=785945>.

- that no sector, including consumers, would be disadvantaged when the TPM provisions come into effect.
30. The JSCOT Report recommended that the Government legislate so as to protect 'the rights of universities, libraries, educational and research institutions to readily and cost-effectively access material for academic and related purposes'.
 31. The AUSFTA came into effect on 1 January 2005, following the passage of the *US Free Trade Agreement Implementation Act 2004 (the Implementation Act)*. The Implementation Act effected a number of changes to Australian law - notably in areas of intellectual property - to ensure that, upon commencement of the AUSFTA, Australia's laws would accord with its AUSFTA obligations. However no changes have yet been made to the TPM measures that were introduced into the Act as part of the Digital Agenda reforms.
 32. DEST understands that most aspects of the liability scheme relating to circumvention of TPMs are to be addressed directly by AGD, and the role of the LACA Committee is tightly circumscribed.
 33. In precise terms: the LACA Committee is to consider whether Australia should include in the liability scheme any exemptions based on Article 17.4.7(e)(viii) of the AUSFTA.
 34. However, DEST considers that it is not a trivial matter to understand what this really means, and expects that the LACA Committee will receive some submissions that are not directed accurately to the real questions in issue. Accordingly, DEST has taken pains to develop a clear understanding about the nature of the issues to be examined by the LACA Committee. DEST has endeavoured to set out this understanding below, especially at paras. 53 - 70.
 35. Finally, the LACA Committee will be aware of the recent decision of the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58, in which the court unanimously overturned the decision of the Federal Court, and ruled that the device used by Sony to stop copied games being played on its PlayStation did not constitute a 'technological protection measure' under the Copyright Act. In effect the court ruled that regional playback controls are not TPMs because they do not prevent or inhibit infringement of copyright. DEST makes further reference to this decision later in its Submission - see paras. 63 and 128.

TPMs under the Digital Agenda Act

36. Part V, Division 2A of the *Copyright Act 1968* (inserted by the Digital Agenda Act) deals with actions in relation to circumvention devices⁴ and interference with electronic rights management information.

⁴ The provisions relating to electronic rights management information are not relevant for current purposes.

37. The operation of this Division is supported by the following definitions in section 10:

circumvention device means a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective⁵ technological protection measure.

circumvention service means a service, the performance of which has only a limited commercially significant purpose, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of an effective⁶ technological protection measure.

technological protection measure means a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject matter by either or both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject matter) with the authority of the owner or exclusive licensee⁷ licensee of the copyright; [This equates to the concept of an **ACM** as developed later - see para. 45.]
- (b) through a copy control mechanism. [This partly equates to the concept of a **CPM** as developed later - see para. 45.]

38. **Section 116A** is the key provision. In brief, it provides a right of action against a person who (amongst other things) makes a circumvention device, distributes a circumvention device or provides a circumvention service. The provision does not prohibit *use* of a circumvention device, in contrast to the US DMCA. This

⁵ The *Copyright Amendment (Parallel Importation) Act 2003* made incidental amendments to the above definitions, by:

- omitting the word 'effective' from the definitions of 'circumvention device' and 'circumvention service'. The Explanatory Memorandum notes that these changes were intended 'to ensure consistency with the definition of 'technological protection measure' in the Act';
- altering 'licensee' to 'exclusive licensee' in the definition of 'technological protection measure'. According to the Explanatory Memorandum, this was done for the sake of drafting consistency with sections 116A, 132(5A) and 132(5B).

These amendments are technical changes designed to correct the drafting logic, and do not have any bearing on the current TPM issues.

⁶ See previous footnote.

⁷ See previous footnote.

apparently reflected a policy view that prohibition of use would amount to an unnecessary intrusion into privacy.⁸

39. For present purposes, the relevant issue is not the scope of the prohibition, but the scope of exceptions provided. Importantly, s.116A(3) states that the section does not apply to the 'supply' of a circumvention device or service to a 'qualified person' for a 'permitted purpose', provided certain conditions are met. The italicised terms are defined in subsections (7) and (8). The term '**permitted purpose**' refers to acts of copyright⁹ under a number of the exceptions provided in the Act. These are generally provisions applicable to institutions, and that may be related to:

- the fact that, as noted, mere use of circumvention by individuals is not prohibited;
- a policy conclusion that institutional users are more likely to respect any limitations on the use of circumvention devices and services.

The term '**qualified person**' (broadly) refers to officials of those institutions. The term '**supply**' (broadly) covers any mode of providing or making available a circumvention device or a circumvention service.

40. The 'permitted purposes' are set out in s.116A(7), and include:

- s.47D - Reproducing computer programs to make interoperable products;
- s.47E - Reproducing computer programs to correct errors;
- s.47F - Reproducing computer programs for security testing;
- s.48A - Copying by Parliamentary libraries for members of Parliament;
- s.49 - Reproducing and communicating works by libraries and archives for users;
- s.50 - Reproducing and communicating works by libraries and archives for other libraries and archives;
- s.51A - Reproducing and communicating works for preservation and other purposes;
- s.183 - Use of copyright material for the services of the Crown;
- Part VB - Reproducing and communicating works etc. by educational and other institutions.

41. **Section 116D** sets out the remedies available to the copyright owner in an action under (*inter alia*) section 116A, which include, in the ordinary case, an injunction and either damages or an account of profits.

⁸ See AGD: *Cracking Down on Copycats: Enforcement of Copyright in Australia*, at www.law.gov.au.

⁹ Technically 'acts comprised within the copyright' of relevant material. Note that this is not restricted to copying (or 'reproduction'), but extends to other 'acts comprised . . .', such as 'communication'.

42. **Part V, Division 5** of the Copyright Act deals with criminal offences and summary proceedings. **Section 132(5A)-(5J)** contains parallel provisions to those set out above.¹⁰ Again, the criminal sanction does not apply in relation to 'supply' of a circumvention device or service to a 'qualified person' for a 'permitted purpose'. The term 'permitted purpose' is defined in s.132(5H), and refers to the same list of non-infringing uses as set out in para. 40.
43. The exceptions permitting circumvention of TPMs under the Digital Agenda reforms are listed in **column 2** of the Issues Matrix. The exceptions were not altered by the Implementation Act.

Important distinctions

44. DEST has already referred to the distinction between a 'circumvention device' and a 'circumvention service'. However, certain other important distinctions emerge from the above discussion. They are mentioned here because those distinctions are fundamental to the operation of the AUSFTA and the LACA Inquiry.
45. First, a *TPM* may be broadly classified as either:
- an access control measure (referred to in this Submission as an **ACM**). This appears to correspond with what is described in paragraph (a) of the definition of a TPM - see para.37;
 - a copyright protection mechanism (referred to in this Submission as a **CPM**). This largely corresponds to the 'copy control mechanism', as referred to in paragraph (b) of the definition of a TPM - see para.37. However it is wider, as it extends to acts of copyright other than copying (e.g. communication). For that reason DEST prefers the term 'copyright protection mechanism' rather than 'copy control mechanism' as sometimes used.
46. Second, *circumvention of a TPM* can be broadly divided into:
- **use**: that is, use of a circumvention device or a circumvention service in order to circumvent a TPM.
 - **dealing**: that is, roughly, making or importing a circumvention device, or promoting or supplying a circumvention device or a circumvention service.
47. Applying these distinctions, under the Digital Agenda reforms:
- the *use* of circumvention (devices and services) is not prohibited;
 - however, *dealing* in circumvention (devices and services) gives rise to a civil action under section 116A [and may give rise to a criminal prosecution under section 132];

¹⁰ The criminal sanctions in section 132 only apply in relation to circumvention of an *effective* TPM. By comparison the civil sanctions in section 116A are available in relation to any circumvention device, whether 'effective' or not.

- however, a dealing in relation to circumvention is excepted where it is done for a 'permitted purpose' - see s. 116A(3) [and s.132(5F)]. For this purpose the thing circumvented might be either an ACM or a CPM.¹¹

48. These propositions are illustrated in the following table:

	Use to circumvent . . .	Dealing in relation to circumvention of . . .
. . . an access control measure (ACM)	not prohibited	s.116A: prohibited except in case of:
. . . a copyright control mechanism (CPM)	not prohibited	(1) anything done for law enforcement / security - s.116A(2); (2) 'supply' for a 'permitted purpose' - s. 116A(3) & (7); or (3) making or importing a device for a 'permitted purpose' - s. 116A(4) & (7).

49. Note that the current exceptions relate only to various 'dealings', not 'use' as the latter is not prohibited in the first place.¹²

50. Finally, it is important to note the distinction between:

- a provision which permits an act of copyright that would otherwise be an infringement - if done without permission of the copyright owner ('**a permitted purpose**');
- a provision which allows circumvention of a TPM in certain circumstances - usually for a 'permitted purpose'.

To underline the distinction DEST has consistently referred to the first category of provision as an '**exemption**', and the second category as an '**exception**'.

¹¹ The 'permitted purpose' generally involves copying ('reproduction'). However this is not the same as saying that circumvention relates to making the reproduction despite the presence of a CPM. It may equally be circumvention of an ACM, enabling access to the copyright material which is then copied ('reproduced').

¹² To be more accurate: the exceptions relate to making, importing and supply for a permitted purpose, *but not* promoting or advertising. The rationale of this dichotomy is not clear. It appears that it may be a drafting anomaly that arose in the course of amendments made during passage of the legislation.

Impact of AUSFTA

General observations

51. The AUSFTA provisions in the area of intellectual property provide more stringent protection for copyright owners, at the expense, arguably, of creativity and competition. In particular the TPM regime required under AUSFTA will shift the existing balance significantly in favour of copyright owners, and against institutional and other users. It does this by:
- prohibiting *use* of circumvention, as well as *dealings* in circumvention devices and services;
 - extending the reach of criminal sanctions for both use and dealings;
 - allowing exceptions in respect of *use* of circumvention, but not *dealings*;
 - imposing several criteria on the exceptions which may be granted in that area.
52. DEST's overriding concern in this Submission is that the approach to granting exceptions to the TPM measures, *in the limited area where exceptions are possible*, must be a flexible one, in order to moderate the shift in the copyright balance.

Analysis of AUSFTA provisions

53. Article 17.4.7(b) of the AUSFTA defines the term 'effective technological measure' as follows:
- Effective technological measure** means any technology, device, or component that, in the normal course of its operation, *controls access* to a protected work, performance, phonogram, or other protected subject matter, or *protects any copyright*.
- [Emphasis added]
54. Thus an 'effective technological measure' (that is, an *effective* TPM) includes both an ACM and a CPM, as described at para. 45.
55. Under the AUSFTA provisions:
- *use* of circumvention is prohibited in relation to an ACM - see Article 17.4.7(a)(i);
 - however, circumvention of a CPM is not prohibited;
 - a *dealing* is prohibited if it is for the purpose of circumventing *any* effective TPM, i.e. *either an ACM or a CPM* - see Article 17.4.7(a)(ii).
56. These propositions are illustrated in the following table. Note that the LACA Inquiry terms of reference are quite restricted, being confined to the cell shown with a heavy border:

	Use to circumvent . . .	Dealing in relation to circumvention of . . .
. . . an access control measure (ACM)	Article 17.4.7(a)(i): prohibited unless undertaken for an 'activity' listed in Article 17.4.7(e)(i)-(viii)	Article 17.4.7(a)(ii): prohibited unless undertaken for an 'activity' listed in Article 17.4.7(e) (i)-(iv) or (vi)
. . . a copyright control measure (CPM)	not prohibited	Article 17.4.7(a)(ii): prohibited unless undertaken for an 'activity' listed in Article 17.4.7(e) (i) or (vi)

57. It will be seen from the table that:

- it is permissible to use a device / service designed to circumvent a CPM, but in most cases it is illegal for anyone to deal in such devices / services;
- it is permissible to use a device / service designed to circumvent an ACM under all exceptions, but in the case of some exceptions¹³ it would be illegal for anyone to deal in such devices / services.

58. Note that under Article 17.4.7(a) use (as well as dealing) can give rise to criminal sanctions where it is done for commercial gain. However the criminal sanctions may be relaxed in the case of a non-profit library, archive, educational institution or public non-commercial broadcasting entity.

59. Article 17.4.7(d) is important. It provides in effect that there is no necessary correlation between the legality of circumvention, and the legality of any act that may flow from the circumvention. That is, the fact that a particular activity is non-infringing (as set out in **column 1** of the Issues Matrix) does *not* mean that circumvention of a TPM in order to carry out such an activity is permitted (**column 3** relates).

60. It is also important to note that the 'non-infringing' activities in **column 1** of the Issues Matrix fall into two categories:

- those relating to an 'act of copyright' which are non-infringing by virtue of a specific exemption, i.e. 'permitted purposes' (in these cases the applicable provision is stated in **column 1**);
- those which do not inherently involve any 'act of copyright'.

¹³ Article 17.4.7(e) (v) or (vii). [In addition the 'catchall' exception in Article 17.4.7(e)(viii) applies to use only, and there is no corresponding exception for dealings.]

61. Article 17.4.7(e) provides that a party must confine any exceptions permitting circumvention to specified activities. The Issues Matrix shows such 'activities' in **column 1**, and the corresponding exceptions are listed in **column 3**. **Column 4** indicates whether the exception applies to:
- a. use to circumvent an ACM;
 - b. 'dealings' (i.e. supply, etc. of circumvention device / service) in relation to an ACM;
 - c. 'dealings' in relation to a CPM.
62. Articles 17.4.7(e) (i)-(vii) set out a number of *specific* activities which may be the subject of a TPM exception. DEST understands that the examination of the Act to ensure consistency with the exceptions allowed under AUSFTA is being undertaken by AGD, and is not part of the LACA Inquiry's brief.
63. In addition, it appears that AGD will need to address broader issues, such as how to define a TPM or an ACM, and the definition of 'circumvention device'. DEST submits that the definition of a TPM is an issue of overwhelming importance. In DEST's view there are strong arguments to confine the concept of a TPM to measures or mechanisms that protect copyright from being infringed, and not to allow the concept to be broadened to cover devices that serve extraneous purposes, such as regional playback control¹⁴, controlling after-markets for computer accessories¹⁵ or otherwise inhibiting competition. It would be valuable in DEST's view for AGD to circulate an issues paper on specific proposals at some stage for consultation purposes, especially given the highly technical nature of this area.
64. Article 17.4.7(e)(viii) provides for *other* categories of circumvention to be permitted, which relate to the following 'activities':
- (viii) non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.

¹⁴ This was the issue in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58. The High Court ruled that regional playback controls are not TPMs because they do not prevent or inhibit infringement. The court's decision evidences a unanimous concern about the use of the TPM regime to effect a non-copyright objective - namely to divide up the global market into regions. The High Court resoundingly rejected the approach of the Federal Court which had, in effect, extended the copyright monopoly by including within the definition of a TPM 'devices which prevent the carrying out of conduct which does not infringe copyright and which is not otherwise unlawful'.

¹⁵ This was the issue in *Lexmark v Static Controls Corp.* 387 F3d 522 (6th Cir 2004). In that case, Lexmark (a manufacturer of computer printers) sought unsuccessfully to rely on US DMCA to prevent Static Controls Corporation (a US competitor) from marketing a device which enabled the use of cheaper, non-Lexmark, cartridges.

65. The LACA Committee Inquiry constitutes such a 'legislative or administrative review'. Its task is to report on any additional categories of circumvention to be permitted under the above 'catchall' provision (over and above those covered in Article 17.4.7(e) (i)-(vii) which are to be reviewed by AGD).
66. Article 17.4.7(f) sets out additional requirements to be fulfilled by the exceptions permitting circumvention for the various 'activities'. The exception in relation to each 'activity' varies according to whether it permits:
- use of circumvention in relation to an *ACM*;
 - circumvention *dealings* in relation to an *ACM*;
 - circumvention *dealings* in relation to a *CPM*.

That is, they apply in each of the three areas where circumvention is prohibited - see Table in para. 56. There is no exception for use of circumvention in relation to a *CPM*, because that is not prohibited anyway.

67. These distinctions are mapped out in the table included within the Background Paper on the website of the LACA Committee. Note that the 'other' exceptions permitted under 'catchall' Article 17.4.7(e)(viii) can relate only to the first area, i.e. circumvention in relation to an *ACM*. In other words, any exceptions cannot apply to *dealings*. Thus, the LACA Committee is only concerned with the top left quadrant of the table at para. 56.

Criteria to be addressed in proposing exceptions under AUSFTA

68. Reading Article 17.4.7(e)(viii) together with Article 17.4.7(f), the following criteria are to be met by any exception permitting circumvention in the 'other' category under Article 17.4.7(e)(viii):
- it must relate to non-infringing uses of a particular class of works, performances and phonograms [referred to in this Submission as the **particular class criterion**];
 - an actual or likely 'adverse impact' on the non-infringing use must be 'credibly demonstrated' [referred to in this Submission as the **adverse impact criterion**];
 - it must apply only where it does not impair the adequacy of legal protection or the effectiveness of legal remedies against circumvention of the TPM [referred to in this Submission as the **no impairment criterion**]¹⁶.
69. Accordingly this Submission seeks to address those criteria in relation to each recommended exception.

¹⁶ The 'no impairment' criterion is also applicable to each of the specific exceptions envisaged under Articles 17.4.7(e)(i)-(vii).

70. Referring again to the Issues Matrix, given the analysis above it should be apparent that exceptions proposed relate to those areas of the Issues Matrix that are shown with a heavy border.

Primary (non-infringing) activities

71. See Issues Matrix, **column 1**. The LACA Terms of Reference state that the particular activities which the Committee may examine for this purpose include:
- a. the activities of libraries, archives and other cultural institutions
 - b. the activities of educational and research institutions
 - c. the use of databases by researchers (in particular those contemplated by recommendation 28.3 of the Australian Law Reform Commission Report on Gene Patenting)
 - d. activities conducted by, or on behalf of, people with disabilities
 - e. the activities of open source software developers, and
 - f. activities conducted in relation to regional coding of digital technologies.
72. **Column 1** of the Issues Matrix lists a number of specific activities that are covered by exemptions in the Copyright Act.
73. It should be noted that the exemptions are *current* exemptions. They may be affected by the outcomes of the Digital Agenda Review and the current AGD Review of Fair Dealing Exceptions.
74. Although the TPM exception (**column 2 & 3**) must be specific as to the class of work *etc*, it does not follow that the copyright exemption (**column 1**) must be similarly specific (or indeed that the non-infringing activity has to be non-infringing by virtue of an exemption at all). Accordingly, those exemptions in **column 1** that relate to a *range* of copyright subject matters (e.g. all works) can be retained, regardless of the outcome of the LACA Inquiry.

Examples of TPMs that may impact on the primary (non-infringing) activity

75. These include:
- encryption of software requiring the user to supply an access key or registration code before the software can be installed or run;
 - encryption and/or application of a password to an online database or the protected area of an internet or intranet site;
 - software applied to a VHS cassette (Macrovision) to disable good quality copying;
 - software applied to a document available to read online that restricts the printing of all or a part of that document;

- anti-copying music CDs that will not play in a PC;
- a regional playback control (RPC) applied to DVD players purchased in a particular region of the world so that they will not play DVDs from another region;
- IP addressing schemes.

Approach to defining exceptions

76. As discussed above at paras. 51 *et seq.*, the effect of the AUSFTA is to shift the balance significantly in favour of copyright owners and away from the interests of educational and other institutional users. The scope of exceptions which may be granted is exceedingly constrained - notably in that:
- an exception may permit *use* of circumvention, but the user is prevented from sourcing devices or services for this purpose from outside their organisation;
 - an exception can only relate to circumvention of an ACM.

DEST submits that it is vital the LACA Committee adopts a flexible approach to the granting of exceptions in the area where they *are* allowed, to prevent educational and other institutional users from being more adversely affected than necessary.

77. DEST submits that as well as identifying exceptions that may be justified under the catchall provision (Article 17.4.7(e)(viii)), the LACA Inquiry should draw conclusions about the approach to be taken in formulating any exceptions. DEST makes a number of representations in this regard, and recommends that the LACA Committee consider and (as appropriate) endorse the policy conclusions and interpretations suggested.
78. First, DEST notes that there is a considerable body of literature suggesting that in many areas the US DMCA confers excessive and unintended protection for TPMs. It has produced outcomes which have little or nothing to do with copyright protection, but which impede education, research, innovation and competition. For example, see: para. 63 referring to the Lexmark case; see also *Unintended Consequences: Five Years After the DMCA*, Electronic Frontiers Foundation, September 2003.
79. DEST does not offer a survey of the literature here, but has no doubt that the Committee will receive numerous submissions which contain support for this point. DEST therefore submits that the LACA Committee should avoid applying interpretations based on the US DMCA precedents (including rulemaking under US DMCA). The only requirement is to implement Australia's treaty obligations as stated under AUSFTA.
80. Second, DEST suggests that the LACA Committee should be guided by the government's stated intentions in relation to implementation of a TPM framework, as referred to at para. 29, in particular that the intent was to combat commercial piracy not to upset the balance struck between copyright owners and users exercising legitimate exemptions. In addition to the matters mentioned at para.

29, DEST reminds the Committee that the government has indicated that Article 17.4.7(e)(viii) was intended to protect educational interests. In light of this, the LACA Committee should proceed on the assumption that it is not the intent of AUSFTA to provide copyright owners with a wholesale means to disturb the delicate balance with users that the legislature has established by creation of copyright exemptions and statutory licences. The importance of preserving the copyright balance is reflected in the outcomes of recent inquiries:

- the CLRC report on *Copyright and Contract*, released in October 2002;
- the Phillips Fox Report to AGD, January 2004, in connection with the Digital Agenda Review.

Each of these is discussed briefly below.

81. *The CLRC report* concluded that agreements were being used to exclude or modify the copyright exceptions, and that there was a displacement of the copyright balance fundamental to the operation of copyright law in Australia. The CLRC recommended that the Act be amended to provide that:
- a provision of an agreement excluding or modifying the operation of ss. 40, 41, 42, 43, 43A, 48A, 49, 50, 51, 51AA, 51A, 52, 103A, 103B, 103C, 104, 110A, 110B or 111A of the Act has no effect;
 - the integrity of the 'permitted purposes' in s.116A be retained by preventing the use of contract terms that users will not avail themselves of a circumvention device or service for the 'permitted purpose' of doing an act that is not an infringement under ss. 47D, 47E, 47F, 48A, 49, 50, 51A, 183 and Part VB.
82. *The Phillips Fox Report* recommended retention of all existing exceptions permitting circumvention dealings for a 'permitted purpose', and indeed proposed *extending* the exceptions relating to TPMs to include supply and use of circumvention devices and services for *any* non-infringing purpose, including fair dealing and the various institutional exemptions and statutory licences under the Act.
83. DEST submits that, in general, where the substantive operation of an existing copyright exemption is preserved against attempts to exclude its operation by contract, it should follow:
- that circumvention of a TPM in order to exercise the exemption should be permitted;
 - that (this goes hand in hand with the previous point) a contract clause purporting to exclude the use of circumvention is similarly invalid.
84. At a minimum, DEST recommends that the copyright exemptions applicable to libraries, educational and cultural institutions, archives and research organisations (referred to subsequently as '**institutions**') should be protected by permitting

circumvention of an ACM for a purpose covered by the exemption.¹⁷ There are a number of reasons for this. Institutions are more likely (than individuals) to have the in-house technical capability to undertake circumvention on their own behalf.¹⁸ Further, many of the institutional exemptions and statutory licences involve a compliance framework which includes user education, written guidance, supervision, specific copying limits, marking and record-keeping requirements, and (in relevant cases) the payment of remuneration to the copyright owner. In this context it is realistic that restrictions could be imposed to prevent supply of the in-house circumvention device or process to third parties. This goes to meeting the 'no impairment' criterion.

85. The three 'criteria' are now addressed in turn. DEST's broad conclusion is that the criteria are capable of more flexible application than might appear at first sight.

The 'particular class' criterion

86. The requirement is that the TPM exception must relate to non-infringing uses of a particular class of 'works, performances and phonograms'. That language in AUSFTA corresponds largely to the range of copyright subject matters under the Australian Act, which includes:

- literary, dramatic, musical and artistic works;
- cinematograph films;
- sound recordings (phonograms);
- radio or television broadcasts;
- performances.

87. The question that arises is how precisely the copyright subject matter must be defined. DEST notes that AGD has offered some guidance on the meaning of 'class'. In particular AGD considers that the LACA Committee could not recommend an exception that applied to all 'works'¹⁹. Nor could it recommend an exception based on the category of user, e.g. activities of institutions assisting people with disabilities - see [AGD e-NEWS on Copyright](#).

88. DEST would agree that an exception cannot relate to *all copyright subject matters*. DEST considers that an exception may be framed in part by reference to a particular category of user (e.g. an educational institution), but it would not meet the 'particular class' criterion purely on that account. In other words, the category

¹⁷ That is, the exercise of the copyright exemptions should be a 'permitted purpose'.

¹⁸ The capability must be 'in-house', because third parties are not permitted to supply a circumvention service or service to a user.

¹⁹ It appears from the context that in referring to 'all works' AGD intended to 'all copyright subject matters', although this is not clear.

of user who benefits may be one of the parameters of the exception, but it does not go to the question of class of material.

89. DEST considers that a permissible 'class' may be defined by reference to any attributes of the material, or any characteristics relating to the form in which it is distributed or communicated. Thus an 'educational edition' of a software product could be considered a 'class'. So too an e-Book, which may incorporate literary, dramatic and artistic elements. Attributes such as whether a work is published may also go to defining the 'class'. Similarly the fact that a particular product is made available to a user under a licence may go to defining a 'class' (we make further reference to this case later, para. 141).
90. There is nothing to suggest that the term 'class' has to align in some way with the categories from the list in para. 86, or that it must be confined to, or within, a single category.
91. DEST is aware of the exceedingly narrow interpretation placed on the concept of a 'particular class' under US DMCA. See the United States Register of Copyrights' Recommendation to the Library of Congress in RM2002-4: *Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*. However there is no reason to apply a similar restrictive interpretation for purposes of Australia's obligations under AUSFTA.
92. DEST submits that any class of copyright subject matter (other than *all* subject matter) that is meaningful having regard to the rationale of the exception, is a permissible 'class'. Indeed, a rationale-based approach seems necessary to promote technological neutrality, to avoid artificial distinctions and to harmonise with the design of existing exemptions under the Act. DEST observes that most existing copyright exemptions and statutory licences apply to a defined 'class' of subject matter in this 'rationale-based' sense.²⁰ For example, it makes sense that some exemptions apply to literary works such as in journals *and* accompanying or embedded artistic works, on the basis that it is impracticable to access one without the other. Accordingly DEST submits that an exception to permit circumvention of an ACM for the purposes of exercising a particular copyright exemption or statutory licence would generally meet the 'particular class' criterion.

The 'adverse impact' criterion

93. The requirement here is that an actual or likely adverse impact on the non-infringing use must be credibly demonstrated.²¹

²⁰ Section 183 (Crown use of copyright material) is an exception.

²¹ This criterion is not limited to exceptions in the 'other' category that are to be considered by the LACA Committee, but would apply to any exception permitted under AUSFTA, including exceptions relating to both use and dealing.

94. DEST has already made the point - see para. 60 - that the non-infringing use may be non-infringing either because no act of copyright is involved, or because the use is a 'permitted purpose' allowed by a particular provision of the Act.
95. The question that arises is how substantial must be the 'actual or likely adverse impact'?
96. DEST submits that *any* adverse impact - actual or likely - will suffice. It is significant in DEST's view that the AUSFTA provision does not say that the impact must be 'substantial'. By contrast, the corresponding US DMCA provision has been interpreted by the US Library of Congress as requiring a 'substantial' likely adverse impact. In other words, it is necessary under the US DMCA to show that significant activities are inhibited. There is no reason for Australia to follow this interpretation. If it was intended that users demonstrate adverse impacts of a 'substantial' degree, it would have been exceedingly simple for the drafters of AUSFTA to include that word in Article 17.4.7(e)(vii). The fact that they did not is telling. Accordingly, DEST submits that the 'adverse impact' criterion is met wherever users can credibly demonstrate a likely adverse impact on non-infringing use - even if that is manifest only occasionally.

The 'no impairment' criterion

97. The requirement here is that the TPM exception must apply only where it does not impair the adequacy of legal protection or the effectiveness of legal remedies against circumvention of the TPM.²²
98. It is not clear how an exception might be thought to impair enforcement where it relates to 'use'. DEST's view is that this criterion is more relevant to the exceptions for 'dealing'. Where mere use is involved it is difficult to see where enforcement measures may be impaired, as long as the circumvention process that is developed is not marketed and is protected from disclosure or use by others.
99. DEST submits that the 'no impairment' criterion would generally be met as a matter of course in those cases where the exception applies only to institutional users - see discussion at para. 84. The fact that an exception allows an institutional user to circumvent an ACM does not mean that the institutional user can subsequently provide the circumvention device or provide a related circumvention service, to a third party. That remains prohibited. It is highly unlikely that educational and other institutions would expose themselves to the risk of liability for dealing in circumvention services or circumvention devices developed by them.

²² This criterion is not limited to exceptions in the 'other' category that are to be considered by the LACA Committee, but would apply to any exception permitted under AUSFTA, including exceptions relating to both use and dealing.

Proposals for exceptions under Article 17.4.7(e)(viii)

100. DEST recommends a number of exceptions under the catchall provision, as follows:

- circumvention of ACM for a 'permitted purpose';
 - the most important example of an activity that should be a 'permitted purpose' is the exercise of the Part VB statutory licence;
- circumvention of region coding ACM;
- circumvention of ACM that is defunct, etc.;
- circumvention in order to exercise the statutory licence for Crown use of copyright materials.

The remainder of the Submission deals with each of these proposed exceptions in turn.

Circumvention of ACM for a 'permitted purpose'

101. DEST reiterates its conclusion at para. 84 that circumvention be permitted to enable the exercise of existing copyright exemptions and statutory licences - especially those applicable to institutions.

Particular class criterion

102. The recommendation applies to circumvention for at least the following uses (which would constitute 'permitted purposes'):

- reproducing computer programs to correct errors - covered by s.47E.
- copying by Parliamentary libraries for members of Parliament - covered by s.48A.
- reproducing and communicating works by libraries and archives for users - covered by s.49.
- reproducing and communicating works by libraries and archives for other libraries and archives - covered by s.50.
- reproducing and communicating works for preservation and other purposes - covered by s.51A.
- reproducing and communicating works etc. by educational and other institutions - as covered by various sections within Part VB.

103. A detailed case for an exception allowing circumvention for purposes of the last-mentioned 'activity' (Part VB) is presented in the next section. Apart from that it is not proposed to deal separately with each proposed exception. The considerations in each case are similar and are adequately covered in the general discussion above - paras. 76-99.

104. The proposals assume that all existing exemptions permitting the primary 'activity' are retained. If the primary exemption were removed, the exception would be extraneous.
105. By the same token, if additional institutional exemptions are included in the Act, it is likely that a case could be made for an exception to permit circumvention. AGD is currently reviewing fair dealing and a wide range of other exemptions under the Copyright Act. In the context of that review DEST has presented a case to establish a number of additional exemptions, including for:
- *Format shifting*: The proposed exemption would allow copying by institutional and other users from an out-of-date medium, subject to limitations on the use to which the format-shifted copy can be put. The exemption would not apply to copying from an infringing copy.
 - *Orphaned works*: The proposed exemption would allow copying by institutional users where, after reasonable inquiry:
 - suitable copies cannot be obtained within a specified time period, or a 'reasonable time'; and
 - the copyright owner cannot be identified or located, or has abandoned the 'exercise' of their copyright.

Adverse impact criterion

106. DEST refers again to its general comments at paras 93-96.

No impairment criterion

107. DEST refers again to its comments at paras 97-99.

Circumvention of ACM to exercise Part VB statutory licence

108. A particular example of a 'permitted purpose' is the statutory licence contained in Part VB of the Act. This deserves special mention because of its importance to educational institutions. It allows educational institutions to make copies of copyright materials for educational purposes. The licence applies, in general, only to works.²³ This statutory licence has been in the Act since 1989. It was extended by the Digital Agenda amendments to apply:
- to the use of digital source materials, as well as hardcopy;
 - to any reproductions, not just 'copies' (ie, hardcopy to digital conversion, and *vice versa*, are permitted)
 - to the making of a communication.

²³ Except for Division 4 relating to institutions assisting persons with an intellectual disability, which applies also to sound recordings, films and sound broadcasts.

109. The statutory licence contains a number of operative provisions under which copying and/or communications may take place. In each case it sets out limits on what types of work and how much of a work may be copied, and the conditions applicable to such copying, e.g. non-availability of the work. There are provisions for marking of copies. In relation to the 'remunerated' provisions, Part VB lays down detailed record keeping or sampling processes to determine the quantum of use, and contains provisions for determination of rates of equitable remuneration - either by agreement or through the Copyright Tribunal.
110. As mentioned in the preceding section, DEST proposes an exemption to permit circumvention for the purpose of exercising any of the operative provisions in Part VB. Because of the importance of the Part VB statutory licence, this might have been one of the exceptions specifically allowed under AUSFTA. DEST surmises that the only reason it is not listed is that there is no regime even remotely similar to Part VB under US domestic copyright law.
111. At present the supply of a circumvention device or service to a qualified person to enable that person to exercise the licence on behalf of their institution is a 'permitted purpose under s.116A.

Particular class criterion

112. As mentioned, Part VB is a composite statutory licence scheme which encompasses a range of provisions for copying and communication of various classes of works. The relevant class of works will vary according to the particular provision involved, e.g. some relate to works appearing in journals, others to books or electronic media.

Adverse impact criterion

113. DEST refers again to its general comments at paras 93-96, and makes the following additional comments.
114. The main collecting society appointed for purposes of Part VB is Copyright Agency Limited (**CAL**). Substantial amounts of money are paid to CAL for uses that occur under the scheme. Because of the scale of Part VB uses, TPMs applied to even a small proportion of works would have a significant impact in absolute terms.
115. The assessment of equitable remuneration pre-supposes that educational institutions are able to copy the full range of relevant subject matters of different values, which are averaged out in the assessment of remuneration. However, if copyright owners are permitted to use TPMs to exclude chosen works from the practical operation of Part VB, it is highly likely that the more desirable works will be excluded. This would progressively disturb the balance represented by Part VB as a whole, and undermine the premise under which rates of equitable remuneration have been determined.

No impairment criterion

116. DEST refers again to its comments at paras 97-99.
117. In addition, DEST notes that the educational institutions have been operating under the Part VB statutory licence or its predecessor for 25 years, and is not aware of any suggestions that Part VB has been used to 'cloak' infringing activity of a commercial character.

Circumvention of region coding ACM

118. DEST supports an exception or exceptions to permit circumvention of region coding ACMs (or regional playback control) applied to any works *etc* embodied in any imported article which is non-infringing under the parallel importation rules. That is, where the intent of the TPM is to impose a *de facto* restriction on parallel importation that would otherwise be permissible. **Note:** the requirement for this exception(s) may depend upon the way in which a TPM is defined in future. As noted at para. 63, DEST is of the view that the concept of a 'TPM' should be confined to measures or mechanisms that protect copyright from being infringed, and should not be broadened to cover devices that serve extraneous purposes, such as regional playback controls. If the definition of 'TPM' does *not* encompass regional playback controls, the need for the exception(s) proposed here may be avoided.
119. The *Copyright Act 1968* contains extensive provisions relating to the importation of copyright materials. These provisions are contained in:
- s.10(1): definitions of 'infringing copy', 'non-infringing accessory', 'non-infringing book', 'non-infringing copy' [the last-mentioned is defined separately in relation to (i) a 'sound recording'; (ii) a 'computer program', and (iii) an 'electronic literary or music item'];
 - s.10AA: definition of 'non-infringing copy of a sound recording';
 - s.10AB: definition of 'non-infringing copy of a computer program';
 - s.10AC: definition of 'non-infringing copy of an electronic literary or music item';
 - s.10AD: accessories to imported articles;
 - s.37: infringement [of works] by importation for sale or hire;
 - s.44A: importation etc. of books;
 - s.44C: copyright subsisting in accessories etc. to imported articles;
 - s.44D: import of non-infringing copy of sound recording does not infringe copyright in works recorded;
 - s.44E: importation and sale etc. of computer programs;
 - s.44F: importation and sale etc. of copies of electronic literary or music items;
 - s.102: infringement [of subject matter other than works] by importation for sale or hire;

- s.112A: importation and sale etc. of books;
 - s.112B: reproduction of writing on approved label for containers for chemical product;
 - s.112C: copyright subsisting in accessories etc. to imported articles;
 - s.112D: import of non-infringing copy of sound recording does not infringe copyright in the sound recording;
 - s.112E: importation and sale etc. of copies of electronic literary or music items.
120. The operation of these provisions is highly complex. However with some simplification the provisions can be summarised as follows:
- the copyright owner (meaning the owner of the copyright *in Australia*) has certain exclusive rights, including the right to control the making of copies;
 - this 'primary' right is supplemented by a 'secondary' right to control certain dealings, which include:
 - the right to control importation of copies for purposes of certain (generally commercial) 'dealings' (the relevant 'dealings' are specified in s. 37(1)(a), (b) & (c) and s. 102(1)(a), (b) & (c);
 - the right to control such (generally commercial) dealings in 'infringing copies' (that means those whose *making* was an infringement, or whose *importation* was an infringement in accordance with the preceding rules);
 - the right to control importation of copies extends even to 'non-infringing' copies made legitimately in another country (that is, 'parallel importation') - see ss. 37 & 102 (the term 'legitimate' entails, broadly, that the copy is made with the permission of the copyright owner in a country which is a party to a relevant copyright convention and to which Australia extends protection under the principle of 'national treatment');
 - however in certain, precisely defined, situations, the prohibition of 'parallel importation' is relaxed.
121. Parallel importation rules were liberalised under various reforms implemented from 1991 onwards. Currently, parallel importation is permitted in relation to about a dozen subject matters embodied in an 'article' - these are set out in para.130
122. It is important to note that where, in accordance with the above provisions, importation is permitted, other secondary (generally commercial) dealings in the imported copy are also permitted - see, for example, s. 44A(6) and s. 112A(6). We make reference to this point later - see para.141 below
123. Copyright owners, or distributors on their behalf, may apply 'region coding' to various sorts of digital media or devices. This technology has a legitimate purpose of protecting the copyright owner (i.e. the owner of the copyright in Australia) from unauthorised importation of copies - where the prohibition on parallel importation is in place. But the corollary of this is that, in those special

cases where the Australian Parliament has determined that the prohibition of parallel importation does not apply, a user should be permitted to circumvent any region coding applied to the article or device.

124. DEST therefore recommends that:

A user be permitted to circumvent a technological protection measure that consists of 'region coding' applied to a work or other subject matter embodied in an imported article where the importation does not constitute an infringement of copyright.

125. It is likely that the implementation of such a recommendation would entail drafting of a number of provisions, corresponding the various existing exemptions for parallel importation, and would need to be supported by a definition of 'region coding' in relation to a TPM. It is not necessary for purposes of this submission to develop the full detail of the provisions that would be required. However the underlying principle is easily understood. In summary, circumvention of an access control measure that consists of 'region coding' would be permitted if the importation of the relevant article was permitted. It would appear that there are three broad cases in which such importation is permitted:

- *Non-commercial importation*: where the article was imported without permission but for a purpose other than to engage in one of the (generally commercial) 'dealings' specified in s. 37(1)(a), (b) & (c) and s. 102(1)(a), (b) & (c);
- *Exempted importation*: where the article was imported without permission for the purpose of engaging in one of the specified commercial 'dealings', but that importation is not an infringement because of the operation of one of the parallel importation exemptions - see para. 121;
- *Authorised importation*: where the article was imported with the permission of the (Australian) copyright owner.

We deal with each of these cases in turn.

Non-commercial importation

Particular class criterion

126. Exemptions would apply to particular classes of copyright subject matters, and articles embodying them. Further inquiry may be necessary to identify of the sorts of article embodying particular types of work *etc.* that an individual is likely to bring into Australia which could contain a 'region coding' TPM.

Adverse impact criterion

127. The policy basis of these exemptions would be that as the importation for non-commercial purposes is not prevented by law, the user should be permitted to access the material that they have paid for. It can often be difficult in practice for a user who is overseas to determine whether particular media are playable on equipment that they will be using in Australia. DEST considers that the enjoyment of lawfully acquired private property is a one of the clearest instances of 'non-infringing' use.

128. In this regard DEST refers the LACA Committee to the observations of Kirby J in *Sony v Stephens* that protection for regional coding systems may be subject to constitutional challenge for interfering with the individual's basic right to enjoyment of private property. It is worth quoting from this judgment at length:

Ordinary principles of statutory construction, observed by this Court since its earliest days, have construed legislation, where there is doubt, to protect the fundamental rights of the individual. The right of the individual to enjoy lawfully acquired private property (a CD ROM game or a PlayStation console purchased in another region of the world or possibly to make a backup copy of the CD ROM) would ordinarily be a right inherent in Australian law upon the acquisition of such a chattel. This is a further reason why s 116A of the Copyright Act and the definition of TPM in s 10(1) of that Act should be read strictly. Doing so avoids an interpretation that would deprive the property owner of an incident of that person's ordinary legal rights.

The provisions of the Australian Constitution affording the power to make laws with respect to copyright operate in a constitutional and legal setting that normally upholds the rights of the individual to deal with his or her property as that individual thinks fit. In that setting, absent the provision of just terms, the individual is specifically entitled not to have such rights infringed by federal legislation in a way that amounts to an impermissible inhibition upon those rights constituting an acquisition. This is not the case in which to explore the limits that exist in the powers of the Australian Parliament, by legislation purporting to deal with the subject matter of copyright, to encumber the enjoyment of lawfully acquired chattel property in the supposed furtherance of the rights of copyright owners. However, limits there are.

In *Wilson v Anderson* [(2002) 213 CLR 401 at 457] I said, in words to which I adhere, that fundamental rights will persist in the face of legislation said to be inconsistent with them "unless there be a clear and plain intention' to extinguish such rights". These remarks were made in the context of a suggested extinguishment of rights ordinary to the ownership and possession of property. I added:

"It is an old, wise and beneficial presumption, long obeyed, that to take away people's rights, Parliament must use clear language. The basic human right to own property and to be immune from arbitrary dispossession of property is one generally respected by Australian lawmakers. This fundamental rule attributes to the legislatures of Australia a respect for the rights of the people which those legislatures have normally observed, being themselves regularly accountable to the electors as envisaged by the Constitution. In some circumstances, at least in respect of federal legislation depriving people of established property rights, the presumption to which I have referred is reinforced by constitutional imperatives."

To the extent that attempts are made to push the provisions of Australian copyright legislation beyond the legitimate purposes traditional to copyright protection at law, the Parliament risks losing its nexus to the constitutional source of power. That source postulates a balance of interests such as have traditionally been observed by copyright statutes, including the Copyright Act.

In the present case, it is legitimate to say that, had it been the purpose of the Parliament to push the provisions of the Copyright Act attaching offences and sanctions to circumvention of TPMs in a way that deprived chattel owners of ordinary rights of ownership, such a provision would have been spelt out in unmistakable terms. In the definition of TPM in s 10(1) of the Copyright Act, such unmistakable language does not appear. This fact affords a further reason for preferring the more

restricted interpretation that is compatible with the ordinary incidents of ownership of lawfully acquired chattels.

[From paragraphs 215-219. Footnotes omitted.]

No impairment criterion

129. The underlying premise of course is that the importation is for a non-commercial purpose. Consistent with that premise, qualifications can be included in any exceptions to ensure that the circumvention device or process is not supplied or provided to other persons. With this concession it is difficult to see that an exemption confined to non-commercial users could impair the adequacy of legal protection or the effectiveness of legal remedies against circumvention of the TPM.

Exempted importation

Particular class criterion

130. As noted in para.121 above, parallel importation is permitted in relation to certain copyright subject matters embodied in certain 'articles'. A list of the subject matters and the articles follows:
- a published work in a 'non-infringing' book, in a number of special situations set out in s.44A. Some of these exemptions are based on a 'non-availability test'. Note that a 'book' for this purpose may be in digital media form [check], and that it excludes music books, computer manuals and journals;
 - a work embodied in a non-infringing accessory to the article- s.44C;
 - a literary, dramatic or musical work embodied in a non-infringing copy of a published sound recording - s.44D;
 - a published literary work that is a computer program, embodied in a non-infringing copy of the computer program - s.44E;
 - a published work that is an 'electronic literary or music item', embodied in a non-infringing copy of the electronic literary or music item - s.44F;
 - a published edition of a work embodied in a non-infringing book - s.112A. This exemption applies in a number of special situations paralleling those set out in s.44A. Again, some of these exemptions are based on a 'non-availability test';
 - a published edition of a work embodied in a non-infringing accessory to the article - s.112C(1)(a);
 - a cinematograph film (a copy of) which is a non-infringing accessory to the article - s.112C(1)(b);
 - a sound recording (a copy of) which is a non-infringing accessory to the article - s.112C(1)(c);
 - a published sound recording embodied in a non-infringing copy of the sound recording - s.112D.

Adverse impact criterion

131. The exemptions sought would implement the policy of Australian copyright law under which parallel importation is permitted in relation to particular classes of works listed at para. 130 above. In those cases where parallel importation is allowed, as noted at para. 122, other secondary (generally commercial) dealings in the imported copy are also permitted. It does not make policy sense for Australia law to permit importation of an article, and to permit commercial dealings in it, but not permit a user to access the copyright material contained in the article. To argue otherwise would entail that 'region coding' can be used to subvert Australia's chosen policy regarding when parallel importation will be allowed, and would encourage copyright owners to use region coding to subvert future reform of the parallel importation rules.

No impairment criterion

132. The exemptions sought would only relate to use of circumvention, not dealings in circumvention devices or services. Qualifications can be included in any exemptions to ensure that the circumvention device or process is not supplied or provided to other persons. With this concession it is difficult to see that an exemption confined to the special cases listed at para. 130 above could impair the adequacy of legal protection or the effectiveness of legal remedies against circumvention of the TPM.

Authorised importation

133. Section 116A (Importation, manufacture etc. of circumvention device and provision etc. of circumvention service) proscribes circumvention activities that are undertaken *without the permission of the copyright owner*. In a case where the copyright owner has authorised an article to be imported, as a rule they must be taken to have abandoned the protection afforded by the region coding. This is not strictly an exemption allowing circumvention, since the circumvention does not meet the elements of the prohibition in s.116A, and accordingly we have not addressed the three criteria required under AUSFTA.
134. If there is any doubt, DEST would **recommend**:
- that the Act be amended to include a presumption that permission to import an article includes:
 - an implied permission for the user to circumvent any technological protection measure applied to the article;
 - an implied permission for any person to supply a circumvention device or service for that purpose,
 unless there is a clear indication to the contrary.
135. Note that the proposition advanced here is not limited to *circumvention* of an ACM involving 'region coding', but extends to *dealings in a circumvention device or service* for such purpose.

Circumvention of defunct/ inoperable ACM on licensed product

136. DEST proposes an exception to permit circumvention of an ACM applied to a licensed product, where the ACM is defunct, or un-usable in the ordinary manner, for any of a variety of reasons.
137. The exception would apply where an ACM such as an access key was mislaid preventing use of the copyright item by the authorised licensee. For example, one school administrator has reported the following experience:
- The grade 6 class has new computers and the teacher has just tried to load a program called Inspiration for her class to use . We bought this software a couple of years ago and it was quite expensive. No-one can find the serial number required because it was recorded in a file on another school computer that also has been replaced (because it died).
138. The proposal can be stated more rigorously as follows. It applies where the owner of a product comprising copyright material is the beneficiary of an (express or implied) licence to perform acts of copyright in relation to the material, but is prevented from doing so because the material is protected by an ACM which:
- is defective;
 - has been lost;
 - has been damaged or corrupted;
 - is obsolete (e.g. because it requires an obsolescent hardware or software platform);
 - requires support, but is not supported by the supplier; or
 - is otherwise not accessible to or usable by the user,
- and the TPM cannot be replaced on reasonable terms upon inquiry to the supplier of the product (or a person nominated by them for such support purposes).
139. Elements of the proposed exemption correspond to one of the exceptions permitted under the US DMCA Rule-making.
140. It should be noted that the exception proposed here is to be distinguished from the exceptions proposed in relation to format shifting for obsolete formats, and copying of orphaned works - see para. 105. Those exceptions are overlaid upon a 'permitted purpose' i.e. an exemption which renders the primary copying 'activity' non-infringing. Here the primary copying or communication activity is non-infringing by virtue of a licence. Another pertinent distinction is that the exception proposed here relates to obsolescence of the ACM protecting the work, rather than 'orphaning' of the work, or obsolescence the format / medium on which it is recorded.²⁴

²⁴ The exceptions proposed can be contrasted as relating to, respectively:

- obsolete media or data formats (format shifting);

Particular class criterion

141. The exception should apply at least to licensed software products and licensed data products. The fact that a product is licensed is, it is submitted, an element in the delineation of the class of work.

Adverse impact criterion

142. DEST refers again to its general comments at paras 93-96. It is submitted that the adverse impact on the 'non-infringing' (i.e. licensed) use is obvious and acute, and needs no commentary.

No impairment criterion

143. The proposed exception does not impair the proper application of the TPM. On the contrary the premise of the exception is that the TPM has a proper role to perform, and the exception is triggered when for some technical reason the proper function is not occurring.
144. The licensee would not be permitted to supply any circumvention device used, or to provide a circumvention service in relation to the product, to third parties.

Circumvention to exercise the statutory licence for Crown use of copyright materials

145. Section 183 of the Copyright Act contains a broad statutory licence which permits the Crown in right of the Commonwealth or a State or Territory to perform any act of copyright in third party copyright material 'for the services of [the Crown]'. The statutory licence is subject to the giving of notice of the act performed, and agreement on terms (including remuneration) for such use. Where terms cannot be agreed the Copyright Tribunal may determine the terms for the use.
146. DEST notes that section 183 has been an important part of the copyright balance, which ensures that government departments and agencies have access to copyright materials of private copyright owners, for the services of government. DEST, along with most other departments, participates in arrangements under which section 183 royalties are paid to Copyright Agency Limited and Screenrights for photocopying and electronic copying and communication of works.
147. DEST would be concerned if its access to the benefits of the statutory licence were to be materially impeded by the application of TPMs to electronic materials that it may wish to copy or communicate under the licence. Accordingly consideration should be given to exceptions to allow circumvention so that the Crown can avail itself of its privileges under section 183.

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- obsolete works (orphan works);
 - obsolete access controls.

Particular class criterion

148. Unlike other exemptions and statutory licences in the Copyright Act, section 183 is applicable to *all* copyright works and subject matters. However, any exception to permit circumvention so that the Crown can avail itself of section 183 must relate to a particular 'class' of material. DEST is not in a position at this time to suggest how such classes should be delineated. Further inquiry may be necessary to identify of the sorts of article embodying particular types of work *etc.* that government agencies may wish to copy or communicate under section 183 and which may have TPMs applied to them.

Adverse impact criterion

149. DEST refers again to its general comments at paras 93-96.

No impairment criterion

150. DEST refers again to its comments at para. 84 and paras 97-99. In DEST's view it would be appropriate for the LACA Committee to proceed on the expectation that government agencies would not abuse any exception by trafficking in circumvention processes or devices that they develop.

Issues Matrix prepared by AGS for Department of Education Science and Training

relating to

House of Representatives Standing Committee on Legal and Constitutional Affairs
Inquiry Into Technological Protection Measures (TPM) Exceptions

October 2005

Existing Australian law: Copyright Act 1968, as amended by the Copyright (Digital Agenda) Act 2000		3. Australia United States Free Trade Agreement (AUSFTA)	4. Comments			
1. Primary (non-infringing) activity	2. Exception re circumvention or dealing in circumvention devices / services for the primary activity	3. Exception re circumvention or dealing in circumvention devices / services for the primary activity	(a) Use to circumvent an Access Control Measure (ACM)	(b) 'Dealings' (i.e. supply, etc. of circumvention device / service) in relation to ACM	(c) Dealings in relation to a Copyright Protection Mechanism (CPM)	AGD is responsible for developing any amendments to the Act to ensure compliance with Article 17.4.7.
reproducing computer programs to make interoperable products - covered by s.47D.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.47D.	Article 17.4.7(e)(i): reverse engineering for the purpose of achieving interoperable software (not hardware)	√	√	√	
reproducing computer programs for security testing - covered by s.47F.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.47F.	Article 17.4.7(e)(ii): security testing of encryption technology	√	√		
parental control locks - any acts of copyright that may occur not covered by a specific exemption.		Article 17.4.7(e)(iii): parental control locks	√	√		
reproducing computer programs for security testing - covered by s.47F.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.47F.	Article 17.4.7(e)(iv): security testing of computers / networks	√	√		
disabling capability for undisclosed collection of personal information - any acts of copyright that may occur not covered by a specific exemption.		Article 17.4.7(e)(v): disabling capability for undisclosed collection of personal information	√			
anything lawfully done for the purposes of law enforcement and national security - any acts of copyright that may occur not covered by a specific exemption.	s.116A(2): lawful action by a government agency for law enforcement or national security.	Article 17.4.7(e)(vi): law enforcement and national security	√	√	√	
acquisition decisions by libraries, archives and educational institutions - any acts of copyright that may occur not covered by a specific exemption.		Article 17.4.7(e)(vii): acquisition decisions by libraries, archives and educational institutions	√			
Other primary (non-infringing) activities. Note that these may include: — those relating to an 'act	Other exceptions permitting circumvention of a TPM	Article 17.4.7(e)(viii): other exceptions identified under a legislative or administrative review as addressing a credibly	√			

of copyright', but which are non-infringing by virtue of a specific exemption; — those which do not inherently involve any 'act of copyright'.		demonstrated actual or likely adverse effect on non-infringing use	Note that as identified in the Submission, establishing a case for an exemption to permit circumvention of a CPM involves addressing 3 criteria, as indicated below. Note also that the exceptions permitted are confined to use to circumvent an ACM - category (a) above. Thus it is not possible to retain the existing exceptions in s.116A(3) for supply of a circumvention device / service for the permitted purposes.		
			particular class criterion: the activity must relate to non-infringing uses of a particular class of works, performances and phonograms	adverse impact criterion: an actual or likely 'adverse impact' on the non-infringing use must be 'credibly demonstrated'	no impairment criterion: the exception must apply only where it does not impair the [enforcement] of the TPM
reproducing computer programs to correct errors - covered by s.47E.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.47E.		a literary work that is a computer program	even occasional use of ACM adversely impacts on exercise of the exemption - see Submission para.96	licensee of computer program not permitted to on-supply circumvention device / method
copying by Parliamentary libraries for members of Parliament - covered by s.48A.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.48A.		a work (excludes other subject matter)	as above	Parliamentary Library not permitted to on-supply circumvention device / method
reproducing and communicating works by libraries and archives for users - covered by s.49.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.49.		a periodical article or other work held in collection	as above	library / archive not permitted to on-supply circumvention device / method
reproducing and communicating works by libraries and archives for other libraries and archives - covered by s.50.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.50.		a periodical article or other work held in collection	as above	library / archive not permitted to on-supply circumvention device / method
reproducing and communicating works by libraries and archives for preservation and other purposes - covered by s.51A.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.51A.		a work held in collection	as above	library / archive not permitted to on-supply circumvention device / method
reproducing and communicating works etc. by educational and other institutions - as covered by various sections within Part VB.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of Part VB.		(i) a periodical article and accompanying artistic works; (ii) other literary, dramatic, musical and artistic works	as above. Also, selective exclusion of material from statutory licence disturbs basis for determining rates of equitable remuneration - see Submission, para.116	educational etc institution not permitted to on-supply circumvention device / method
use of copyright material for the services of the Crown - covered by s.183.	s.116A(3): supply of circumvention device / service to a qualified person for the permitted purpose of s.183.		Further inquiry needed to identify types of work / format where circumvention required - see Submission para.149	as above	government agency / department not permitted to on-supply circumvention device / method
use of article embodying copyright material which is protected by regional playback control (RPC), where importation is legitimate because it is: (i) non-commercial; (ii) covered by one of the exemptions for parallel importation			(i) <i>non-commercial importation</i> : further inquiry need to identify articles / materials with RPC that consumer may import; (ii) <i>exempted importation</i> - see list of articles / materials in Submission at para.131	(i) regional playback controls interfere with the enjoyment of lawfully acquired private property (ii) regional playback controls would subvert the legislative policy to allow parallel importation in certain cases	user not permitted to on-supply circumvention device / method
use of article embodying copyright material which has been licensed to user			Any copyright material embodied in licensed products - especially software and data products	ACM is defunct / unusable and product cannot be used in accordance with the licence	licensed user not permitted to on-supply circumvention device / method