



Australian Government
Attorney-General's Department

**Information Law and
Human Rights Division**

06/16504

8 November 2006

Senator Marise Payne
Chair
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Madame Chair

Submissions received in response to Exposure draft Copyright Amendment (Technological Protection Measures) Bill 2006

During the public hearing of the Committee's Inquiry into the Copyright Amendment Bill 2006 held on 7 November 2006, Senator Lundy requested that the Attorney-General's Department provide to the Committee certain submissions made to it in the course of its consultation on the Exposure Draft of the technological protection measures (TPM) provisions.


Please find attached a folder containing copies of submissions received by the Department which relate to amendments to the definition of 'access control TPM' and 'TPM' as requested.

Whilst the submission from the Australian Vice Chancellors' Committee (AVCC) is marked as 'confidential', the Department has obtained permission from Ms Angela Magarry of the AVCC to provide a copy of this submission to the Committee.

The Australian Federation Against Copyright Theft (AFACT) has advised us that it will itself provide to the Committee a copy of its confidential submission made to the Department.

The action officer for this matter is Johanna Taylor who can be contacted on (02) 6250 6317.

Yours sincerely

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List of selected submissions made to the Attorney-General's Department on the Exposure draft of the Copyright Amendment (Technological Protection Measures) Bill 2006¹ relevant to the Committee's request

1. Law Council of Australia
2. Supplementary submission - Law Council of Australia
3. Dale Clapperton and Professor Stephen Corones, Queensland University of Technology
4. Open Source Industry Australia Limited
5. Australian Libraries' Copyright Committee/Australian Digital Alliance
6. Australian Vice-Chancellors' Committee
7. Cyberspace Law and Policy Centre
8. Australian Copyright Council
9. Mary Alice Bannister, Reed Elsevier
10. Viscopy
11. Australian Recording Industry Association
12. Professor Brian Fitzgerald, Queensland University of Technology
13. International Intellectual Property Alliance
14. Flexible Learning Advisory Group
15. Australian Broadcasting Corporation
16. Special Broadcasting Service
17. Department of Education, Science and Training
18. Australian Visual Software Distributors Association Ltd
19. Australian Publishers Association
20. Copyright Agency Limited
21. Interactive Entertainment Association of Australia
22. Business Software Association of Australia

¹ The technological protection measure amendments are now included in Schedule 12 of the Copyright Amendment Bill 2006.

**Law Council of Australia
Business Law Section
Intellectual Property Committee
Copyright Subcommittee**

Supplementary Submission to the Attorney-General's Department

**Exposure Draft
Copyright Amendment (Technological Protection Measures) Bill 2006**

September 2006

This further submission, foreshadowed in section 4, page 7 of our previous submission, has also been prepared by the Copyright Subcommittee of the Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**Subcommittee**) in response to the Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 (**Exposure Draft**), released by the Attorney-General's Department (**Department**) on 4 September 2006.

Suggested alternative methods for defining ACTPM and TPM to achieve the government's aims

The Subcommittee understands that the Exposure Draft is intended, in technology neutral terms, to exclude certain technologies, or uses of technology, from the scope of protection: in particular, where a technological measure is used to bring about region-coding. The Subcommittee understands also that the government wishes to include terms in the legislation to ensure that Australian courts reach similar results to those reached by US courts in the 'aftermarket' or 'spare parts' cases: refusing to intervene to protect where technology used to control an aftermarket, for example, for printer toner cartridges or garage door openers. The Subcommittee shares the government's view that some indication in the legislation or explanatory material may be necessary to give Australian courts a basis for achieving these results. The problem, however, is that it is exceedingly difficult to achieve these technology-specific aims, using technology-neutral terminology.

The current drafting has significant problems, and it is important to that the legislation protects copyright owners while avoiding undesirable applications. By way of illustration, we tentatively suggest an alternative drafting, using language from the case of *Chamberlain Group, Inc v Skylink Technologies, Inc* (Fed. Cir. 2004). Under it ACTPM would be defined in the following terms:

access control technological protection measure means a technological protection measure that is designed in the normal course of its operation to control access to a work or other subject matter without permission deriving from the owner of copyright of the work or other subject matter.

To exclude 'spare parts' and region-coding, without using technology-specific terms, the definition could be coupled with an exclusion (either as part of the definition, or perhaps in the 'definitions' part of the Act, for example, as s 24A):

For the purposes of this Act, any device, product or component (including a computer program) applied to a work or other subject matter for purposes unrelated to, or not substantially related to, uses which bear a reasonable relationship to the rights that this Act otherwise affords to the copyright owner of the work or other subject matter, shall be taken not to comprise an access control technological protection measure.

This drafting is evocative of the *chapeau* language while at the same time, ensuring copyright owners are protected in cases where they are engaging in new and innovative ways to distribute copyright works – such as the ‘rental’ of digital copies referred to above. It would also give the courts a direct, textual basis for exercising judgment and reaching sensible results in cases where technology is being used in ways that does not truly further the aims of copyright law.

The most significant objection to this definition may be that its application is uncertain. However, it may not be possible to write legislation which is certain, excludes particular technologies, **and** uses technology neutral terms. The uncertainty could be reduced through the inclusion of commentary in the Explanatory Memorandum, which could refer to the intended exclusions and effect of the legislation. For example, the Explanatory Memorandum could state explicitly that:

- (1) The protection offered by the legislation is not intended to apply:
 - (a) in cases where access controls are being used to control aftermarkets, as evidenced by past US cases such as *Chamberlain Group, Inc v Skylink Technologies, Inc* and *Lexmark International, Inc v Static Control Components, Inc.* (6th Cir. 2004); or
 - (b) in cases where technology is solely designed to implement region-coding; and
- (2) That the ‘uses’ referred to in the exclusion are not intended to be confined to the acts comprised in the copyright.

If other exclusions and qualifications are envisaged, these, too, could be noted in the Explanatory Memorandum.

In addition, certain drafting changes should be made to the definition of a TPM consistent with this revised definition, and to address some of the observations made in our earlier submission. The definition could read:

technological protection measure means a device, product, or component (including a computer program) that:

- (a) is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter; and
- (b) is designed, in the normal course of its operation:
 - (i) to control access to the work or other subject matter without permission deriving from the owner of copyright of the protected subject matter; or
 - (ii) to prevent or inhibit the doing of a restricted act.

Where the term ***restricted act*** used in the definition above is defined to mean:

any act which could comprise infringement of the relevant copyright under Part III, Division 2 or Part IV, Division 6 of this Act

This alternative wording is put forward for illustration and discussion; decisions about actual drafting and terminology are for expert Parliamentary drafts people.

**Law Council of Australia
Business Law Section
Intellectual Property Committee
Copyright Subcommittee**

Submission to the Attorney-General's Department

**Exposure Draft
Copyright Amendment (Technological Protection Measures) Bill 2006**

September 2006

This submission has been prepared by the Copyright Subcommittee of the Intellectual Property Committee of the Business Law Section of the Law Council of Australia (**Subcommittee**) in response to the Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 (**Exposure Draft**), released by the Attorney-General's Department (**Department**) on 4 September 2006.

1. Executive Summary

The Subcommittee notes that the object of the Exposure Draft is to implement the provisions of the Australia-United States Free Trade Agreement (FTA), Article 17.4.7. The Subcommittee has a number of concerns about the Exposure Draft, dealt with in more detail below. In summary, the submissions of the Subcommittee are as follows:

- (1) The definition of ACTPM is problematic, and fails to give effect to Article 17.4.7 of the AUSFTA. In particular:
 - (a) The '*chapeau*', or introductory text, of the AUSFTA does not support the limitation of ACTPM to only those technologies which prevent or inhibit acts which infringe copyright. Interpreted in accordance with their ordinary meaning, the words of the *chapeau* do not qualify the more specific obligations which follow.
 - (b) Even if the *chapeau* does give some indication of the way anti-circumvention law should be drafted, the current draft definition of ACTPM has unintended effects: it will exclude from protection some technologies which should, in accordance with the *chapeau*, be protected because they are used by copyright owners in connection with the exercise of their rights.
- (2) There are further problems with the Exposure Draft which affect both the definition of ACTPM and TPM. In particular:
 - (a) by requiring that a technology prevent an act which is comprised in the copyright, *and* infringes copyright, the language is redundant, confusing, and open to two unintended, remarkably narrow interpretations: either
 - (i) That the technology must distinguish between infringing and non-infringing acts; or
 - (ii) That the technology must in the case before a court actually prevent an infringement.
 - (b) The legislative note designed to exclude region-coding technologies is not an appropriate use of this drafting device, and is drafted in broad terms which may have unintended applications;

- (3) Establishing the requirement that a technology be 'used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter' may cause unnecessary difficulty and expense for copyright owners. A presumption should be added to the Copyright Act. That presumption should provide that if a TPM is applied to a protected subject matter, ownership of which is presumed as a result of the other provisions in s 126/126B, then it also be presumed that the TPM has been applied by, with the permission of, or on behalf of the owner or exclusive licensee of copyright;
- (4) The phrasing 'of a person' found in the definitions of circumvention device and circumvention service, and the trafficking liability provisions, is unclear and confusing. In the body of the submission, two possible alternatives are suggested;
- (5) The exception to liability under s 116AK where 'the person has, or has reasonable grounds to believe that the person has the permission of the copyright owner or exclusive licensee to circumvent the ACTPM' is inconsistent with the general framework of Australian copyright law and uncertain in its effect. It would be preferable to express liability in terms of circumvention 'without authority'. If necessary, innocent infringers could be protected through a provision similar to s 115(3) which would be applicable in the context of remedial relief.
- (6) The current drafting of s 116AL, and other trafficking provisions may render it technically illegal to sell a device, such as DVD players, which decrypts protected subject matters with the permission of copyright owners.
- (7) The remedies provisions should be amended:
 - (a) To allow for orders for destruction of all circumvention devices in the possession of a defendant; and
 - (b) To allow a court to take 'deterrence' into account in considering additional damages orders.
- (8) The criminal provisions are narrower than current copyright law, in that they apply criminal penalties only to conduct done 'with the intention of obtaining a commercial advantage or profit'. Australian copyright law in general allows a criminal penalty to be applied where conduct is done for some other purpose to such an extent that will affect prejudicially a copyright owner.
- (9) The interoperability exceptions in the Exposure Draft should apply the same definition of 'computer program' as is used currently in Part III Div 4A.
- (10) The process for implementing new exceptions via regulation is unclear, and seems to confer very extensive discretion on the Minister not to respond to a request for an exception. Further detail is needed.
- (11) The Exposure Draft does not, contrary to earlier statements of the Attorney-General's Department, appear to exclude broadcasts from the scope of subject matter protected under these laws. Further consideration should be given either to excluding broadcasts, or to how the overlap with Part VAA is expected to operate.

Further detailed comments follow.

2. Definition of Access Control Technological Protection Measure (ACTPM) and the relationship to infringement (Sch 1 Clause 1)

The first problem with the definition of ACTPM in the Exposure Draft lies in the government's attempt to limit the technologies protected to those which are directly related to copyright infringement. This intention is clearly stated in the 'Summary' released with the Exposure Draft, which notes that the legislation is intended to be limited 'to preventing circumvention of TPMs designed to stop copyright piracy.'

It appears that limiting the concept of an access control by reference to copyright infringement may fail to give effect to the clear and specific language of the FTA.

In order to comply with the FTA, the Australian legislation must give effect to the ordinary meaning of words in Article 17.4.7. Under Article 17.4.7, Australia is obliged to provide protection for 'effective technological measures' ('ETMs'). These are defined in Article 17.4.7(b) to mean

'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).

The use of the word '**or**' in this definition indicates that **two** types of ETM are to be protected: those which 'control access to a protected work', **and** those which 'protect any copyright'. The latter would be technologies which prevent copyright infringement. The use of the disjunctive '**or**' suggests that technology which 'controls access' should be protected **regardless** of whether it prevents (or inhibits) infringement. The liability scheme in Article 17.4.7 is also based on an assumption that there are two different kinds of TPM. By requiring that an ACTPM 'prevent or inhibit infringement' by preventing an act comprised in the copyright, the Exposure Draft makes measures which control access merely a subset of measures which 'protect any copyright', rather than a distinct kind of measure.

The 'chapeau argument'

The Subcommittee understands, from evidence given by Mark Jennings to the Legal and Constitutional Affairs Committee, that the government relies on the *chapeau* or introductory words to Article 17.4.7(a) as the basis in the treaty text for the qualifications in the definition of ACTPM, and for linking protection for access controls to those which prevent or inhibit acts which infringe copyright.

As a matter of treaty interpretation, it is questionable whether this reliance is appropriate. The *chapeau* language derives directly from Article 11 of the WIPO Copyright Treaty ('WCT'), which provides as follows:

'Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.'

The introductory text in Article 17.4.7(a) surrounds an almost direct quote from this provision with words that indicate that the purpose of Article 17.4.7 is to implement this obligation:

'In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and

producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that... (emphasis added).

The underlined words indicate that the purpose of the provision is to implement Article 11 of the WCT ('**in order to**' provide adequate protection... '**each Party shall**'): with this purpose achieved by means of enacting the detailed and specific obligations that follow. As a matter of the ordinary meaning of these words, is not clear that this general purpose was intended to qualify, or can be used as a reason for reading down, the specific obligations.

There is some international jurisprudence where introductory text has been held to qualify the provisions which follow. Appellate body decisions in the WTO have used the opening words of GATT Article XX to qualify the listed exceptions in that Article. GATT XX provides a list of 10 exceptions to free trade obligations (eg 'necessary to protect public morals' and 'necessary to protect human, animal or plant life or health'). The opening words of GATT XX provide:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ..."

The GATT/WTO jurisprudence, which applies Vienna Convention principles, has read these opening words (described as Article XX's *chapeau*) as imposing an important qualification on the scope of the exceptions that follow. The Appellate body decisions require consideration, first, of whether a national measure falls within a specific exception, and then whether the measure also operates within the parameters of the *chapeau*'s qualification. This reading does not, however, give rise to a substantive interpretive principle that allows introductory words to be read as qualifying more specific obligations. It is instead a natural reading of the opening words of Article XX, in particular, the phrase 'subject to'. These are express words clearly intended to qualify broadly worded exceptions.

This line of authority does not justify an interpretation of the Article 17.4.7 *chapeau* as a limitation on the specific obligations which follow. The introductory text of Article 17.4.7 looks very different to the introductory words of GATT XX. As already noted, the introductory words in Article 17.4.7(a) express the **purpose** of the provisions ('In order to each Party shall...'). These are not words of qualification.

The weaknesses in the drafting of the definition of ACTPM

In the alternative, if it is accepted that the *chapeau* language should be given direct effect, the Subcommittee submits that the definition of ACTPM in the Exposure Draft goes further than that text could justify.

According to the *chapeau*, the purpose of Article 17.4.7 is to provide legal protection for technical measures which are used by copyright owners **in connection with** the exercise of their rights and which restrict unauthorised acts. The government appears to have interpreted this text as confining protection to technical measures which 'prevent or inhibit people from infringing copyright' (the quotation comes from the government's summary).

The government has enacted this interpretation by drafting a definition of ACTPM which requires that in order to be protected, the device, product or component must:

1. be used by or with the permission of or on behalf of the owner or exclusive licensee of copyright;
2. be designed, in the normal course of its operation, to prevent or inhibit the doing of an act:
 - a. that is comprised in the copyright, and
 - b. that would infringe the copyright
3. achieve that end by preventing those who do not have permission of the owner or exclusive licensee from gaining access to the work.

The first problem with this drafting is that it is potentially even **more** narrow than the stated intention of the government. The phrase 'prevent or inhibit' is used in the current definition of technological protection measure in section 10 of the Copyright Act ('**the Act**'), which defines TPMs as devices which 'prevent or inhibit infringement', either by controlling access or through a copy control mechanism. In *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 65 IPR 513 ('*Stevens v Sony*'), the High Court interpreted the phrase 'prevent or inhibit infringement' in this context as requiring that the technology 'physically' prevent or inhibit acts which, if carried out, would or might infringe copyright in the work (at [38]).

The Exposure Draft appears to adopt, amplify, and perhaps even narrow further this interpretation. It specifically provides that a measure must prevent or inhibit **an act which is comprised in the copyright**. This would appear to adopt the High Court's 'technically prevent' interpretation. Indeed, by requiring that the act prevented **would** infringe (not 'would or might infringe' as endorsed by the High Court of Australia), it may be even narrower than the High Court approach.

The effect of this language, in light of existing caselaw, is to protect from circumvention only those technologies which prevent an act of infringement subsequent to a person gaining access to the protected subject matter. Technical measures which 'inhibit' (or more properly, deter) infringement by making infringing copies useless are not protected under this definition.

The second problem is that not only is this definition narrower than the government's stated intention, it would also appear to be significantly narrower than the set of technologies which the *chapeau* language indicates should be protected. That is, the technologies which 'prevent an act of infringement' is a narrower subset than the technologies which are used by copyright owners **in connection with the exercise of their rights** (the phrase in the *chapeau*).

This can be illustrated with an example. Copyright owners now use technological measures to distribute electronic copies of their content which 'expire' after a certain period of time, thus allowing consumers in effect to 'rent' an electronic copy. One example is the recently launched *Amazon Unbox Video* from online book retailer Amazon.com. In this system, according to launch documents, the consumer can:

- 'buy' a copy of a film which can be watched an unlimited number of times; or
- 'rent' a copy, in which case the consumer must commence watching the video within 30 days of download, and finish watching the film within 24 hours.

Viewing a movie in the privacy of the home does not involve the doing of any 'act comprised in the copyright'. Thus the technical measure which enforces this kind of limitation might not be an ACTPM according to the Exposure Draft definition. Such a measure is, however, on any interpretation, being used 'in connection with the exercise of' copyright rights: the rights of a copyright owner to exploit their copyright using new technologies to sell, distribute and license copies of their work.

3. Further issues with the definition of ACTPM and TPM

There are two **further** issues which affect the drafting of both the definition of ACTPM and TPM: redundancy, and the use of the legislative note.

Redundancy

The definition in the Exposure Draft requires that a technical measure prevent or inhibit an act which has two properties:

1. it is an act 'comprised in the copyright'; **and**
2. it would infringe the copyright.

The Subcommittee presumes that the government's intention is that a technology should fall within the definition where **some** of the acts prevented or inhibited would or might be infringements of copyright. However, having the two requirements is redundant: if an act infringes copyright (requirement 2) it **must** be an act falling within the exclusive rights of the copyright owner (requirement 1). Requirement 1 thus adds nothing and is confusing.

Having the two requirements also leaves the provision open to other unintended interpretations. A court could take the view that the government must have intended the two requirements to have independent effect. This could lead to one of two, equally problematic, interpretations:

1. That a TPM must **distinguish** between infringing and non-infringing acts, and prevent or inhibit only the infringing acts. Given that many exceptions under the Act (for example, fair dealing) only apply where the user has a particular purpose, drawing such a distinction will rarely be possible for a piece of technology. Very few, if any technologies could fall within such a definition; or
2. That to give effect to the second requirement, the court must determine whether, **in the particular circumstances of the case before it**, an infringing act was in fact prevented. This interpretation would be inconsistent with Article 17.4.7(d) of the FTA text, but is open on the wording in the Exposure Draft.

The Subcommittee understands that the intention of the government may be to implement the *chapeau* language in the requirements of Clause 1(b): ie that (b)(i) implements 'in connection with the exercise of their rights' and (b)(ii) implements 'restricts unauthorised acts'. As explained by the movie example above, however, the set of technologies which 'prevent or inhibit acts comprised in the copyright' is a narrower subset than technologies 'used in connection with the exercise of copyright rights'. Some technologies which should be protected under Article 17.4.7 – and which are used by copyright owners to make their copyright works available to the public will not be protected under the Exposure Draft.

Legislative note to definitions of ACTPM (Clause 1) and TPM (Clause 4)

The Subcommittee is also concerned at the use of the 'legislative note' to the definition of ACTPM and TPM, which provides that:

'To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not an access control technological protection measure.'

The Subcommittee submits that this is not an appropriate way to use a legislative note. Legislative notes do not form part of an Act, have no legislative force (Pearce and Geddes, *Statutory Interpretation in Australia*, 5th ed 2001 at [4.47]), and can be used by a court, at most, as an aid to interpretation where the meaning of a provision is in doubt (s 15AB of the *Acts Interpretation Act* 1901 (Cth)). The note in the Exposure Draft seems to intend more than indicating the 'drift of the section' (*Joyce v Paton* (1941) 58 WN (NSW) 88, 90 per Street J). If the intention is that certain technologies should be excluded from protection, it would be preferable, and more certain, to give the exclusion legislative force.

In addition, the wording of the note is overly broad. It seems that the note is aimed mostly to exclude technologies which implement region-coding – that is, certain forms of *geographic* segmentation. Leaving aside whether any technology is ever **solely** designed to achieve this end, the note is written in broad terms which may lead to unintended exclusions. The Subcommittee understands the desirability of drafting legislative provisions in 'technology neutral' language. On some occasions, however, the attempt to write an exclusion in such language can misfire. On its face, the current 'note' applies to other kinds of market 'segmentation'. Copyright owners can exploit their copyrights in many ways that involve 'market segmentation' of some form. For example, a copyright owner might offer lower prices to educational users than it offers to commercial users. This is a form of 'market segmentation', and a technology designed to achieve this might thus not be protected under the Exposure Draft. If, contrary to these submissions, the note or some similar exclusion is to be retained, at least, the word 'geographic' should be added to qualify 'market segmentation'.

4. Alternative methods for defining ACTPM and TPM to achieve the government's aims?

The Subcommittee understands that the Exposure Draft is intended, in technology neutral terms, to exclude certain technologies, or uses of technology, from the scope of protection, in particular where a technological measure is used to bring about region-coding. The Subcommittee understands also that the government wishes to include terms in the legislation to ensure that Australian courts reach similar results to those reached by US courts in the 'aftermarket' or 'spare parts' cases: refusing to intervene to protect where technology is used to control an aftermarket, for example, for printer toner cartridges or garage door openers. The Subcommittee shares the government's view that some indication in the legislation or explanatory material may be necessary to give Australian courts a basis for achieving these results. The problem, however, is that it is exceedingly difficult to achieve these technology-specific aims through the use of technology-neutral terminology.

We are giving further consideration to this drafting and hope to provide some more detailed comments on Monday.

5. Definition of ACTPM/TPM: 'Used by, with the permission of, or on behalf of, the owner or exclusive licensee of the copyright' (Clauses 1 and 4)

Another aspect of the definitions of ACTPM and TPM requiring comment is the requirement that a technology be 'used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject matter'.

In practice, the need to prove this may cause unnecessary difficulty and expense for copyright owners. In the current Act, several presumptions are available to copyright owners, so that:

- The plaintiff is presumed to be the owner of copyright if he or she claims to be the owner and the defendant does not put the matter in issue (s 126); and

- If a copy of the work, or its packaging bears a label or mark stating that a person is the owner of copyright at a particular time, that label/mark is admissible as prima facie evidence of those facts (s 126B).

The purposes of these presumptions will be defeated if a plaintiff nevertheless has to prove that a TPM has been applied with the copyright owner's permission or on their behalf. The Subcommittee submits, consistent with current law, a presumption should be added to s 126B, such that if a TPM is applied to a copyright work, ownership of which is presumed as a result of the other provisions in s 126/126B, then it should also be presumed that the TPM has been applied by, with the permission of, or on behalf of the owner or exclusive licensee of copyright.

6. Definition of circumvention device and circumvention service (Clauses 2 and 3)

Both the definition of circumvention device, and service, include the words 'of a person'. This language is confusing and unclear.

The Subcommittee presumes that the purpose of this language is twofold: to avoid banning 'dual use technologies', and to address the potential problem of the 'innocent infringer': that is, to ensure that individuals do not become liable for manufacturing, selling (etc) particular technologies or providing services which have been promoted or marketed **by some third person** as circumvention devices or services (whether or not the technologies/services are in fact circumvention devices or services). This concern appears to stem from the fact that, unlike the current law (s 116A), there is no knowledge element provided for in Article 17.4.7(a)(ii) of the FTA. The intention of the drafting may be to limit liability strictly to match that which arises under the US DMCA (17 USC §1201(a)(2) and §1201(b)(1)), under which a person is liable for selling (etc) a device which:

- (1) is primarily designed or produced for the purpose of circumvention;
- (2) has only limited commercially significant purpose or use other than to circumvent; or
- (3) is marketed **by that person** or another acting in concert with that person **with that person's knowledge** for use in circumventing protection.

The Subcommittee submits that the references in the Exposure Draft to devices 'of a person' are unnecessarily confusing. The phrase might also have undesirable effects in marginal cases. For example, consider a device which is not designed primarily for circumvention, and has other commercially significant uses. Such a device will not fall within parts (b) or (c) of the definition. In the hands of person A (who advertises 'copy all your Hollywood DVDs!') this device is a circumvention device. In the hands of person B, who does not do any such marketing or promotion, it is not. It would then appear that B can continue intentionally to sell the device, even after A's advertising and promotion, and even after its use for circumvention becomes widely known, provided that B is not acting 'in concert' with A. B could, in theory, sell the device to a person who specifically asks for it for the purposes of circumvention and infringement, provided that B has not promoted the device for that purpose.

The Subcommittee submits that there are other ways to achieve the government's aims which would be less confusing. One approach would be to include a knowledge requirement, like that found in the current s 116A which imposes liability only where a person 'knew, or ought reasonably to have known, that the device or service would be used to circumvent, or facilitate the circumvention of, the technological protection measure'. If necessary (although it would probably be redundant) the legislation could also provide that in the case of a device

primarily designed for, or with no purpose or use other than circumvention, such knowledge is presumed.

Another approach would be to define circumvention device more narrowly, such that a device only becomes a circumvention device (or service) under part (a) of the definition where the person doing the marketing, advertising or promoting is the same one who is being sued under ss 116AL, 116AM, 132APB or 132APC. For example, circumvention device might be defined along the following lines:

'Circumvention device means a device, component or product (including a computer program) that:

- (a) is promoted, advertised, or marketed by a person who does any act described in section 116AL(1), 116AM(1), 132APB(1) or 132APC(1) (the first person) or by another person acting in concert with the first person, as having the purpose of circumventing the technological protection measure.'*

The Subcommittee puts this forward, not as a final draft for inclusion, but as an illustration of an alternative approach which avoids the confusing 'of a person' language of the Exposure Draft.

7. Subsection 116AK

Subsection 116AK(2) excludes liability where 'the person has, or has reasonable grounds to believe that the person has the permission of the copyright owner or exclusive licensee to circumvent the ACTPM'. This approach is inconsistent with the general framework of Australian copyright law. A person is liable for copyright infringement wherever they do an act falling within the exclusive rights of the copyright owner, without the authority/licence? of the copyright owner (ss 36(1) and 101(1), *Copyright Act 1968*). 'Authority'/Licence? is determined as an objective question of fact (was there authority/licence, whether express or implied, or not?). Under ordinary principles, too, an innocent infringer is protected by s 115(3), which excludes damages as a remedy where the defendant was not aware, and had no reasonable grounds for suspecting, that their act was an infringement [**NB an account of profits may still be obtained in such a case**]. Even if s 115(3) is not made out, the court has discretion in granting remedies for copyright infringement. NB I note that "permission" is currently used in s 116A.

The Exposure Draft, by contrast, adds a new and different concept ('permission' rather than 'authority'/licence) and excludes liability altogether in those circumstances, rather than (as s 115(3) does) leaving remedies such as targeted injunctions open. The Subcommittee submits that such inconsistency is undesirable because it is uncertain: courts will be required to interpret these new concepts, which may or may not be similar to standard copyright law.

The Subcommittee submits that an alternative would be to express liability in terms of circumvention 'without authority'. There is already a basis in the draft for remedial discretion: courts **may** award damages or injunctions (clause 116AO(1)). However, if there was concern about the 'innocent' infringer, a provision like s 115(3) could be added to s 116AO.

8. Liability for devices and services which circumvent with permission (Sections 116AL and 116AM)

In relation to the 'device and service' provisions (ss 116AL, 116AM, 132APB, 132APC) there is no exception which will apply in the case of devices sold, or services offered, that circumvent with the permission (or, preferably, authority/licence as per above) of copyright owners or exclusive licensees.

The absence of any 'permission' (or 'with authority'/licence) exception or qualification may have unintended consequences. Specifically, it may result in the ban applying to perfectly legitimate commercial activities, particularly for makers of consumer electronics and software. In the case of access control TPMs, such as TPMs which encrypt content, it is normal for consumer electronics devices to be manufactured in accordance with contracts with copyright owners which allow the device to decrypt the content. An example is DVD players which are manufactured under license from the DVDCCA (DVD Copy Control Association) which provides the keys to decrypt commercial films encoded using the Content Scrambling System (CSS). If this activity (decryption with the permission of the copyright owner) is interpreted as 'circumvention' of the access control TPM, then, technically, such a device (the DVD player, or a component thereof) could be a 'circumvention device' and thus the manufacture, import and sale of such devices is a breach of s 116AL – and a criminal offence under s 132ABP when done for a commercial purpose. The same issue arises under s 116AM, which also has no exception in cases where there is permission.

It may be possible for a court to interpret 'circumvention' to require more than decryption, importing a concept that circumvention only occurs where decryption occurs 'without permission'. However, such an interpretation may be precluded by s 116AK(2) which implies that it is possible to 'circumvent with permission' of the copyright owner.

It is worth noting that this issue is addressed in the US legislation: selling devices which decrypt or descramble copyright-protected content with the authority of the copyright owner is not a breach of US law (17 USC §1201(a)(3)(A)).

9. Section 116AO: remedies

In relation to the remedies provided for in s 116AO, the court is allowed to make an order for destruction of **the** circumvention device involved in the doing of an act which is the subject of the action. The Subcommittee submits that orders for destruction of circumvention devices should extend to all such devices in the defendant's possession or control. Section 116(1) of the Act does not provide a sufficient substitute, because it allows an action for conversion or detention of a circumvention device only where those devices are 'used or intended to be used for making infringing copies'.

The Subcommittee also notes that the matters to be taken into account in ordering 'additional damages' under s 116AO(2) do not specifically include 'the need to deter similar' actions (compare s 115(4)(b)(ia)). While s 116AO(2) is consistent with the current Act (s 116D), it would be more appropriate to make the provision consistent with s 115(4).

10. Criminal liability for circumvention and trafficking (Sections 132APA, 132APB, 132APC)

The offence provisions in the Exposure Draft are limited to situations in which a person engages in the relevant conduct 'with the intention of obtaining a commercial advantage or profit' (ss 132APA(1)(d), 132APB(1)(b), 132APC(1)(b)). Unlike the other offence

provisions in the Act, therefore, criminal liability does not extend to situations in which an individual engages in conduct 'to an extent that will affect prejudicially an owner of copyright' (compare s 132(5A)). This limitation would mean, for example, that a person who circumvents access controls on a mass scale, or who makes a circumvention device available online with malicious intent, but with no direct commercial purpose, cannot be criminally prosecuted. The Subcommittee submits that this is inconsistent with other provisions of the Act and even weaker than the current criminal provisions. It would be appropriate to add, to subsections 132APA(1)(d), 132APB(1)(b) and 132APC(1)(b) the phrase, 'or for any other purpose to an extent that will affect prejudicially an owner of copyright.'

The Committee does, however, note that the provisions of the Exposure Draft match the scope of the criminal provisions under current US law (17 USC §1204).

The Subcommittee also submits that either in a legislative note, or the Explanatory Memorandum, it may be useful to refer to the Criminal Code provisions on knowledge/intent (section 5 of the Criminal Code), which qualify liability under these criminal provisions, for the benefit of non-expert readers.

11. Interoperability exception

The 'interoperability exception' (subss 116AK(3), 116AL(2) and 116AM(2)) may fit awkwardly with the existing interoperability exception in s 47D. In section 47D of the current Act, 'computer program' has a particular meaning set out in s 47B (that is, it includes 'any literary work' that is 'incorporated in or associated with a computer program' and 'essential to the effective operation of a function' of that program). For the purposes of consistency, the Subcommittee submits that the same definition of computer program should apply in relation to the interoperability exceptions here. This could be achieved by the inclusion of a subsection adopting s 47B here.

12. Exceptions

There is no provision in the Exposure Draft which will allow any person to sell a circumvention device, or provide a circumvention service, to a person with the benefit of one of the exceptions to liability provided for in s 116AK(6), (8) or (9). The Subcommittee notes that this may create practical difficulties in the future, and recommends that the matter be kept under review. If there is evidence in the future that the exceptions are rendered ineffective by this gap, further consideration of its resolution may be required.

The Subcommittee is also concerned about the approach of introducing exceptions solely through regulation rather than in the body of the legislation. While this has the advantage of flexibility, it is questionable whether it is appropriate for exceptions to liability to be created solely through regulation. This may not be an appropriate division of power between Executive and Parliament, and raises questions about the transparency of the law.

Another issue with exceptions is that on the face of the Exposure Draft, future exceptions to s 116AK will be introduced through a process which allows the Minister to receive submissions seeking an exception (s 116AK(12)). Where such a submission is made, the legislation requires that the Minister makes a decision whether to recommend an exception **within four years** of receiving the submission. This confers an extremely broad discretion on the part of the Minister to refuse to respond within a reasonable period. The Subcommittee suggests that further information on how this process should be provided, at least in the regulations and Explanatory Memorandum.

13. Coverage of the Exposure Draft provisions

The Subcommittee notes that the House of Representatives Legal and Constitutional Affairs Committee provided the following question on notice to the Attorney-General's Department during its Inquiry into TPM exceptions late last year:

‘Will TPMs on broadcasts and published editions come under the new scheme?’

The response from the Attorney-General's Department was:

‘No. There is no obligation under the AUSFTA to include published editions and broadcasts within the proposed liability scheme because they do not fall within the categories of protected works, performances or phonograms’.

The Exposure Draft, however, does not appear to exclude broadcasts or published editions from its scope. This may have unpredictable consequences particularly in the case of broadcasts, where there is likely to be significant overlap with the scheme already provided in Part VAA of the Act. The Subcommittee submits that further consideration needs to be given either to excluding broadcasts, or considering how the overlap between sections of the Act is expected to operate. Alternatively, the Department may wish to outline, for the benefit of interested parties, how the new provisions and Part VAA are expected to work together.



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CRICOS No 00213J ABN 83 791 724 622

22 September 2006

Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

by email to copyrightlawbranch@ag.gov.au

**Re: Copyright Amendment (Technological Protection Measures)
Bill 2006**

Dear Sir or Madam

We are pleased to make the following submission to the Department on the exposure draft of the *Copyright Amendment (Technological Protection Measures) Bill 2006*.

We trust that our submission will assist the Department, and would welcome the opportunity to provide any further information which may be required.

Yours faithfully

Mr Dale Clapperton
Senior Research Assistant

Professor Stephen Corones
Investigator

Submission on the Competition and Interoperability Implications of the Copyright Amendment (Technological Protection Measures) Bill 2006 Exposure Draft

1. Background

Queensland University of Technology (QUT) is currently undertaking a research project *The Use of Information and Cryptographic Technology to Restrict Competition* (the "research project"). This project is funded by an Australian Research Council grant.¹

Although research in the project is ongoing, our preliminary results suggest that 'anti-circumvention' legislation, such as the *Copyright Amendment (Technological Protection Measures) Bill 2006* ('the TPM Bill') have a significant potential to restrict competition in high-tech markets.

The authors, in their capacity as individual members of the research project team, appreciate the opportunity to share their thoughts on these important issues with the Department.

2. Linking TPM protection to infringement of copyright

We welcome the decision of the Australian government to link the definition of 'technological protection measure' ('TPM') and 'access control technological protection measure' ('ACTPM') to infringement of copyright.

This link will align the definitions of TPM and ACTPM more closely with current judicial interpretation of the equivalent provisions of the US Digital Millennium Copyright Act ('DMCA').²

However, this does not mean that the scope of the TPM Bill will match that of the DMCA. If the scope of the anti-circumvention laws in each country is determined by the scope of copyright protection, the TPM Bill will have a much broader scope than the DMCA.

¹ ARC reference DP0666521

² 'We conclude that 17 USC § 1201 prohibits only forms of access that bear a reasonable relationship to the protections that the Copyright Act otherwise affords copyright owners.' *The Chamberlain Group Inc v. Skylink Technologies Inc* 381 F 3d 1178 at 1202 (Fed Cir, 2004).

Functional computer code

As the decision of the Court of Appeals in *Lexmark* demonstrates, the copyright law of the United States will not protect the functional aspects of computer software. As applied to the copyrightability of TPM's, the US position is that:

Generally speaking, "lock-out" codes fall on the functional-idea rather than the original-expression side of the copyright line. Manufacturers of interoperable devices such as computers and software, game consoles and video games, printers and toner cartridges, or automobiles and replacement parts may employ a security system to bar the use of unauthorized components. To "unlock" and permit operation of the primary device (i.e., the computer, the game console, the printer, the car), the component must contain either a certain code sequence or be able to respond appropriately to an authentication process. To the extent compatibility requires that a particular code sequence be included in the component device to permit its use, the merger and scènes à faire doctrines generally preclude the code sequence from obtaining copyright protection.³

The High Court of Australia has previously examined the copyright status of TPMs, albeit years before such technology enjoyed specific legal protection. In *Autodesk Inc v Dyason (No 1)*, the High Court held that the verbatim copying of a TPM authentication sequence (127 bits of computer data) to infringe copyright.⁴

The decision in *Autodesk* had implications for the development of interoperable software in Australia. In the later case *Data Access Corporation v Powerflex Services Pty Ltd*, Powerflex Services produced computer software known as PFXplus, which interoperated with data files created by a competing program (Dataflex) produced by Data Access Corporation. The data files were compressed by use of a Huffman compression table. Unless PFXplus could use the Huffman compression table to decompress the Dataflex files, it would be unable to read them.

The High Court held that the Huffman compression table was a 'table expressed in figures and symbols, and falls squarely within the statutory definition of a "literary work".⁵ On that basis, Powerflex Services infringed the copyright subsisting in the table by reproducing it in the PFXplus software,⁶ despite the fact that such a reproduction was required to produce software which would interoperate with Dataflex files. The High Court was not oblivious to the consequences of this decision, noting that

[t]he finding that the respondents infringed the appellant's copyright in the Huffman table embedded in the Dataflex program may well have considerable practical consequences. Not only may the finding affect the relations between the parties to these proceedings, it may also have wider ramifications for

³ *Lexmark v Static Control Components* 387 F 3d 522, 536 (6th Cir, 2004).

⁴ *Autodesk Inc v Dyason (No 1)* (1992) 173 CLR 330.

⁵ *Data Access Corporation v Powerflex Services Pty Ltd* (1999) 202 CLR 1, 41.

⁶ *Ibid* 42.

anyone who seeks to produce a computer program that is compatible with a program produced by others. These are, however, matters that can be resolved only by the legislature reconsidering and, if it thinks it necessary or desirable, rewriting the whole of the provisions that deal with copyright in computer programs.⁷

Although a new exception⁸ was introduced in an attempt to remedy this problem, it has yet to be judicially considered and may not be wide enough to protect all interoperable software.⁹

In any case, the difference between the US position (copyright does not subsist in functional computer code) and the Australian position (copyright probably subsists in such code, but s 47D may apply) will be significant, as a TPM as defined in the FTA and the TPM Bill applies only to a work or other subject matter *in which copyright subsists*. A technological measure for protecting functional computer code would be protected as a TPM under the TPM Bill, but not under the DMCA.

Standard of originality

The copyright law of the United States protects works with a 'creative spark' or 'minimal degree of originality'.¹⁰ The threshold for obtaining copyright protection in Australia is significantly lower, in that it does not require any originality, requiring merely 'labour and expense' or 'industrious collection'.¹¹

As an example, compilations of factual information such as telephone directories are protected by copyright in Australia,¹² but not in the United States.¹³ A technological measure protecting a compilation of factual information would be protected as a TPM under the TPM Bill, but not under the DMCA.

The Joint Standing Committee on Treaties (JSCOT) review of the FTA recommended that the standard of originality required to obtain copyright protection in Australia be reviewed, with a view to adopting a higher standard such as that in the United States.¹⁴ The Labor Senators on the Senate Select Committee investigating the FTA ('the Labor Senators') also recommended such a change,¹⁵ and the Government Senators on that committee adopted the recommendations of the JSCOT report.¹⁶ The government response to

⁷ Ibid.

⁸ Copyright Act 1968 (Cth) s 47D.

⁹ Dale Clapperton and Stephen Coronos, 'Locking-in Customers, Locking-out Competitors: Anti-Circumvention Laws in Australia, and Their Potential effect on Competition in High-Tech Markets' (Forthcoming journal article)

¹⁰ *Feist Publications, Inc v Rural Telephone Service Company* 499 US 340 (1991).

¹¹ *Desktop Marketing Systems Pty Ltd v Telstra Corp Ltd* (2002) 119 FCR 491.

¹² Ibid.

¹³ *Feist Publications, Inc v Rural Telephone Service Company* 499 US 340 (1991).

¹⁴ Joint Standing Committee on Treaties, *Report 61: The Australia – United States Free Trade Agreement* (2004), 243.

¹⁵ Senate Select Committee on the Free Trade Agreement Between Australia and the United States of America, Parliament of Australia, *Final Report* (2004) 230.

¹⁶ Ibid 243.

the Select Committee report stated that the government has no immediate plans to conduct such a review.¹⁷

Fair use

The lack of a fair use right in Australia is often dismissed as a consumer rights issue, but fair use has important commercial applications. In the United States, reverse engineering to produce interoperable computer software is protected as fair use.¹⁸ This was established many years before *Data Access Corporation v Powerflex Services Pty Ltd* demonstrated that such activity was unlawful in Australia.

Australia's 'fair dealing' exception has no application where the copying is for commercial purposes, including the production of interoperable products.

Although the reports of both JSCOT and the Labor Senators recommended the adoption of an open-ended right resembling 'fair use',¹⁹ and such a change had previously been recommended by the Copyright Law Review Committee,²⁰ a recent review conducted by the Attorney-General's department apparently rejected these recommendations.

Lack of a flexible, open-ended exception to copyright (such as fair use) has caused, and will continue to cause Australia's copyright system to be reactive in nature, and dependent on legislative intervention to create new exceptions where required. The *Powerflex* case demonstrates the failure of this approach. A reactive approach to copyright exceptions will chill development of new, useful and competitive (yet potentially infringing) products. Technology companies will be reluctant to risk becoming the "next Powerflex", and lose an infringement action to demonstrate the inadequacy of the current static exceptions.

Conclusion

The anti-circumvention provisions of the FTA, as implemented by the TPM Bill, will have a far broader effect in Australia than in the United States. This disparity is primarily caused by a greater protection for functional elements of computer software, lower standard of originality, and narrower exceptions in Australia.

¹⁷ Commonwealth Government, *Government response to the Final Report of the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America*, p 5

<http://www.aph.gov.au/senate/committee/freetrade_ctte/gov_response/gov_response.pdf>
at 20 September 2006.

¹⁸ *Bowers v Baystate Technologies* 320 F 3d 1317, 1325 (Fed Cir, 2003); *Sony Computer Entertainment v Connectix Corporation* 203 F 3d 596, 602 (9th Cir, 2000); *Sega Enterprises Ltd v Accolade Inc* 977 F 2d 1510 (9th Cir, 1993).

¹⁹ JSCOT above n 18, 240; Select Committee above n 19, 230.

²⁰ Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1* (1998) [6.10].

These areas of copyright law can be amended consistently with Australia's obligations under the FTA. The previously discussed recommendations of JSCOT and the Labor Senators should be implemented to ensure that Australia's copyright laws are more closely harmonised with those of the United States, as was the objective of the FTA.

3. Protection of market segmentation TPM's

The summary of the TPM Bill states: '[t]he scheme will not apply to TPMs *solely* designed for other purposes, such as market segmentation (eg region coding)'. [Emphasis added]

We view this statement as confusing, in that there are unlikely to be any TPMs in use whose *sole* purpose is market segmentation. Certainly, market segmentation is a 'feature' of many TPM systems, and while it may be a substantial or dominant purpose of those systems, it is by no means their *sole* purpose. At least one purpose of a TPM will usually be the protection of some copyright, and it is difficult to envisage a scenario where a court would hold that a TPM had no purpose other than market segmentation.

It was a recommendation of both JSCOT²¹ and the Labor Senators²² that exceptions be available to provide for the legitimate use of legally purchased or acquired copyright material, regardless of the place of acquisition. This would require that TPMs including region-coding be excluded from protection, or that an exception be available to permit their circumvention.

The inclusion of the 'note' following the definitions of 'access control technological protection measure' and 'technological protection measure' in the TPM Bill does not adequately give effect to these recommendations. For the reasons discussed above, the notes will be of no practical use, and as a practical matter Australian consumers and businesses will be unable to use imported copyright material protected by TPMs.

The failure to give effect to the committees' recommendations is likely to result in the de facto reintroduction of parallel importation controls over computer software, motion pictures, sound recordings, and any other material protected by TPMs.

Australian businesses who sell these products would be unable to purchase legitimately produced products from overseas (parallel importation), and would be constrained to purchase from the domestic market, at a greater price.

²¹ JSCOT, above n 18, 243.

²² Select Committee, above n 19, 231.

4. Production of interoperable products

The summary of the TPM Bill also states that a specific exception is included for 'interoperability between computer programs'. We are concerned that this statement oversimplifies a very complex problem and might also tend to confuse the reader.

Taking as an example the exception in the new s 116AK(3):

- (3) Subsection (1) does not apply to the person if:
 - (a) the person circumvents the access control technological protection measure to enable the person to do an act; and
 - (b) the doing of the act:
 - (i) is in relation to a copy of a computer program (the original program) that is not an infringing copy; and
 - (ii) is not an infringement of the copyright in the original program; and
 - (iii) is for the sole purpose of obtaining information necessary to achieve interoperability of an independently created computer program with the original program or any other program; and
 - (c) the information is not readily available to the person from another source when the act is done.

'Computer program' versus computer data

'Computer program' is defined by s 10 of the *Copyright Act 1968* as 'a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.' This definition may be broad enough to encompass computer data files, which would not fall within the every-day meaning of 'computer program'. So far as we are aware, no courts have clarified this issue since the definition was amended in 2000.

Production versus use of interoperable software

The interoperability exceptions within the TPM Bill seem to have the purpose of allowing the production of interoperable computer software, similarly to the existing s 47D exception. The exceptions however do not appear to permit the *use* of interoperable software, where it must circumvent a TPM in order to operate.

Interoperability with computer data

The exceptions deal with interoperability between computer *programs*. In the context of competing software products however, programs rarely interoperate with each other – instead program B will interoperate with *data files* created with program A. For example, Openoffice (a freely available open-source alternative to the Microsoft Office suite, which can open and modify data files created by Office) does not interoperate with Microsoft Office itself, it interoperates with the data files created by users of Office.

It would hardly be of commercial benefit for producers of computer software products to be able to interoperate with competing products themselves – it would necessarily require that the user obtain *both products*.

Taking as an example the *Powerflex* case, Data Access Corporation could protect the data files produced by Dataflex with a TPM. The purported purpose of the TPM would be to protect the copyright which subsists in the data structures and layouts within the Dataflex data files, but the real purpose would be to prevent competing software programs (such as PFXplus) from being able to open and work with data files created using Dataflex.

Powerflex Services Pty Ltd could not reverse engineer the Dataflex data files, or circumvent the TPM which protects them, unless the Dataflex data files were 'computer programs' within the meaning of s 10 of the *Copyright Act 1968*.

Even if the data files were 'computer programs' and these activities were undertaken to produce the competing PFXplus software, *users* of PFXplus (or any software other than Dataflex) would be unable to circumvent the TPM which protects *their own Dataflex data files*.

By using a TPM in this way, Data Access Corporation could preclude the production of software which interoperates with data files created by Dataflex, which would reduce competition in the market for such software.

5. Unfairly disadvantaging Australian technology companies

Although the FTA provides that further exceptions can be created in certain circumstances,²³ this provision is likely to be of little or no practical benefit. Such further exceptions will only apply to the *use* of circumvention devices, and can not apply to manufacture or distribution of circumvention devices.

Unless people who would benefit from these exceptions can either produce a circumvention device themselves, or import one from overseas, the further exceptions will be of no practical use.

This situation will also unfairly disadvantage Australian technology companies against their overseas competitors. While Australian users can legally import a circumvention device for their personal use, Australian companies cannot produce or distribute circumvention devices for any further exceptions.

To illustrate this point, if a further exception were to be granted to allow the circumvention of the TPM which prevents imported DVDs from working with Australian DVD players, Australian consumers could legally circumvent the TPM for this purpose, but would require tools (circumvention devices) with which to do so. Australian companies or individuals could not manufacture,

²³ FTA 17.4.7(e)(viii)

import, distribute or advertise such tools for that purpose, under threat of fines of over \$300,000 or imprisonment for five years.

Even though these circumvention devices could be used legally, they could not be sold legally within Australia. This situation would exclude domestic suppliers from the market within Australia for these circumvention devices.

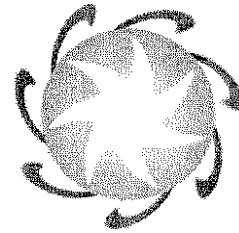
6. Conclusion

Our submission has sought to highlight some of the problems we perceive with the TPM Bill, but is not an exhaustive list of our concerns. Many of these problems cannot be corrected while maintaining compliance with the text of the FTA, and to that extent our submission is more properly a criticism of the FTA rather than the TPM Bill.

However, we have identified ways in which Australian copyright law could be amended to reduce the adverse effects of the FTA on competition, while maintaining compliance with the FTA itself.

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22 September 2006

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Ms Helen Daniels
Copyright Law Branch
Information Law and Human Rights Division
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Dear Ms Daniels,

**Exposure Drafts - Copyright Amendment (Technological Protection Measures)
Bill 2006 and related Regulations (the Draft)**

1. Summary

- 1.1 OSIA is thankful for the level of thought which appears to have been put into this draft. OSIA is also grateful that the Draft evidences an intention to balance the interests of domestic copyright holders and new media publishers (such as OSIA and its members) against those of foreign old media publishers.
- 1.2 By failing to permit interoperability between software and user data the Draft fails to support a free market for software. Section 47D in particular is out of date and needs to be updated. Both the Draft and section 47D should be changed to permit the interoperability between a program a user's data.
- 1.3 The Draft is complex and relies on subtle terminology. The Draft introduces broad catch all phrasing to create criminal offences. Any exceptions must be clear if they are to be of practical value.
- 1.4 The scheme may prohibit the sale of all DVD players (including authorised players).

2. About this Submission

- 2.1 I am a director of Open Source Industry Australia Limited (OSIA). I make this submission on behalf of that company. OSIA is a company limited by guarantee established in 2004 to represent the interests of the open source



industry in Australia. All of OSIA's members are businesses and copyright owners. OSIA membership comprises mostly SMEs from around Australia, but it also counts large organisations including several multinationals among its membership.

- 2.2 OSIA's members are active and successful participants in the burgeoning digital publishing market. The operation of the typical OSIA member involves the supply (including through electronic publication) of copyrighted material (mainly software and documentation). The typical member will also leverage the value of such material by providing high skill value added services in conjunction with that supply. Our members include some of the most successful digital publishers in the world. For example, one of our members, MySQL AB, uses digital publishing for practically all of its material, including software and manuscripts. MySQL estimates that more than 10 million copies of its flagship database product are in active use as a result.¹
- 2.3 OSIA's members are active suppliers in the burgeoning electronic publishing market. OSIA believes that its members' experiences are that the market for electronic publishing of their materials is growing rapidly and that this is an exciting time to be part of that growth. OSIA does not believe that TPM legislation would provide any benefit to its members in their digital publishing endeavours. Quite to the contrary, the only submarkets of digital publishing which appear to be in a parlous state are those for which old media interests have insisted on a reliance on TPMs. OSIA is concerned that this legislation is extending and entrenching what appears to be a proven recipe for failure.

Primary Concerns

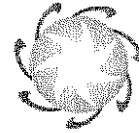
3. Interoperability with User Data

*"[taking the (US) TPM provisions at face value] would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyright material in a trivial 'encryption' scheme, and thereby gain the right to restrict consumers' rights to use its products in conjunction with competing products. In other words [this] construction of the DMCA would allow virtually any company to attempt to leverage its sales into aftermarket monopolies - a practice that antitrust laws... normally prohibit."*²

- 3.1 OSIA members have little or no interest in reproducing the software of any third party other than in accordance with the terms of the licence for that software. OSIA believes that the Draft will prohibit, or more correctly permit an incumbent vendor to prohibit, the legitimate practice of accessing a user's data. As no potential customer will adopt a new product if to do so means they

¹ MySQL publishes distribution information upon its press releases - "The company's flagship product is the MySQL Server, the world's most popular open source database, with more than 10 million active installations." http://www.mysql.com/news-and-events/press-release/release_2006_41.html (dated 20 September 2006).

² *The Chamberlain Group Inc v Skylink Technologies Inc* (Court of Appeals for the Federal Circuit) http://www.eff.org/legal/cases/Chamberlain_v_Skylink/20040831_Skylink_Federal_Circuit_Opinion.pdf at page 37.



must abandon their existing data, this will effectively foreclose many markets to OSIA members.

- 3.2 If a software vendor is able to place an end user's data behind a TPM it will from there be a trivial exercise to commingle its own data with that of the customer. Indeed, this already happens in many situations today. For example, it is already a common enough practice to embed font files (owned by the vendor) in word processing and other documents. Once that material is commingled, the competing vendor may be able to sue for any subsequent access to the data. It would be an easy matter to craft a licence which ties access to the data to the use of vendor's products.

4. Regulations

- 4.1 The Regulations should include an exception for the interoperability between programs and data as set out in Recommendation 15 of the report titled "Review of Technological Protection Measures Exceptions" tabled by the House of Representatives Standing Committee on Legal and Constitutional Affairs on 1 March 2006.
- 4.2 There should be a clear exception for the interoperability between a computer program and a person's data even if the act of saving that data has resulted in the commingling of third party data. It should not be a breach or an offence to supply a program to so access that data.

5. Proposed Interoperability Exception

- 5.1 The proposed exception, based on section 47D of the Act is inadequate in that that provision is concerned primarily with the interoperability between two programs, not the interoperability between a program and data. Section 47D is predicated on the assumption that the act of access is not itself prohibited (as was the case when 47D was passed), but this is no longer true. The combined practical effect of the exceptions and section 47D is that a person is free to work out *how* to interoperate with a computer program, but is prohibited from *actually doing* the interoperation. This is a substantive problem with section 47D which has remained static while the balance of the Act has moved on. This section needs to be updated to reflect the new prohibition on access. A clear right to access, particularly to data, in the course of interoperation needs to be added.
- 5.2 An OSIA member will want to sell a software product as a replacement for a customer's legacy system. Ideally, the legacy system will be completely removed. What our members need is an assurance that they can legally sell a product which will provide access to the customer's data previously created by or accessed through the replaced application and which is left once that application is removed. The interoperability between two "programs" aspect is more likely to be a peripheral activity.

Other Comments



6. Access Control Technological Protection Measure

- 6.1 The concept of “access control technological protection measure” (ACTPM) is unclear in that it presumes that there is a single identifiable work and/or copyright holder in respect of a work. In relation to many works this is simply not the case. A movie on a DVD may incorporate a sound recording copyright in which is held by a third party as part of the sound track for the movie. When that movie is put behind an access control protection measure who is the relevant copyright holder? The words “in relation to a work or other subject matter” should be added prior to the word “means” and references to “a work” should be changed to “that work”. The words “in relation to that work or other subject matter” should also be added after “access control protection measure” in section 116AK(1)(a).

7. Circumvention Device

- 7.1 This definition is qualified by reference to “a person” but the person is only mentioned in paragraph (a). Paragraphs (b) and (c) need to be linked to the person mentioned in the introductory wording.

8. Notes

- 8.1 The Notes in sections 1 and 10 are wrong in principle and wrong in practice. These notes says that devices which are “solely” designed for market segmentation are not TPMs. This is wrong in principal because an unacceptable activity remains unacceptable despite the fact something else is done in conjunction with it. It is wrong in practice because it provides a positive incentive for the intermixture of other purposes into devices for market segmentation. If the market segmentation component was segregated it could be legally circumvented thus achieving stated Government policy now it cannot be. These notes are effectively a legislative endorsement of market segmentation and is contrary to the Government's stated policy on region coding. It will be no great imposition for a manufacturer to enforce a separation between the market segmentation components of a device and the TPM components. The words “designed, in whole or in part,” should replace “solely designed”.

9. Permission Exception

- 9.1 The permission exception (116AK(2) and its counterparts) will be of little practical value. A person accessing a TPMed bundle has no actual knowledge of the contents of the bundle (and therefore who are the relevant copyright holders) until after that access has already occurred. It is arguable that they will never have any grounds for believing that they have the relevant permission. Further, any particular data object will typically contain material from a multitude of copyright owners, few of whom will be disclosed or even discernible on the face of the data. For example, the number of distinct



the third party material for which copyright clearances must be sought) is enormous. Finally, the ACTPM definition is itself conditional upon the application with the permission of the copyright holder – a fact that no end user will be in any position to judge. In these circumstances no one could reasonably be expected to even be able to determine who permission should be sought from, let alone to have received it. The permission exception can only be given meaning if it is drafted in the negative. That is, that the person does not have reason to believe that the person does not have the permission of the relevant copyright holders.

- 9.2 It is not clear that it makes sense to speak of a copyright holder in a work in this context, as there are separate and distinct copyrights in respect of different acts and it is not necessarily the case that those copyrights are all vested in the same person. This is not normally an issue in copyright cases as they relate to infringement and the infringement itself uniquely determines who is the relevant copyright holder. As these provisions do not require an infringement, for liability to attach, the relevant copyright holder (unless there is only one) is indeterminate. The structure of the provisions, is not therefore likely to admit of a clear meaning in all cases (or results in an overbroad meaning). For example, if A holds the copyright in a sound recording incorporated as a sound track into a DVD movie which is the subject of a 116AK circumvention and B holds the broadcast rights in the sound track, who can bring an action for the circumvention?

10. Provides v Distributes

- 10.1 What is intended to be the difference in meaning between these two words (eg section 116AL)?

11. Subdivision E

- 11.1 Unless this will already be the effect under the Criminal Code, the operation of this subdivision should be limited to acts done within Australia.

12. Provisions May Prevent the Sale of DVD Players

- 12.1 No TPM is of any commercial value unless the material which has been placed behind the TPM is able to be accessed. Any access must necessarily involve the circumvention of the TPM but *the manufacture of something which will circumvent the TPM is not subject to a permission or authorisation defence.*

Example:

- 12.2 A places a movie behind an ACTPM and releases it. A states that anyone can write and distribute their own player for the movie if they pay \$1 to A. To play the movie, the player must necessarily decrypt the movie or otherwise bypass the ACTPM. A also states that anyone can play the movie using any third party player as long as A has been paid \$1 for that player. If a third party writes their own player and doesn't pay and never intends to pay A the \$1 for



their player then the use of that player will presumably³ be a circumvention of the ACTPM. If this is the case, *as permission is not a defence to manufacture or distribution*, on what basis can even a person who fully intends to comply with A's conditions manufacture and distribute a player?⁴ A cannot, by granting a permission, allow the manufacturing prohibition to be avoided. In other words, the Draft may make it illegal to manufacture or distribute DVD players irrespective of when those players have been authorised or by whom. This is especially the case for the sections creating an offence.

- 12.3 For a sharper example consider the case where B releases their own movie under an ACTPM which can be decrypted by any player which plays A's movie. Will the dissemination of such a player with the authority of A (or even by A), but against the wishes of B be in breach of the Draft?
- 12.4 The absence of a linkage between the permission to use a device to circumvent and the distribution of that device is a fundamental problem which threatens to undermine the objectives of the entire scheme. It is not clear how to resolve this in the general case, although creating a definition of "circumvent" and limiting it to acts for the sole purpose of infringing a copyright would avoid many of the potential issues.

13. Legal Advice

- 13.1 It is not clear that circumvention is permitted in the course of acquiring legal advice. Such an exception should be included. In this instance, especially as there will be an exposure to criminal sanctions, a requirement that a defendant (ie the legal practitioner) bear the burden of proof would unreasonably limit the access of interested parties to adequate legal advice.

14. Penalties Should be Consistent

- 14.1 Groundless threats of legal proceedings in respect of TPMs can have a profound chilling effect on the industry. Persons making groundless threats of legal proceedings under the Act should be exposed to an award of additional damages in similar terms to those for a breach of the circumvention provisions.

Yours faithfully,

[by email 22 September 2006]

Brendan Scott
Director
Open Source Industry Australia Limited

³ "Presumably" because "circumvent" is not defined in the Act or the Draft, the US equivalent includes (eg) to decrypt a work or bypass a TPM.

⁴ Or, conversely, if this is not the case on what basis can A prevent unauthorised players?



Australian Libraries' Copyright Committee

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Australian Digital Alliance

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Ms Helen Daniels
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON 2600

21 September 2006

Dear Ms Daniels

Re: Copyright Amendment (Technological Protection Measures) Bill 2006

The Australian Digital Alliance (ADA) and Australian Libraries' Copyright Committee (ALCC) write in relation to the *Copyright Amendment (Technological Protection Measures) Bill 2006* ("draft Bill") and thank the Government for the opportunity to consult in relation to this Bill which is extremely important to the interests of both ADA and ALCC members.

2. The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

3. The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- National and State Libraries Australasia
- Australian Council of Archives
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia

4. The ADA and ALCC recognise the hard work of the Attorney-General's Department in achieving draft legislation which acknowledges the important functions of the members of the ADA and ALCC within the context of the Australia-US Free Trade Agreement ("AUSFTA"). We herein make comments, further to those

provided to your department on 3 August 2006 (attached), in relation to remaining areas of concern that we have.

Subsection 10(1): Definitions of Technological Protection Measure and Access Control Technological Protection Measure

5. The ADA and ALCC support the Department's drafting of the definitions of 'technological protection measure' ("TPM") and access control TPM as contained in section 10(1) of the proposed Bill, and particularly, we commend the link to copyright infringement contained in these provisions

6. However, the ADA and ALCC seek further clarification of the following issues raised by these definitions in the Bill:

(a) That regional coding is not intended to be incorporated by the TPM scheme;

7. The ADA and ALCC understand that regional coding is not intended to be covered by the TPM scheme and commend such an approach; however it is not clear whether the wording in the note following the subsection actually has this intended effect. This is particularly so given the insertion of the word 'solely', which may render the note ineffective, particularly if future devices are not designed for one purpose only. The addition of 'solely' therefore makes the provision technologically specific rather than neutral.

8. Furthermore, the ADA and ALCC recommend that the Government's intention to exclude regional coding from the TPM scheme be incorporated in legislation. The use of a note may work to complicate legislative interpretation.

(b) that the TPM scheme will not protect anti-competitive conduct prohibited by the *Trade Practices Act 1974* ("TPA");

9. The ADA and ALCC understand that the intent of the legislation is to not incorporate in the scope of the legislation, circumstances which have anti-competitive effects. We commend such an approach and understand that the draft Bill, by linking the definitions of TPM and access control TPM with copyright infringement, will enable courts to avoid circumstances such as those that arose in the US in the cases of *Skylink*¹ or *Lexmark*², where companies attempted to oust competition via copyright law when there was no identifiable act of copyright infringement, in Australia.

10. The ADA and ALCC however have remaining concerns that the Bill does not adequately address the danger of circumstances where a TPM, whilst protecting material from copyright infringement, is in the particular circumstances in question, facilitating anti-competitive conduct within the meaning of the *TPA*. For example, this

¹ *The Chamberlain Group Inc. v. Skylink Technologies Inc.* No.04-1118, 31 August 2004

² *Lexmark International, Inc., v. Static Control Components, Inc.*, No. 03-5400, 26 October 2004

may particularly be the case with devices that function both to prevent copyright infringement, and to prevent competitors entering a market thus substantially impeding competition in that market contrary to the TPA.

11. Thus, as the ADA and ALCC have submitted previously, it is important that the question of whether a device falls within the definition of 'TPM' depends on how it operates in the particular circumstances in question. If a device, in effect, prevents competition in a market, however the ancillary effect of it is to prevent a copyright infringement, this should not fall within the scope of the definition, particularly where this would cause a conflict with long-standing principles enshrined in Australian law. In other words, there is an important policy consideration in relation to how the law should respond in circumstances where companies developing new technologies utilise access control measures to prevent competitors entering the market for those technologies. Copyright laws should not be able to override principles contained in the TPA.

12. The ADA and ALCC would therefore support clarification in the legislation that TPMs that contravene Australian law are not protected by the TPM scheme. Alternatively, this should be made clear in the explanatory memorandum.

(c) Malfunctioning/ineffective TPMs

13. In our initial submissions to the House of Representatives Legal and Constitutional Affairs Committee inquiring into TPM exceptions, the ADA and ALCC recommended that devices which protect works only by reason of technological obsolescence, be excluded from the definition of TPM, or alternatively that a specific exception be included to allow circumvention. The ADA and ALCC commend the Government for addressing this issue. However, we are concerned that the inability under the scheme (and particularly, section 116AL), to be able to manufacture devices to circumvent ineffective TPMs, would frustrate the Government's exceptions contained at 20Z(k) and (j) of the *Draft Copyright Amendment Regulations 2006* and would therefore effectively protect such TPMs, over and above the requirements of the AUSFTA.

14. The ADA and ALCC therefore recommend that, in accordance with Article 17.4.7 of the AUSFTA, only 'effective' TPMs be protected by the TPM scheme, and that the definitions of 'TPM' and 'access control TPM' be amended to exclude ineffective or malfunctioning TPMs.

(d) *Stevens v. Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (6 October 2005) and Consistency with Australian Law

15. The definition of TPM in the Government's implementation of the AUSFTA ensures that TPM is linked directly to copyright infringement. The ADA and ALCC strongly support and commend this approach. However, we have remaining concerns that the draft Bill only partly implements the important precedent of *Stevens v. Sony*.

16. In this regard, the ADA and ALCC recommend implementation of the principles of the *Stevens v. Sony* case to ensure that the various essential attributes of Australian law referred to therein, are reflected in this legislation:

“Moreover, the submissions in the present case...called to attention a number of considerations that may need to be given weight in any clarification of the definition of TPM... Such considerations included the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. They are integrated in the protection which that law offers to the copyright owner's interest in its intellectual property.” (*Per Kirby J, at 224*)

17. The ADA and ALCC thus believe that clarification that the TPM scheme does not intend to override principles of Australian law, including trade practices laws and fair dealing laws, will ensure not only consistency with *Stevens v. Sony* but also, that the TPM scheme fits neatly within the overall framework of Australian law.

(e) Broadcasts and the operation of Part VAA of the Copyright Act

18. The definition of TPM in the draft legislation includes devices which protect both works and subject matter other than works including broadcasts. This is not in accordance with what the ADA and ALCC initially understood would be the case. The ADA and ALCC therefore seek clarification in relation to why broadcasts are included in the scope of the TPM scheme, particularly given that the AUSFTA does not require that broadcasts be covered by the scheme.

19. The ADA and ALCC further seek clarification in relation to how the TPM scheme is intended to operate in relation to the scheme set out in Part VAA of the Act regarding broadcast decoding devices. We particularly seek clarification regarding whether defendants may be caught by both schemes in relation to the same set of circumstances.

Subsection 10(1) Definitions of circumvention device and circumvention service

20. The ADA and ALCC are concerned that the proposed definitions of circumvention device and circumvention service are unduly broad. Devices and services which are ‘promoted, advertised, or marketed as having the purpose of circumventing the TPM’ will fall within the scope of the definition of circumvention device or service, even if they are not in fact circumvention devices or services.

21. The ADA and ALCC seek clarification that the intention of provisions 116AL and s132APB is that those sections will not be contravened unless the circumvention

device is a **circumvention device for a TPM**, meaning that in effect a device which circumvents another device which is not a TPM is not a circumvention device.

22. The ADA and ALCC are concerned that the new definition of circumvention device may lead to confusion and prefer the definition currently in the *Copyright Act 1968*.

Sections 116AL-O Manufacturing, Providing etc., a circumvention device or service

23. These draft provisions remain an important concern for the ADA and ALCC. We reiterate our comments made to you in our letter of 3 August 2006 that logic requires that the draft Bill must ensure that the exceptions to the ban on circumvention can be properly utilised via access to circumvention devices and services.

24. The ADA and ALCC are of the view that this could be done via inclusion of a provision akin to section 116A (3) of the current *Copyright Act 1968* which permits the supply of circumvention devices and services to a person for use for a permitted purpose. This type of provision would ensure, not only that the exceptions are workable, but also that devices can only be dealt with in the limited circumstances prescribed by law, and compliant with the AUSFTA.

25. Alternatively, the ADA and ALCC support the view that remedies for breach of the TPM scheme should not be available in cases where a person does a prohibited act pursuant to s.116AL only to assist a person who has appropriately used an available exception. Legal commentary³ has discussed legislative options for such an approach; for example, remedies for breach could be made contingent upon harm being shown by the plaintiff, with a presumption that there is no harm resulting from acts assisting a person with the benefit of an exception.

26. The ADA and ALCC also understand that the word 'person' in the draft Bill will be defined in accordance with section 22 of the *Acts Interpretation Act 1901*, to mean 'a body politic or corporate as well as an individual'. The ADA and ALCC strongly support the maintenance of this definition to ensure that the TPM scheme is workable within institutions. The scheme would not be workable if 'person' were to be defined as 'individual'.

27. In summary, it is essential for ADA and ALCC members that provisions relating to manufacturing etc. a circumvention device and providing etc. a circumvention service (proposed section 116AM), facilitate the proper operation of the TPM scheme. Institutions particularly will be affected if the legal mechanism by which the TPM exceptions may be used is not clear, given their accountability and thus risk averse practices. Pirates on the other hand will no doubt be prepared to circumvent these laws. Many ADA and ALCC members do not have the resources or know-how to manufacture circumvention devices themselves and will require a legal mechanism which allows them to share information and/or devices between them, in order to take advantage of the exceptions.

³ For example, see the comments of Ms Kimberlee Weatherall on "Weatherall's Law" (<http://weatherall.blogspot.com/>), post dated 15 July 2006.

202A Groundless threats of legal proceedings in relation to circumventing an access control technological protection measure

28. The ADA and ALCC support the inclusion of this section to deter groundless threats of legal proceedings. However, we view the current scope of the provision as outlined in the draft Bill as too narrow to effectively deter groundless legal threats altogether. For example, a plaintiff could avoid the effect of the provision by threatening to bring an action under 116AL instead. We would therefore support the extension of this provision to cover:

- Groundless legal threats to bring actions under 116AL & AM
- As per 116AO(2)(c) a provision allowing a court to take into account the flagrancy of the defendant's acts that are the subject of the action and any detriment to the defendant as a result of those actions.

Criminal Penalty Provision: Sections 132APB & 132 APC

29. The ADA and ALCC seek clarification in relation to:

- a) The breadth of the criminal penalty provision at sections 132APB and 132APC;
- b) The relationship of these provisions to the civil liability provisions at sections 116AL and 116AM.

30. The ADA and ALCC are concerned that people will risk imprisonment for manufacturing etc. a circumvention device or providing etc., a circumvention service if that act is done 'with the intention of obtaining a commercial advantage or profit'.

31. As noted above, many public organisations or indeed small private organisations simply do not have the know-how or technical expertise to manufacture circumvention devices in-house. Thus, the ADA and ALCC envisage many situations where an institution or private organisation might engage a consultant to provide them with a circumvention device or service in circumstances where the consultant reasonably believes that the institution or company is entitled to circumvent a TPM in order to access material legitimately acquired. Of course, in such circumstances it is most probable that the consultant providing the device or service will be seeking a fee, thus the element of 'intention of obtaining a commercial advantage or profit' will very easily be proved.

32. Given the heavy penalties available for commission of these offences, the ADA and ALCC submit that it is essential that these provisions apply only where the intention of obtaining a commercial advantage or profit is:

- a) Linked to an intentional act of infringement; and
- b) Results in infringement on a commercial scale.

33. Our main concern here are that these provisions will act as a huge disincentive to those providing potential circumvention devices and services, even in circumstances where circumvention is legitimate, in aid of an exception, or unrelated to copyright infringement. Thus, this will amplify the 'lamentable and inexcusable flaw' contained in the AUSFTA and implemented via 116AL as discussed above.

Contracting Out

34. It is imperative that contractual provisions purporting to exclude or modify any of the exceptions in the Copyright Act, including the TPM exceptions, are unenforceable. Unequal bargaining power between 'owners' and 'users' necessitates the inclusion of such a provision. As the ADA and ALCC have argued in the context of the Fair Use and Other Copyright Exceptions Review, failure to clarify this issue by way of legislative reform frustrates the very policy justifications for including exceptions in the Act. 'Balance' between owners and users cannot be achieved through exceptions if the exceptions can be easily excluded.

35. In relation to the provisions at sections 47B(3)- 47F of the Copyright Act, the policy justification behind inclusion of section 47H will be frustrated if there is no equivalent provision in the TPM exceptions.

The ADA and ALCC thank the Government for this opportunity to consult in relation to the proposed TPM scheme. Please do not hesitate to contact the writer should you have any further queries or concerns.

Yours sincerely,

Sarah Waladan
Australian Digital Alliance
Australian Libraries' Copyright Committee



Cyberspace Law and Policy Centre
A Centre for the Public Interest in Networked Transactions

Submission on the exposure draft Bill on technological protection measures (TPMs)

**Graham Greenleaf, Alana Maurushat, David Vaile,
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22 September 2006

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Introduction

This submission is by the following researchers at the Cyberspace Law & Policy Centre <<http://www.cyberlawcentre.org/>>, University of New South Wales Faculty of Law: Professor Graham Greenleaf and David Vaile (Co-Directors), Alana Maurushat, Catherine Bond and Abi Paramaguru (postgraduate researchers). The Centre's focus is on research into networked transactions, from a public interest perspective.

The authors are involved in the 'Unlocking IP' project, an ARC-funded project which examines the protection and expansion of Australia's information commons¹. Other investigators in the project have not been involved in the preparation of this submission.

Criticism of the general approach

Our general approach is that we consider that the approach taken to TPM protection in the current provisions, the Australia-US Free Trade Agreement, and the proposed amendments are all undesirably broad. Aspects of the provisions that in our view are not in the public interest include that they do not allow for exemptions for circumventions for the purposes of exercising fair dealing rights, or to access materials not protected by copyright, or for other uses allowed by law. Furthermore, some supply of circumvention devices for these purposes should be allowed.

However, the focus of this submission is on improvements to the current proposals that are feasible, given that the amendments to copyright law required by the Australia-US Free Trade Agreement (AUSFTA) makes the continuation or alteration of certain aspects of TPM law now unavoidable.

Support for certain provisions

There are a number of aspect of the draft Bill which we wish to support as improvements on the current legislation. We do not discuss these in detail later in the submission.

- ☐ The overall attempt to ensure that TPMs must be connected with copyright infringement is supported strongly, but we make suggestions for improvement
- ☐ The proposed action for groundless threats of legal proceedings (s202A) is highly desirable because of the potential these provisions have to be mis-used to deter legitimate research and to support otherwise anti-competitive conduct.
- ☐ The limiting of criminal liability only to cases where a person engages in the conduct for the purpose of "commercial advantage or profit."
- ☐ The exception relating to interoperability is necessary from a competition and consumer perspective, and will help to reduce barriers to entry to various markets.
- ☐ In general, the proposed exemptions are desirable, but deserve to be strengthened.

Undesirable breadth of definitions of TPM and circumvention

¹ See <<http://www.cyberlawcentre.org/unlocking-ip/>> and particularly the Background Paper contained there.

Removal of 'effective' from the definition of TPM

In our view, the definition of 'technological protection measure' in s10(1) is inconsistent with the Australia-United States Free Trade Agreement (FTA), the WIPO Copyright Treaty (WCT), the WIPO Performances and Phonograms Treaty (WPPT), and Australian case law.

FTA: Section 17.1.4.7(b) explicitly defines an "effective technological measure" keeping with the language utilized by the WCT and WPPT. The definition under the current draft bill excludes "effective." This is a derogation from the FTA, WCT and WPPT. We further note that the FTA section does not adequately define what is meant by the word "effective". Any definition of "effective technological measure" in the *Copyright Act* should do so. Our suggested wording is found in our submission below.

WCT and WPPT: Article 11 WCT and Article 18 WPPT mandate that legal protection of *effective* technological measures. There have been many suggestions by experts as to the meaning of "effective" in this context. One relatively uncontroversial conclusion that can be drawn is that *not every* TPM is subject to legal protection. This supposition is supported in the wording of the FTA as well as in Australian case law.

Australian case law: The original definition of "technological protection measure" in s10 of the *Copyright Act 1968* did not include the term "effective." The definition of "circumvention device", however, specifically referred to "an effective technological protection measure." The issue of what constituted an "effective technological protection measure" became one of the main issues in the decisions leading up to the High Court of Australia decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58. Prior to the appeals at the Federal Court and later the High Court of Australia, the word "effective" was removed from the definition of 'circumvention device' by the *Copyright Amendment (Parallel Importation) Act 2003*. While the two appeals did not deal specifically with the notion of "effective", the High Court made specific references to the rejection of the definition suggested by the Australian Parliamentary Committee by the International Intellectual Property Alliance (IPA), which definition mirrored the provision in the United States in the *Digital Millennium Copyright Act of 1998* (DMCA). In the AUSFTA, however, Australia has explicitly adopted the wording as proposed by IPA and as reflected in the DMCA. The FTA wording, as noted above, specifically refers to *effective technological measure*.

Importance of re-affirming that TPMs must be 'effective'

The removal of the term *effective technological protection measure* from the definition of *technological protection measure* and *circumvention device* may have unintended consequences:

- It would expand the scope of protection to weak and often ineffective technologies which should not be given legal protection. These would include: passwords, basic cipher / rot technologies (i.e., the mere shifting of letters, eg. a=c, d=f), exclusive technologies (i.e., white coloured "H" with black background becomes a black coloured "H" with white background) - all basic encryption technologies known since the 9th Century. This example is not merely whimsical. The criminal charges brought under the DMCA (later dismissed) against Russian computer scientist, Dmitri

Sklyarov, involved his circumventing such 9th Century techniques (exclusive and not encryption technologies).

It allows for a host of potentially abusive litigation. The United States has had cases of TPMs involving cell phones, printer cartridges and garage door openers. These cases were not about copyright (and in certain instances were rightfully dismissed as such) but involved anti-competitive practices to gain advantage in the market. While it is likely that the Australian courts would dismiss such legal actions as they are clearly an abrogation from the principles in the *Copyright Act*, the damage would have already been done. As prominent Internet analyst Michael Geist notes, "the mere threat of a lawsuit is frequently enough to dissuade many companies from entering the market or from developing an innovation new product."²

Unlike in the United States, the Australian courts have not adopted the principle of copyright misuse. This equitable defence in American law is applicable to cases of infringement where the plaintiff's actions expand copyright beyond the limits imposed by copyright law (eg. anticompetitive acts). It is therefore essential for Australian legislation to deter inappropriate and abusive litigation.

The definition needs to be amended to restore 'effectiveness' as an element of a TPM.

Submission 1: Section 10(1) should be amended to become a definition of an 'effective technological protection measure' and its wording should be altered so that (b) refers to 'effectively prevent or inhibit the doing on an act'³.

ACTPMs should be 'effective'

The definition of 'access control technological protection measure' has the same deficiency. Please refer to suggestions and arguments as presented in the above section on definition of *effective technological protection measure*.

Submission 2: Definition of 'access control technological protection measure' in subsection 10(1) should be amended to reflect the proposed wording change in the definition of effective technological protection measure.

Market segmentation

The proposed wording of the note to exclude market segmentation may not achieve its

² M Geist, '30 Days of DRM' at <<http://www.michaelgeist.ca/daysofdrm>>

³ In other words we suggest a change to "Repeal the definition, substitute:

effective technological protection measure means an device, product or component (including a computer program) that:

(a) is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and

(b) is designed, in the normal course of its operation, to **effectively** prevent or inhibit the doing on an act:

(i) that is comprised in the copyright; and

(ii) that would infringe the copyright"

intended goal. Technological protection measures, specifically those which utilize computer programs, are often developed for multi-purposes. The computer code used in the program is often not set out in a manner which would allow someone to separate the market segmentation components from other components. For example, the TPM used in computer game consoles performs two distinct functions: (1) region coding / market segmentation, and (2) prevents unauthorized games from playing on its console. These two functions may be separated but the computer code performing these functions may be inseparable.

The proposed wording of "solely designed to control market segmentation" would allow a company to design a TPM with multi-functions in order to continue to utilize market segmentation.

Submission 3: The current wording found in the clarification note related to market segmentation in the definitions of *access control technological protection measure* and *technological protection measure* requires rewording to better achieve its intended goal.

Submission 4: Remove the word "solely" from the "Notes" found in the definition of '*access control technological protection measure*' and '*technological protection measure*', and insert '*effective*' where appropriate⁴.

Undesirable breadth of definition of circumvention

Section 116AK(1) defines the action for the act of circumvention of an AC-TPM, though 'circumvention' remains undefined. If a person does an act which circumvents an AC-TPM without causing any breach of copyright (for example, if they only do so in order to reproduce a work which is in the public domain, or to exercise a right of fair dealing), then there is no good policy reason why such circumvention should be prohibited.

The AUSFTA cl 7(a)(i) refers to TPMs that copyright owners 'use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works' and that circumvent a TPM that controls access to a protected work. Where an act of circumvention does not result in a breach of an owner's copyright cl 7 could be interpreted to only apply where an actual circumvention results.

Submission 5: Concerning the meaning of circumvention, s116AK(1) should have added a clause (c) "and the act results in a breach of copyright in the work or other subject matter by the person or another person".

Without such an addition the attempt to limit protection of TPMs to those situations connected with copyright protection will be ineffective.

Need to strengthen exceptions

We consider all of the following exceptions to be desirable, but requiring some improvement. The inclusion of specific exceptions, especially those which involve functions related to the

⁴ In other words, to read: 'Note: To avoid doubt, a device, product or component (including a computer program) that is ["solely" removed] designed to control market segmentation is not an access control technological protection measure / effective technological protection measure.'

computer science community, is very desirable.

The comments below reflect a combined reading each of the interoperability sections (circumvention of an access control TPM, manufacturing of a circumvention device, and circumvention service). Suggestions are, however, only put forth for in the first instance, circumvention of an access control TPM.

Permission exception

We strongly support this exception, in particular the 'reasonable grounds' test, which will avoid accidental infringement where a person was acting in good faith on the belief of permission. However, it should also apply to those activities where at present it is not mentioned, such as ss.116AL and ss.116AM, manufacturing or providing a circumvention device. For example, the owner should be able to give effective permission to a third party to manufacture or provide a circumvention device, which manufacture or provision would under the draft be not permitted even though the use of the device or service would be.

Submission 6: The Permission exception should also apply to those activities where at present it is not mentioned, such as ss.116AL and ss.116AM, manufacturing or providing a circumvention device.

Interoperability exception

The limitation of the interoperability exception for only access control TPMs, and not TPMs generally, is problematic for a number of reasons:

- ☐ **Access control and copy control TPMs may be difficult to categorize.** TPMs very often display both access control and use control characteristics. Where TPMs have both access and copy characteristics, the adoption of a legal exception that only authorizes one form will inevitably lead to more confusion than clarity in its practical application. For example, a prevalent form of copy control technology is a digital rights management system (DRM). DRMS often incorporate TPMs in their applications. A DRM consists of two components: a database containing information which identifies the content and rightsholders of a work, and a licensing arrangement which establishes the terms of use for the underlying work. DRMs often include digital rights language software such as XrML. Technologies such as XrML have the ability to set licensing terms and the technological capability of controlling both the use of and access to a work well beyond the boundaries of the copyright regime. The interoperability exception solely authorizing circumvention of access control measures becomes inapplicable.
- ☐ **Exceptions may be rendered void by licensing provisions.** The current amendments to the *Copyright Act* pose confusion in the area of fair dealings defences and the exceptions to the circumvention of technological protection measures. It is unclear as to whether licensing provisions may lawfully prohibit exceptions to the circumvention of TPMs. This type of approach should be strongly avoided. Clarification may be required in the Act on this point.

Concerning the offences created under section 132APA, as previous discussed, TPMs often display access and copy functions; they are difficult to categorize. It therefore seems illogical

that a person would only commit an offence where an access control TPM has been circumvented.

Interoperability relates not only to computer programs but also to devices, products, and components. Please refer to section on exception - computer security testing.

Submission 7: Concerning interoperability, amend "access control technological measure" to "technological protection measure" as paralleled in the manufacturing of devices and circumvention sections in s116AK(3)(a).

Submission 8: Concerning interoperability, amend "access control technological measure" in s132APA (1)(c) and 132APA(3)(a) to "technological protection measure."

Submission 9: Amend "a copy of a computer program (the original program)" to "a device, product, component or computer program (the original program)" in each of s116AK(3)(b)(i) and s132APA(3)(b)(i).

Encryption research exception

Please refer to above arguments for interoperability exception.

Submission 10: Amend "access control technological measure" to "technological protection measure" as paralleled in the manufacturing of devices and circumvention sections in s116AK(4).

Submission 11: Amend "access control technological measure" in s132APA(4)(a) to "technological protection measure."

Computer security testing exception

Please refer to above arguments for interoperability exception.

The computer security testing as presently worded only includes acts related to copies of a computer program. No harm could be done by broadening the exception to include devices, products, and component. This is perhaps best illustrated by way of example. Many USB devices (memory sticks) now incorporate finger print identification technology. A variety of information may be stored on USB devices from personal information to photographs and works protected by copyright. The finger print identification function would be considered an access control TPM. The ability to perform security testing on this device would be imperative. The current wording of the exception may prevent such types of testing.

Submission 12: Concerning computer security testing, amend "access control technological measure" to "technological protection measure" as paralleled in the manufacturing of devices and circumvention sections in s. 116AK(5)(a).

Submission 13: Concerning computer security testing, amend "a copy of a computer program (the original program)" to "a device, product, component or computer program (the original program)" in s. 116AK(5)(b)(i).

Submission 14: Concerning computer security testing, amend "a copy of a

computer program (the original program)" to "a device, product, component or computer program (the original program)" in s.132APA(5)(b)(i).

Online privacy exception

The exception for online privacy, while commendable in sentiment, will not as presently drafted be effective to protect privacy as is required by Australian law. The problem is that the proposed exception only allows self-defence against a TPM where it has an 'undisclosed capability' to collect or disseminate personally identifying information.

In contrast, the *Privacy Act 1988*'s National Privacy Principles will in some situation make mere disclosure of 'capability' (whatever that means) insufficient for compliance with the Act. Excessive, unlawful, unfair or unreasonably intrusive collection of personal information will breach the Act (NPPs 1.1, 1.2). Collection without the provision of the required statutory notice (NPP 1.3 items (a)-(f)) will also breach the Act. These deficiencies, where they apply because of the collection of personal information, cannot be cured by a TPM having a 'disclosed capacity'. Similarly, where a TPM discloses personal information that it collects to some other person, there may easily be a breach of NPP 2, and once again it may not be cured by disclosure of the TPM's 'capacity'. Under some circumstances there may be further breaches if personal information is transferred overseas (NPP 9, 'Transborder data flows'). In summary, Australian law does not allow a breach of privacy law to be avoided by announcing an intention to do so.

It is not uncommon (though not universal) for TPMs to collect personal information about users of works (NPP 1), and to transfer that information (via Internet) to the owner of the copyright work or their representative (NPP 2), including in cases where the recipient may be overseas (NPP 9). Questions may also arise about the adequacy of the security of the information (NPP 4). Particularly in cases where the recipient of the information may be overseas and any attempts to obtain remedies through the Australian Privacy Commissioner or the Courts may be futile, Australian consumers need to have some means of self-defence against privacy-invasive TPMs.

Submission 15: There should be added an additional exception to s116AK, "Subsection (1) does not apply if the person using the access control technological protection measure uses it in a way which breaches the *Privacy Act 1988*."

Alternatively, the exception discussed below under 'An additional exception for breaches of Australian law' would have the same effect.

Law enforcement and national security exception

We support this exception but think the logic behind it should be extended, as noted below under 'An additional exception for breaches of Australian law'.

Libraries exception

We support this exception but consider that additional exceptions in relation to libraries and archives are needed.

Prescribed acts - Exceptions by regulations

The Bill allows the Minister to recommend to the Governor-General that additional prescribed acts appear in the Regulations if a submission is made to the Minister and fulfils the elements of section 116AK(12). Section 116AK(13) states that if the Minister receives such a submission, a recommendation must be made within four years of receiving this submission.

This provision does not fully reflect what the AUSFTA allows. Article 17.4.7(e)(viii) of the AUSFTA states the an exception may be made for "non-infringing uses of a work...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."

This issue was dealt with in Chapter 5 of the House of Representatives Standing Committee on Legal and Constitutional Affairs *Review of Technological Protection Measures Exceptions*. The Committee recommended the Attorney General's Department conduct "a statutorily defined, public administrative review" (Recommendation 36).

In our view, while it is desirable that the Minister should be able to respond quickly with an exemption by regulation when a need is demonstrated, 116AK should also explicitly allow for Parliamentary consideration of exceptions at least every four years, including a calling for submissions from the public regarding possible new exceptions, resulting in recommendations to the Minister. Such a periodic public review will allow the TPM legislation and the exceptions to better suit the changing requirements of society and technology.

Submission 16: Section 116AK should include a clause explicitly stating that a Parliamentary review of the exceptions to circumvention of a technological protection measures must occur at least every four years, as allowed under the terms of the AUSFTA.

Suggested additional exceptions

We appreciate that the FTA sets out a procedure by which additional exceptions may be created. As noted above, we think the legislative implementation of this procedure could be approved. We consider that the first additional exception that we suggest below (re breaches of Australian law) should be included in the legislation now. The other exceptions suggested would be appropriate for implementation by subsequent regulations and compliance with FTA procedures.

An additional exception for breaches of Australian law

A TPM should not obtain legal protection where its operation results in a breach of Australian law. The new limitation on the definition of TPMs to exclude market segmentation devices recognises that TPMs should not be allowed to breach trade practices laws. The exception for law enforcement, national security and other government functions recognises that public agencies should have the right to circumvent TPMs wherever they do so in order to carry out their legal duties. The revisions to the privacy exemption proposed above are based on the same principle.

It would clearly be good policy, and consistent with these examples, to also have a general exemption from protection wherever the operation of a TPM is in breach of Australian law. It is impossible to anticipate all situations where such breaches of the law by use of a TPM may occur. A person against whom action is taken for circumvention of a TPM should be able to raise the illegality of that TPM's use as a defence to the alleged act of circumvention. In the circumstances suggested, this constitutes self-defence against an illegal act. The person raising the defence will have the onus of proof of the illegality.

There is no reason why the FTA should reward breaches of Australian law with legal protection for the TPM instrumental in the breach. The FTA does not need to explicitly recognise such an exception, but in any event such a limitation can be read as implied by the FTA in a number of ways. Clause 7(b) refers to an 'effective' TPM, and to one which 'in the normal course of its operation' controls access or protects copyright. A TPM is not 'effective' if it requires illegal means to achieve effectiveness, and a 'normal course of operations' should not involve illegal acts.

Submission 17: There should be added an additional exception to s116AK, "Subsection (1) does not apply if the person using the access control technological protection measure uses it for a purpose which is in breach of Australian law."

An additional exception for orphan works

"Orphan works" are works where it is impossible for a potential user to contact the owner to ask permission to undertake certain acts in relation to the work. Unless potential users are willing to breach copyright in the work, it remains unused or underused until it enters the public domain through expiry of the duration of copyright (and there may be difficulties in calculating when that occurs).

The proposed Bill would further exacerbate the problem of orphan works. If a TPM is applied to a work and the work subsequently becomes an 'orphan', the public will be unable to utilise the work, even if there is created a copyright exception in relation to orphan works. There will be no way for the public to legitimately circumvent the TPM in order to access the underlying, abandoned work if permission cannot be sought from the copyright owner. However, under these circumstances there is no reason to assume that the copyright owner wishes the TPM protection to continue, since they have abandoned the work itself.

The proposed *Copyright Amendment Regulations 2006* provide an exception for libraries to circumvent a TPM in order to reproduce or communicate a part of the whole of an article or published work to a person for research or study, pursuant to section 49 of the existing *Copyright Act*, which may sometimes be relevant here. However, there needs to be an assurance that ordinary usage of the work can be guaranteed beyond this limited exception.

The Legal and Constitutional Affairs in its *Review of Technological Protection Measures Exceptions* said "the Committee would also support any moves to render the use of 'orphaned' works non-infringing". In our view the Act should explicitly deal with this issue as soon as possible. The absence of such a provision could have a significantly detrimental impact on the development of the information commons, with the impact being irreversible if the issue is not dealt with appropriately. While it is understandable that the Government may be apprehensive about introducing a broad exception allowing the public to circumvent a

TPM in these circumstances, a broader exception permitting libraries, archives and educational institutions to do so is preferable. Although there is no specific provision identifying this issue in the AUSFTA, Article 17.4.7(e)(viii) is sufficiently broad to permit this exception, given the "actual or likely impact on non-infringing uses" that these problems may have.

Submission 18: If the government addresses the need for an exception to copyright infringement in relation to orphan works (as we think it should), then it should also address by regulation the need for an exception allowing circumvention of TPMs which protect them.

An additional exception for orphan TPMs

A second issue arises in relation to potential 'orphan' TPMs. Recommendation 18 of the House of Representatives Standing Committee on Legal and Constitutional Affairs in its *Review of Technological Protection Measures Exceptions* stated that if the "tinkering, decompilation and exploitation of 'abandonware' " becomes non-infringing, a TPM exception should accordingly be created. We agree, but note that TPMs are themselves capable of becoming 'abandonware'. Such 'orphan TPMs' do not come under the "malfunctioning technological protection measures" exception provided in the *Copyright Amendment Regulations 2006*, so a separate exception will be needed.

There are good reasons to allow circumvention of such 'orphan TPMs'. The extent to which the proposed amendments will protect TPMs used by third parties (persons other than the owner of the work or persons acting on the owner's behalf) to restrict access to a work is somewhat uncertain. But to the extent that they do, then it may be difficult or impossible for anyone to obtain access to such works, whether they have the consent of the copyright owner or whether they have some other legitimate reason to access the work. In such cases where a person has a right to use a work, and the TPM has not been used on behalf of the copyright owner, there should be a right to circumvent it.

Submission 19: Whether or not the Government creates an exception for 'abandonware' (as we think it should), it should introduce an additional exception that explicitly allows a person who has a right to use a work to circumvent an orphan TPM, where that TPM has not been used by or on behalf of the owner of copyright in the work.

Summary of submissions

Submission 1: Section 10(1) should be amended to become a definition of an 'effective technological protection measure' and its wording should be altered so that (b) refers to 'effectively prevent or inhibit the doing on an act'.

Submission 2: Definition of 'access control technological protection measure' in subsection 10(1) should be amended to reflect the proposed wording change in the definition of effective technological protection measure.

Submission 3: The current wording found in the clarification note related to market segmentation in the definitions of *access control technological protection measure* and *technological protection measure* requires rewording to better

achieve its intended goal.

Submission 4: Remove the word "solely" from the "Notes" found in the definition of 'access control technological protection measure' and 'technological protection measure', and insert 'effective' where appropriate.

Submission 5: Concerning the meaning of circumvention, s116AK(1) should have added a clause (c) "and the act results in a breach of copyright in the work or other subject matter by the person or another person".

Submission 6: The Permission exception should also apply to those activities where at present it is not mentioned, such as ss.116AL and ss.116AM, manufacturing or providing a circumvention device.

Submission 7: Concerning interoperability, amend "access control technological measure" to "technological protection measure" as paralleled in the manufacturing of devices and circumvention sections in s. 116AK(3)(a).

Submission 8: Concerning interoperability, amend "access control technological measure" in s. 132APA (1)(c) and 132APA(3)(a) to "technological protection measure."

Submission 9: Amend "a copy of a computer program (the original program)" to "a device, product, component or computer program (the original program)" in each of s. 116AK(3)(b)(i) and s.132APA(3)(b)(i).

Submission 10: Amend "access control technological measure" to "technological protection measure" as paralleled in the manufacturing of devices and circumvention sections in s. 116AK(4).

Submission 11: Amend "access control technological measure" in s. 132APA(4)(a) to "technological protection measure."

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protection measures must occur at least every four years, as allowed under the terms of the AUSFTA.

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Submission 18: If the government addresses the need for an exception to copyright infringement in relation to orphan works (as we think it should), then it should also address by regulation the need for an exception allowing circumvention of TPMs which protect them.

Submission 19: Whether or not the Government creates an exception for 'abandonware' (as we think it should), it should introduce an additional exception that explicitly allows a person who has a right to use a work to circumvent an orphan TPM, where that TPM has not been used by or on behalf of the owner of copyright in the work.



AUSTRALIAN
COPYRIGHT
COUNCIL



***Submission on Copyright Amendment
(Technological Protection Measures) Bill
2006***

September 2006

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions on the Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006.

Context for the Bill

3. The Bill is intended to implement Australia's obligations under Article 17.4.7 of the Australia-United States Free Trade Agreement (AUSFTA). The Bill would amend, and add to, existing provisions relating to technological protection measures (TPMs) in Part V Division 2A, and s132 of the Copyright Act. The existing provisions are intended to comply with the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
4. WCT Article 11 provides:
Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.
5. WPPT Article 18 is in similar terms.¹
6. These treaties set out minimum standards for contracting parties. Neither treaty prevents a contracting party from introducing protection which is more extensive than the required minimum.

¹ Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Scope of protection

AUSFTA provisions

7. AUSFTA Article 17.4.7 sets out the parties' obligations regarding technological protection measures.
8. The first part of AUSFTA Article 17.4.7(a) sets out the purpose of the remedies and penalties required by the second part of 17.4.7(a):

in order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers and producers of phonograms use in connection with the exercise of their rights
9. The second part of 17.4.7(a) requires the AUSFTA parties to provide remedies and penalties in relation to:
 - circumventing an effective technological measure that controls access to a work, and
 - trafficking in certain devices and services connected to circumvention.
10. Article 17.4.7(b) provides that "effective technological measure" means:

any technology, device or component that, in the normal course of its operation:

 - controls access to a protected work, performance or phonogram, **or**
 - protects any copyright.

"Access control technological protection measure"

11. The proposed definition of "access control technological protection measure" would only apply to something which is designed

to prevent or inhibit the doing of an act:

 - (i) *that is comprised in the copyright, and*
 - (ii) *that would infringe copyright.*
12. The condition in (i) would exclude from the definition a measure intended to control access to material whose consumption or use, after access has been achieved, would not result in an act comprised in the copyright.
13. It would also exclude a measure intended to prevent or inhibit secondary infringement – such as importation for commercial purposes (ss37 and 102), distribution of infringing articles (ss38 and 103) and authorisation of infringement.
14. The condition in (i) is not required by the AUSFTA or by the WIPO treaties. On the contrary, its inclusion renders the proposed new definition too narrow for compliance with either.
15. The government's *Summary of exposure draft provisions on technological protection measures* says:

*Technological protection measures are technical locks copyright owners use to stop their copyright material from being copied **or** accessed (eg passwords, encryption software and access codes). [emphasis added]*

16. This statement is not, however, reflected in the drafting.
17. The government appears to have taken the view that the meaning of "effective technological measure" in the AUSFTA may be limited by reference to the expression of purpose in the first part of Article 17.4.7(a). We think this interpretation of the AUSFTA is incorrect.
18. In any event, in our view, a measure used by a copyright owner to prevent or inhibit unauthorised viewing or listening or use of copyright material is a measure used "in connection with the exercise of [the owner's] rights" that "restrict[s] unauthorised acts in respect of" the owner's copyright material. We do think that "unauthorised acts" is not confined to acts comprised in the copyright.
19. For example, an access control TPM on an audiovisual file may, when unlocked, allow a person to view the contents of the file on a screen. The technical process that enables the person to view the contents of the file may not involve an act comprised in the copyright. An alternative technological solution for achieving the same end result – that is, a person becomes entitled to view the contents of a file after being authorised to unlock the access control TPM – may result in an act comprised in the copyright. The government's approach would arbitrarily protect the second technological solution, but not the first.
20. The government's approach may thus force copyright owners to adopt technological solutions which produce incidental reproductions – not necessary for the delivery of the content – in order to get the protection of the TPM provisions. Even this may not be commercially feasible for organisations which have already made significant investments developing business models, and accompanying technology, relating to payment for authorised access.
21. We also take the view that a TPM designed to prevent or inhibit secondary infringement is a measure used "in connection with the exercise of [the owner's] rights" that "restrict[s] unauthorised acts in respect of" the owner's copyright material.

"Technological protection measure"

22. Our concerns about the limitation of "access control technological protection measure" to measures designed to prevent or inhibit the doing of an act comprised in the copyright also apply to the definition of "technological protection measure".

Reference to "and includes an access control technological measure" in TPM definition

23. The proposed definition of "technological protection measure" includes the phrase "and includes an access control technological measure". The inclusion of this phrase is ambiguous: it is not clear whether the effect of including the phrase is that a TPM **must** include an access control technological protection measure, or that an access control technological protection measure is **also** a technological protection measure.
24. We assume, from the AUSFTA, that the latter is intended. If that is the case, it would be clearer to omit the reference to "access control technological protection measure" from the definition of "technological protection measure", and define "access control technological measure" by reference to the definition of "technological protection

measure" – that is: a technological protection measure that is designed to prevent those who do not have the permission of the copyright owner or exclusive licensee from getting access to copyright material.

Aims of the bill

25. The approach in the bill is at odds with the aims of the bill, which the government stated in its media release of 4 September include

to increase the availability of music, film and games in digital form

and in its *Summary of exposure draft provisions on technological protection measures* as

create a more secure environment for copyright owners to release their copyright materials

with the result that

more material will be made available digitally and through online distribution channels.

"Inappropriate" reliance on the TPM provisions

26. The government's *Summary of exposure draft provisions on technological protection measures* says:

The scheme will not cover TPMs which are not designed to prevent or inhibit people from infringing copyright. The scheme will not apply to TPMs solely designed for other purposes, such as market segmentation (eg region coding) or the protection against competition in aftermarket goods (eg spare parts) where the TPM does not have a connection with copyright.

27. The statement apparently refers to US cases involving TPMs such as *Lexmark v Static Components*, *Chamberlain v Skylink*, and *Storage Technology Corp v Custom Hardware Engineering Consulting Inc*. These cases all concerned access controls on computer programs, which were circumvented by competitors in order to develop a competing product or service. Access to the computer program in each case was not an end in itself; it was a means to an end of producing a competing product or service (recycled toner cartridges, universal garage door openers, data maintenance services).
28. Unfortunately, the government's approach goes much further than addressing the concerns in the above statement. The lack of focus has resulted in limitations on the scope of protection which are inconsistent with the government's objectives for the provisions, and inconsistent with Australia's treaty obligations.
29. In our view, concerns about inappropriate reliance on the TPM provisions should be addressed in defences to liability, not by limiting the scope of protection.
30. There are defences in the Bill specifically relating to computer programs. Where the limitations described in the government's summary are not met by the exceptions allowed by subparagraphs (i) to (vii) of AUSFTA Article 17.4.7(e), a person may apply for an exemption under the process set out in Article 17.4.7(e)(viii). A person with a region-coded DVD which will not play on his or her DVD player, for example, could apply for an exemption allowing circumvention. Such an exception could be granted if the criteria in Article 17.4.7(e)(viii) are met.

"Circumvention device"

31. Clause 2 of the bill would introduce a new definition of "circumvention device", replacing the existing definition in s10(1).
32. Art 17.4.7(a)(ii)(A) of the AUSFTA requires sanctions against a person who traffics in devices, products or services that are promoted, advertised or marketed for the purpose of circumvention. A person may be liable for trafficking in a device or service that has been promoted by another person.
33. The government appears to have taken the view that the sanctions required by Art 17.4.7(a)(ii)(A) only apply to trafficking of a device or service which is promoted for circumvention if the promotion is done by the trafficker. The AUSFTA, however, requires sanctions against a person who traffics in a device or service promoted for circumvention, whether or not the promotion is done by the trafficker.
34. In any event, it would be clearer to confine the definition of circumvention device to the characteristics of the device, and to deal elsewhere with the activities proscribed in relation to such a device.

"Circumvention service"

35. We have similar concerns about the definition of "circumvention device" as we do for the definition of "circumvention service".

Exceptions

Clause 8: proposed new s116AK(7): exception for law enforcement and national security

36. AUSFTA Art 17.4.7(e)(vi) allows an exemption for:

Lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security or similar government purposes. [emphasis added]

37. Proposed new s116AK(7) is apparently intended to give effect to Article 17.4.7(e)(vi). The proposed exception, however, would cover "performing of a statutory function, power or duty". There is no requirement that such function, power or duty be in the nature of law enforcement, intelligence or essential security, as required by the AUSFTA. The exception is thus broader than the exception allowed by the AUSFTA. Similar concerns apply to other references to "statutory function, power or duty" in the Exposure Draft.
38. In addition, the bill applies the exemption not only to something done by or on behalf of the Commonwealth, State or Territory, but also to anything done by or on behalf of an authority of one of those bodies. In our view, the application of the exception to "authorities" is not compliant with the AUSFTA.

Exception for libraries and educational institutions: s116AK(8)

39. Proposed new s116AK(8) appears to be intended to implement AUSFTA 7(e)(vii), which allows an exemption for:
- access by a non-profit library, archive or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions.*
40. Proposed new s116AK(8)(b) refers to a "library" as a "person" (that is, an entity). There is no definition of "library" in the Copyright Act. Other references to "library" in the Copyright Act suggest that a library is a collection that is owned by a person (the library itself is not a person). Section 18, for example, provides that library is not taken to be established or conducted for profit by reason only that it is owned by a person carrying on a business for profit.
41. The "person" in relation to archives, on the other hand, is a body referred to in the definition of "archives" in s10(1) (such as the Australian Archives), or a body referred to in s10(4).
42. Similar concerns apply to other references to "library" in the Exposure Draft.
43. The reference to "educational institution" suggests that the definition in s10(1) would apply. That definition, however, applies to non-profit and profit-making entities, whereas the AUSFTA requires the exemption to apply only to non-profit entities. Similar concerns apply to other references to "educational institution" in the Exposure Draft.

Prescribed acts: S116AK(9) to (12)

44. AUSFTA Article 17.4(7)(e)(viii) allows exemptions to circumvention liability, other than those listed in paragraphs (i) to (vii), which meet all of the following criteria:
- the circumvention is of an access control technological measure;
 - the use of the work is non-infringing;
 - there is an actual or likely adverse impact on that non-infringing use; and
 - that impact is credibly demonstrated.
45. In addition, any exemption must apply:
- to a class of works, performances or phonograms, and
 - only to the extent that it does not impair
 - the adequacy of legal protection, or
 - the effectiveness of legal remedies
- against the circumvention of effective technological protection measures.²

² Articles 17.4.7.4(7)(e)(viii) and 17.4(7)(f).

Class of works

46. Proposed s116AK(10) provides that the regulations *may* prescribe a particular class of acts and a particular class of persons. The AUSFTA requires that any exemption *must* apply to a class of works.

Opportunity to respond to proposed exceptions

47. We understand that the intention of s116AK(12) is to cover submissions made before the commencement of the amending act, as well as submissions made after that. We understand that submissions to which the government has had regard so far are submissions made to the LACA Committee, submissions made to the Attorney-General's Department and submissions made to the Attorney-General. We understand that submissions made after the commencement of the TPM amendments will be made to the Attorney-General. We think that paragraph (12) should specify to whom the submission must have been made.
48. We submit that the AUSFTA requirement that an adverse impact has been "credibly demonstrated" requires the government to notify, and allow a response to, any proposed exemption. We think this is also required as part of the "legislative or administrative review or proceeding" referred to in Article 17.4.7(e)(viii) of the AUSFTA. Such an obligation should be required by the Act.

No procedure for review of exceptions

49. In our view, the AUSFTA requires review of existing as well as proposed exemptions at least every four years. The proposed amendments do not provide any mechanism for review of an exemption that has been granted.
50. Similar concerns apply to proposed new s132APA(8).

Who can make a submission seeking a new exemption?

51. Criteria to be addressed for reviews of additional exceptions, in ADG e-News Issue 40 (September 2006), paragraph (C) provides:

Is the person or body seeking the exception able to make the non-infringing use of the work, performance or phonogram in question under the Copyright Act?

(a) Does the Copyright Act limit the non-infringing use to a certain type of user? (eg. Educational institutions)

- i. If the answer is yes, proceed to e.*
- ii. If the answer is no, any person may seek the exception. Proceed to (D).*

(b) Has the specific user or representative of the user sought an exception?

- i. If the answer is yes, proceed to (D).*
- ii. If the answer is no, an exception cannot be granted.*

52. The note to s116AK(12), however, says:

For the purposes of paragraph (a), it is not necessary for the person who made the submission to be the person in relation to whom the act is prescribed.

53. There is an inconsistency between the procedure in the bill and the criteria for new exceptions published by the Attorney-General's Department.

Limitation on remedies: s116AP

54. The proposed limitation on remedies for libraries, educational institutions and public broadcasters does not appear consistent with the AUSFTA. AUSFTA Article 17.4.7(a) allows these bodies to be exempt from criminal penalties, but not from civil remedies.

Defences to circumvention offences: s132APA(2)-(13)

55. AUSFTA Art 17.4.7(a) provides

Each party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

56. The AUSFTA allows, but does not require, each party to exclude the listed types of bodies from criminal penalties. The criminal penalties only apply, however, to a person who circumvents "with the intention of obtaining a commercial advantage or profit". The defences thus appear to relate to an activity undertaken by a non-profit body for commercial advantage or profit. We seek information from the government about the types of activities it thinks would be covered by these defences.
57. It is not clear why all the exceptions to civil liability are repeated as defences to criminal liability. Different public policy considerations apply where the circumvention is done for commercial advantage or profit.
58. As noted above, it appears that the term "educational institution" in the bill includes an educational institution conducted for profit, but that the exceptions allowed by AUSFTA apply only to non-profit educational institutions.
59. The Exposure Draft allows the Minister to recommend additional defences to criminal offences, as well as exception to civil actions. If this is to remain, the notification process referred to above in relation to civil actions would need to clearly identify whether a submission had sought an exception from civil action, or a defence or a criminal action, or both. The consequences of each are obviously different.

Exemptions to circumvention liability in draft Regulations

Relationship between criteria for exemptions and exemptions granted by draft regulations

60. AGD e-News on Copyright Issue 40 (4 September 2006) sets out criteria to be addressed for reviews of additional exceptions.
61. We assume these criteria were applied to the exceptions which would be granted by the draft Regulations.
62. We do not know how the government has applied these criteria to the exceptions in the draft regulations, and thus have had no opportunity to respond. The government appears to have applied the criteria to particular situations described in submissions to the LACA Committee, the Attorney-General's Department or to the Attorney-General. We do not know which submissions contained evidence of activities that the government regards as having met the AUSFTA criteria.

None of these exceptions should apply if the material is available from another source

63. It is unlikely that there is adverse impact if a non-infringing use can be made from another source. All these proposed exceptions should therefore be subject to the material not being available from another source.
64. Under the current provisions, a person may not supply a circumvention device or service to a person, unless that person has provided a signed declaration stating (amongst other things), that:

a work or other subject in relation to which the person proposes to use the device or service is not readily available to the person in a form that is not protected by a technological protection measure.

Exceptions too broadly framed

65. We have sought, and we seek again, information from the government about the evidence upon which it has relied in determining, in relation to each of these proposed exceptions, that:
 - there is an actual or likely adverse impact on the non-infringing use; and
 - that impact has been credibly demonstrated.
66. We note that the report on *Technological Protection Measures* by the House of Representatives Legal and Constitutional Affairs (LACA) Committee makes no reference to circumvention which is currently occurring, and would have to cease as a result of the AUSFTA amendments.
67. We understand the Attorney-General's Department takes the view that there is evidence of such current circumvention in submissions to the LACA Committee, but to date it has declined to provide details.

68. If, in fact, there are non-infringing activities which will be adversely affected by the forthcoming amendments, the exceptions must be directed towards those activities. It appears that the government takes the view that some activities done by educational institutions for educational purposes have been credibly demonstrated to be likely to be adversely affected by the forthcoming amendments. The exception, however, applies to *all* activities for educational purposes.

No classes of works identified

69. As noted above, the AUSFTA requires any exception to apply to a class of works. No class of works is identified for most of the exceptions.

Libby Baulch
Executive Officer
September 2006

20 September 2006

Ms Kirsti Haipola
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Haipola

Exposure draft - Copyright Amendment (Technological Protection Measures) Bill 2006

Reed Elsevier Australia has been monitoring the Australian Government's proposed approach to implementing the technological protection measure liability scheme in the Australia-United States Free Trade Agreement ("AUSFTA") with interest, and welcomes the opportunity to comment on the exposure draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 ("TPM Bill").

The existence of strong legislative protection for technological protection measures ("TPMs") applied to copyright material is essential to the feasibility of Reed Elsevier's current and future business models, most particularly with the transition from a print publisher to a digital content provider. Reed Elsevier is a leading worldwide publisher and information provider; its Australian operations focus on the provision of legal, business to business, scientific, educational and professional information. A significant and growing proportion of Reed Elsevier's information services are delivered to consumers online. These services are protected by a range of technological protection measures, including access controls.

Reed Elsevier Australia ("REA") wishes to convey to the Attorney-General's Department its strong reservations with a fundamental aspect of the TPM Bill: the definitions of technological protection measure and access control technological protection measure. For the reasons given below, REA considers that the narrowness of these definitions contravenes the AUSFTA and is likely to have adverse unintended consequences for copyright owners seeking to exploit their works online, harming the creative industries in Australia as they adapt to the digital age and prejudicing their competitiveness. REA urges the Australian Government to take the necessary steps to avoid both of these undesirable outcomes.

1 The protection afforded to access control TPMs by the AUSFTA

It is clear from an ordinary reading of the AUSFTA that Article 17.4.7 affords protection to all manner of technological protection measures that control access to copyright works and other subject-matter. Yet, the definition of 'access control technological protection measure' in clause 1 of the TPM Bill only covers a very small subset of access control TPMs - specifically, TPMs that prevent or inhibit copyright infringement by preventing unauthorised access to a copyright work or other subject-matter.

Similarly, the definition of 'technological protection measure' (and the prohibitions on dealing in circumvention devices) in the TPM Bill are limited to TPMs which are designed to prevent or inhibit copyright infringement and do not extend to pure access controls.

In REA's opinion, the Australian Government's proposed definition of access control technological protection measure is a clear contravention of the AUSFTA. The definition of 'effective technological measure' in Article 17.4.7(b) of the AUSFTA encompasses the full range of TPMs that control access to copyright works or other subject-matter, and Article 17.4.7(a)(i) requires Australia to introduce liability for those who circumvent "any technology, device, or component that, in the normal course of its operation, *controls access to a protected work*".¹ Australia is obliged to reflect the breadth of these provisions in its legislation implementing Article 17.4.7 of the AUSFTA. The only link with copyright that the AUSFTA requires (and indeed, condones) is that access control technological protection measures are applied to copyright material. In REA's opinion, any attempt to introduce a more restrictive link to copyright in the definition of access control technological protection measure will result in a contravention of the AUSFTA.

2 The unintended consequences of the Australian Government's approach to access control TPMs

REA considers that the Australian Government's proposed approach to access control technological protection measures is likely to have a negative effect on the uptake of innovative online delivery platforms. This is because rights holders are likely to be reluctant to make the required investment in online delivery platforms if it is not clear that circumvention of access controls applied to copyright material made available using those platforms will result in liability under Australia's Copyright Act.

Unlike traditional mediums for delivering copyright material, online delivery platforms focus on a user experiencing a work - by viewing an article, listening to a song or playing a game - rather than providing users with a permanent copy of that work. Often these experiences occur without a user reproducing a substantial part of a work in material form or doing any other act comprised in the copyright. Much of the copyright material that REA protects with access controls and makes available online can be utilised merely by reading or viewing that material online; it is not necessary for a user to download or print out a copy of the material in order to benefit from it. Where this is the case, the proposed definition of access control technological protection measure is unlikely to apply because there is no copyright infringement that an access control could be designed to prevent or inhibit.

¹ AUSFTA, Article 17.4.7(a)(i) (emphasis added)

The consequence of the approach taken in the TPM Bill is that there is a real risk that the prohibitions on circumvention of access controls and dealing in circumvention devices will not apply at all to the pure access controls used by many copyright owners to protect their works.

REA has real concerns about the lack of certainty for rights holders in situations such as these. REA requires certainty that the circumvention of access controls and dealing in devices which circumvent access controls will result in liability if REA is to increasingly make available its copyright material online.

As a final point, REA considers that the overall complexity of the Australian Government's proposed approach to access control technological protection measures is likely to lead to confusion among consumers and rights holders. Consumers cannot be expected to understand the nuances of whether an access control technological protection measure prevents or inhibits copyright infringement by preventing access to copyright material, and rights holders are likely to struggle with a definition of access control technological protection measure that draws heavily upon language that has been interpreted to have a narrow application to copy controls.

REA urges the Australian Government to amend the TPM Bill so as to provide clear protection for access controls used by copyright owners in connection with the exploitation of their rights.

3 Further consultation

REA thanks the Attorney-General's Department for considering its views and welcomes any further consultation with the Attorney-General's Department. To do so, please contact Mary Alice Bannister on (02)9422 2002 or Mary-Alice.Bannister@reed-elsevier.com.au.

Yours sincerely



Mary Alice Bannister
Legal Coordinator & Company Secretary

Visual Arts
Copyright Collecting
Agency

viscopy

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

By email: copyrightlawbranch@ag.gov.au

22 September 2006

Dear Helen,

Re: Copyright Amendment (Technological Protection Measures) Bill 2006 and Regulations

Thank you for the opportunity to comment on the exposure draft Bill and Regulations.

Background

- 1) Viscopy is a copyright collecting society for the visual arts in Australia. It is a non-profit company that represents rights for fine artists, illustrators, cartoonists, textile designers, photographers, crafts workers, sculptors and architects. Over 40% of Viscopy's members are Aboriginal and Torres Strait Islander artists.
- 2) Viscopy is a member of the International Confederation of Societies of Authors and Composers (CISAC). Through 42 International CISAC agreements and our domestic membership, Viscopy licenses the works of 250,000 visual creator authors in Australia. Viscopy members works are licensed by the affiliates overseas.
- 3) Viscopy is affiliated with the Australian Copyright Council and supports that organisation's submission on this Bill.

Definition of "access control technological protection measure"

- 4) It appears that the effect of the Bill's definition of "access control technological protection measure" is that only TPMs that are designed to prevent, by way of denying access, copying or other acts comprised in the copyright that infringe copyright are protected.
- 5) Article 17.4.7(a)(i) of the Australia-United States Free Trade Agreement (AUSFTA) provides that parties must provide remedies in relation to the circumvention without authority of "any effective technological measure that controls access" to a work (our emphasis). "Effective technological measure" is defined in article 17.4.7(b) as "any technology, device, or component that, in the normal course of its operation, controls access to a protected work...or protects any copyright." (our emphasis).
- 6) The House of Representatives Standing Committee on Legal and Constitutional Affairs noted in its "Review of technological protection measures exceptions" report that an important difference between the current definition of TPM in the Copyright Act and the definition of

"effective technological protection measure" ("ETM") in the AUSFTA is that the latter is not limited to devices that 'prevent or inhibit the infringement of copyright', but also includes devices that 'controls (sic) access' to protected copyright material".¹

- 7) We note that the Committee went on to query whether the introductory words of Article 17.4.7(a), or the so-called "chapeau" affected the meaning of the definition, but did not express a concluded view on this. Viscopy agrees with the Australian Copyright Council's submission that measures used to prevent unauthorised viewing or other consumption of a work are measures that are used "in connection with" the exercise of a copyright owner's rights and that "unauthorised acts" includes unauthorised access, and not merely unauthorised acts comprised in the copyright.
- 8) Viscopy notes that article 31(1) of the Vienna Convention of the Law of Treaties, cited by the LACA Committee, requires the treaty's terms to be given their ordinary meaning and account to be taken of the object and purpose of the treaty.
- 9) Viscopy submits that the purpose of Article 17.4.7 is to more closely align the provisions of the Copyright Act with regard to TPMs with the legislation applying in the US, where a clear distinction is made between TPMs which prevent access per se and controls which prevent an act comprised in the copyright, such as copying. The US Copyright Office describes the provisions of the US legislation as follows:²

"Section 1201 divides technological measures into two categories: measures that prevent unauthorised access to a copyrighted work and measures that prevent unauthorized copying of a copyrighted work."

- 10) The paper explains in a footnote to this section that the term "copying" as used here is "short-hand for the exercise of any of the exclusive rights of an author under section 106 of the Copyright Act." The paper goes on to explain the policy reasons behind this distinction which are:

"to ensure that the public will have the continued ability to make fair use of copyrighted works. Since copying of a work may be fair use under appropriate circumstances, section 1201 does not prohibit the act of circumventing a technological protection measure that prevents copying. By contrast, since the fair use doctrine is not a defense to the act of gaining unauthorized access to a work, the act of circumventing a technological protection measure in order to gain access is prohibited".
- 11) Similarly, the various exceptions that exist under our Copyright Act, such as fair dealing, are not a defence to the act of gaining unauthorised access in the physical environment (eg. unauthorised entry to premises to access a book in order to photocopy it), and Viscopy submits they should not be in the digital environment.
- 12) Viscopy submits that Article 17.4.7 requires Australia to adopt the approach to this issue taken by the US as described by the Copyright Office.
- 13) While it may well be desirable to limit or exclude protection for access controls which are applied to products which are not protected by copyright, such as spare parts etc., Viscopy submits that it is vital that visual artists are effectively able to protect themselves against

¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Review of technological protection measures exceptions*, 2006 at 2.54.

² Copyright Office Summary of the Digital Millennium Copyright Act of 1998 available at www.copyright.gov/legislation/dmca.pdf.

unauthorised access of their material, whether or not that access involves a copyright use or not.

- 14) In the "offline" non-digital world, access to the works of visual artists is provided in various ways, but always (except for infringing uses) with the authorisation of the artist (or other copyright owner). Such access might be by way of book publication or public exhibition, for example. Once the artwork is accessible in this way a person may, provided they have legitimate access to the book or exhibition, be entitled to make use of the various exceptions in the Copyright Act, such as fair dealing. In both of these cases, the artist has had an opportunity to earn a return from the act of making their work available (such as a royalty from a publisher). In some cases the artist may have forgone that opportunity in order to achieve some other benefit (such as the sale of their painting by the gallery exhibiting their work).
- 15) In the digital context, if artists and other creators, or collecting societies on their behalf, want to be able to make their works available online then, in order to ensure their works are not simply accessed and used without their authority and without payment, they need to use some sort of technological protection measure, such as password protection. The use of a password in this context is not necessarily, or solely, to protect the work against copying, but against any sort of consumption of the work (such as viewing) which might take away the need for the person to purchase the work, or access to it, and therefore deprive the artist of his or her opportunity to obtain a return for the use of the work. If there is no protection against the act of circumvention of such a password, because of the narrow definition of TPM, the rightsholder is left exposed.
- 16) For these reasons, Viscopy does not believe that the Bill creates a more secure environment for visual artists and other copyright owners to release their copyright materials.

Exceptions to circumvention liability

- 17) Viscopy has concerns about the scope of the exceptions to circumvention liability made in accordance with Article 17.4.7(e)(viii) and contained in the draft Regulations. We are also concerned about the process by which these exceptions are to be implemented.
- 18) We note that the AUSFTA requires that an "actual or likely adverse impact" on non-infringing uses in relation to a particular class of works is "credibly demonstrated in a legislative or administrative review".
- 19) Viscopy does not believe that an actual or likely adverse impact has been credibly demonstrated, at least in relation to exceptions that apply to artistic works, in particular the exceptions for educational purposes and libraries and archives.
- 20) We note, by way of example, the LACA Committee's citation of the submission of the Australian Digital Alliance and the Australian Libraries' Copyright Committee in support of the exception for educational institutions. The Committee notes that this submission disclosed a "Credibly demonstrated likely adverse impact" by way of "Significantly compromised ability of educational institutions to discharge fundamental teaching and learning roles due to inability to use copyright material".³ As far as we can ascertain, this evidence is based only upon the broad and untested assertion that educational institutions will not be able to use Part VB in relation to artistic works and other material in digital form because of technological protection measures.
- 21) Viscopy does not believe that such assertions meet the requirement of credibly demonstrated actual or likely adverse impact, not least because copyright owners have not been given a chance to respond to such submissions and the assertions have not been tested. We are

³ Submission No. 49, p 20.

unaware of any evidence to support the ADA/ALCC's assertion on which the exception appears to be based. We would like to have an opportunity to respond to any such evidence.

- 22) We note the similarities between Article 17.4.7(e)(viii) of the AUSFTA and the provisions relating to exemption under US law. We understand that the US Copyright Office has taken the view that "Actual instances of verifiable problems occurring in the marketplace are generally necessary" in order to prove an adverse impact and that "Claims based on 'likely' adverse effects cannot be supported by speculation alone".⁴
- 23) The other aspect of the exceptions we are concerned about is the failure to limit exceptions, at least in the context of the exception for educational institutions, to a "particular class of works" as required by Article 17.4.7(e)(vii). The exception for educational institutions in relation to Division 2A of Part VB applies to *all* artistic and other works in electronic form.
- 24) In contrast, the US Register of Copyrights has taken the view that the process of granting an exemption involves identifying classes of works "based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works" and that a "class of works was intended to be a narrow and focused subset of the broad categories of works of authorship".
- 25) Viscopy submits that the Government should take a similar approach to the US Copyright Office in relation to exemptions contained in the Regulations.
- 26) Viscopy has similar concerns in relation to the exception for malfunctioning TPMs as we are unaware of the evidence of adverse impact on which this exception is based.

Yours sincerely,



Joanne Brown
Acting CEO for

Chryssy Tintner MBA MFA

⁴ <http://www.copyright.gov/fedreg/2005/70fr57526.html>



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22 September 2006

Ms Helen Daniels
Assistant Secretary, Copyright Law Branch
Attorney-General's Offices
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Daniels,

**EXPOSURE DRAFTS – COPYRIGHT AMENDMENT (TECHNOLOGICAL PROTECTION MEASURES)
BILL 2006 AND RELATED REGULATIONS**

COMMENTS BY AUSTRALIAN RECORDING INDUSTRY ASSOCIATION

We refer to the Department's invitation to comment on the exposure draft containing provisions relation to technological protection measure, and set out our comments as follows. These comments should be treated as confidential. We would be happy to provide any further information or clarification that the Department may require.

Copyright Amendment (Technological Protection Measures) Bill 2006

We are pleased to see that the exposure draft, with one significant exception in our view (see further below), implements the requirements of the AUSFTA. We have few minor comments on Subdivisions A and E. Our main concern, as the Department is aware, is the proposed definition of "access control technological protection measures".

Definition of "access control technological protection measure"

ARIA has previously made submissions regarding its view that this definition (and in particular, the link with infringement) is inconsistent with Australia's obligations under the AUSFTA. This is still ARIA's view, but in light of the Government's stated position, we do not repeat those submissions here.

First, we note that the Government has addressed its concern about devices "solely designed to control market segmentation" (which we take to refer primarily to region coding devices) by way of a clarifying statutory note.

We would suggest that in order to address what appears to be the Government's other concern, restricting competition in the market for spare parts, the wording of the note could be extended by adding the following words (taken from the Government's press release) "*or to protect against competition in aftermarket goods (for example spare parts)*" after the words "control market segmentation". The Government may also wish to consider giving the note the status of an explicit carve-out from the statutory definition, rather than a note to guide interpretation.



If the amendments in the preceding paragraph were made, it appears to us that the Government's stated concerns regarding access control would be adequately addressed, and there would be no further need to include either paragraph (b)(i) or (b)(ii) in the statutory definition. As we have stated, we have serious concerns that including paragraph (b), and in particular (b)(i), could have a dramatic detrimental effect on developing business models. We have a strong preference for drafting which would address the Government's specific concerns (as in the clarifying note), without also cutting back on protection for TPMs more broadly.

ARIA submits that paragraph (b)(i) should be deleted from the provision altogether. The distinction between infringements of copyright and acts comprised in the copyright is confusing and opaque. It also appears to narrow the definition, since some acts that are infringements of copyright (for example, secondary infringements) are not strictly "comprised in" the copyright. The addition of paragraph (b)(i) would make the scope of protection even narrower than in prior Australian law (where the scope of protection was devices that "prevent or inhibit infringement").

The deletion of paragraph (b)(i) would go some way towards meeting ARIA's concerns. However, if paragraph (b)(ii) is to remain, we remain concerned that the definition will still fail to provide protection for access control measures that are very likely to be used in connection with developing business models invested in by the recording industry.

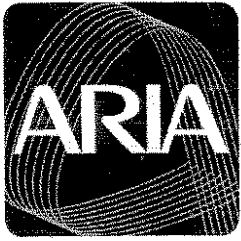
We have in the past referred to the example of time-limited downloads, and we believe the Government understands our concern that TPMs protecting such downloads may fall outside the scope of protection if the proposed definition is enacted.

We should stress that this is not a theoretical example. Online subscription music services permit users to download music that "expires" and is no longer accessible after the end of the month, or if the subscription is not paid. These subscription services are operating in several countries in the world, including the US and Europe, but not in Australia yet. IFPI estimates that in 2005, there were 2.8 million subscription service users worldwide, nearly double the 1.5 million users in 2004 [IFPI Digital Music Report 2006, page 7].

Clearly, if Australian law does not protect the mechanisms used in connection with subscription content, it is difficult for recording companies to make an investment in licensing such services for Australia. Subscription content is priced differently from download-to-own content, it is a different product that appeals to a different market. Not protecting the TPMs that enforce time restrictions effectively means this product differentiation is not possible, since anyone can legally convert their subscription content to permanent downloads, and anyone is permitted to distribute devices and programs that enable this conversion.

Another example of TPMs that risk falling outside the scope of protection are those that protect "pay to activate" pre-loaded content. Again, this is a real-world example. Microsoft recently announced the impending introduction of a new portable music player device to the market, branded Zune [see http://www.reghardware.co.uk/2006/09/15/ms_intros_zune/ visited on 19th September 2006]. That device will ship with pre-loaded music and movie content, which can be activated upon the user making the required payment. If the TPM preventing use of the content prior to payment is not protected, again it seems unlikely that Australian recording companies will be able to take the risk of licensing this content. The device will also offer time-limited song samples, that can be downloaded via a Wifi wireless connection, and which will expire after three days. Again, protection for the associated TPM is critical.

While the precise analysis of each of these TPMs depends upon the facts of their operation, it appears likely that these TPMs may not fall within the scope of the Government's proposed definition, because the playback or listening that they operate to prevent, is not an infringement of copyright under



Australian law (especially in light of section 111B of the *Copyright Act 1968* (Cth) which exempts copies made incidentally as part of the technical process of use).

These mechanisms are not in either of the categories of market segmentation or limiting competition in the market for spare parts. We believe these mechanisms go to the core of copyright and copyright licensing. We urge the Government to address this issue and not to risk undermining the development of new models in Australia.

Definition of "access control TPM", "TPM" and "circumvention device"

We consider the words "device, component or product" are not sufficiently broad, as there is a risk that each would be interpreted as limited to a physical item. We would suggest the addition of the word "technology".

Definition of "circumvention service"

In paragraph (c), we would suggest the words "designed or performed" or "designed or provided" are a better grammatical fit in connection with "service", rather than the word "produced" which is difficult to apply to a service.

Exceptions based on permission – sections 116AK(2), 132APA(2)

We are not aware of the policy or legal basis for exempting a person who "has reasonable grounds to believe" that it has the permission of the copyright owner to circumvent a TPM. There is no such provision for reasonable grounds in the AUSFTA, which uses the words "without authority" and is clearly limited to actual authority.

Similarly in copyright law, there is no statutory provision for a person to be exempted from liability for infringement if they believed they had authority from the copyright owner but in fact did not.

We believe these words should be deleted from subsections 116AK(2) and 132APA(2), as they open up an additional argument for every defendant to attempt. Courts dealing with actions under these two sections would then, in every case, end up hearing evidence as to (1) the defendant's actual belief and (2) whether it was reasonable, and copyright owners would need to respond to this evidence. If a court finds in a particular case that a person truly believed on reasonable grounds they had the authority of the copyright owner to circumvent a TPM, but there was no licence given, this could be taken into account in ordering remedies, but should not affect liability.

Making/Provision of circumvention devices/services - Sections 116AL and 116AM

Sections 116AL(1)(b), 116AM(1)(b) include the words "of the person". We submit those words should be deleted from those paragraphs. The inclusion of the words seems to give rise to the suggestion that copyright owners would need to prove not only that a person was dealing in such devices, but that he or she owned them as well. The words "of the person" are already included in the respective definitions of "circumvention device" and "circumvention service".

Geographical Application - Section 116AN

As this applies to dealings in devices, the section should be amended to clarify beyond doubt that the Act applies to dealings in Australia, even if the intended recipient or user of the device or service is located outside of Australia.

Criminal offences for dealings in/provision of circumvention devices/services – sections 132APB, 132APC



The words "of the person" appear in subsection (1)(c) of each of 132APB and 132APC. These words should be deleted for the reasons set out above.

We note that, in the exposure draft, these offences are made out only if the person undertakes the relevant act "with the intention of obtaining a commercial advantage or profit". We believe that this does not cover all the situations where criminal liability and penalties would be appropriate. A person may distribute a circumvention device not for profit reasons, but for fame or to make a statement against DRM or the content industries. This was the case in relation to the original distributor of the DeCSS technology, which enabled the mass circumvention of CSS technology applied to DVDs and effectively rendered the CSS protection technology useless (see *Universal City Studios v Remeirdes*, 111 F.Supp.2d 294 (2000)). We believe that criminal liability would be appropriate in such circumstances.

Therefore we would suggest the addition of the following words to paragraph (c) of each of section 132APB(1) and 132APC(1): "or to such an extent as to affect prejudicially the owner or exclusive licensee of copyright".

In addition, in relation to the commercial advantage/profit element, we would prefer the wording to be amended to "for the purpose of obtaining a commercial advantage or profit" (as in the AUSFTA). The person's intention is tested in relation to the act (s132APB(1)(a)(i)) and the commercial advantage or profit purpose should be capable of being inferred from relevant facts. While it is possible for "intention" to also be inferred from relevant facts, this arguably sets a higher bar than "purpose" and one that is not necessary.

Copyright Amendment Regulations/Further Review of Exceptions

We have no comments on the current draft of the Regulations. Concerns that we previously raised regarding the specificity of the exceptions have been addressed.

We note the Government intends to undertake a further review regarding a limited set of proposed exceptions to the prohibition on circumventing TPMs. As we have stated previously, it is very difficult for ARIA to comment on proposed exceptions and any justification given for them, until we have had an opportunity to review the evidence submitted in support of the exceptions (which we understand the Government will offer).

We hope these comments have been useful, and we look forward to consulting further with the Government.

Yours sincerely,

A handwritten signature in dark ink, appearing to read "Stephen Peach", written in a cursive, flowing style.

STEPHEN PEACH
Chief Executive Officer

c/o Professor Brian Fitzgerald
Queensland University of Technology
Gardens Point Campus
Brisbane QLD 4000

Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

22 September 2006

Dear Ms Daniels

Copyright Amendment (Technological Protection Measures) Bill 2006

We, the below signed, are writing with regards to the exposure draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 (the Bill), released for public comment on 4 September 2006. Our interest in the Bill flows from our joint expertise in copyright law, and in particular our involvement with open-licensing schemes that aim to encourage more liberal access to copyright material in the digital environment.

In general, we support the current text of the Bill, and believe it goes a long way towards remedying some of the more problematic aspects of the text of the Australia United States Free Trade Agreement (AUSFTA). The proposed amendments have clearly been drafted with a view to ensuring that the legislation provides an appropriate balance between the rights of copyright owners and those of users, within the confines of the Treaty.

In particular, we are highly supportive of the proposed definition of 'access control technological protection measure' (ACTPM), and its incorporation of a requirement for a clear link to copyright protection. Such a link is necessary to ensure that the ACTPM provisions do not go beyond the bounds of the copyright law they are intended to enforce, and cannot be manipulated to apply to inappropriate devices (such as garage door openers) or in inappropriate circumstances (such as in relation to public domain works).

Similarly, we are strongly in favour of the decision to limit standing under the new provisions to the owner or exclusive licensee of a work, and to include an exception to s116AK where the person has, or has reasonable grounds to believe that they have, the permission of the copyright owner or exclusive licensee to circumvent the ACTPM. We feel these measures will assist courts to limit liability in circumstances where, for example, a legitimate product is being used in a legitimate manner, or where the material in question has been released under

an open licensing scheme and subsequently locked behind an ACTPM (with or without the copyright owner's permission).

However, we still believe that there are places in which the proposed amendments risk upsetting the copyright balance. Our main areas of concern are set out below. While we acknowledge that the text of the AUSFTA may limit the Government's options with regards to some of these issues, we believe that there are still measures that the Government could implement in each of these cases that will assist to restore an appropriate balance, without stepping beyond the bounds of Australia's bi-lateral commitments.

1. Lack of a knowledge requirement

While the liability provisions set out in proposed ss116AL, 116AM, 132APA, 132APB and 132APC all incorporate an intention requirement in relation to the prohibited action (eg manufacturing, importing, distributing, offering or providing a device), as currently drafted they do not include any requirement that the person performing the act knew, or ought reasonably to have known, that the device in question was a circumvention device. This strict liability leaves those selling etc technological devices highly vulnerable to legal action even in circumstances in which they could not have known that the device in question was a circumvention device.

As the discussion in *Kabushiki Kaisha Sony Computer Entertainment v Stevens* (*Sony v Stevens*) shows, an extremely detailed understanding of the exact technical workings of a device, as well as the intricacies of copyright law, will often be required to determine whether it is a circumvention device. The Attorney General's Department itself noted in the hearings of the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA) *Review of Technological Protection Measures Exceptions* (LACA Review) that "specific information is required about these technological measures before an assessment can be made of whether they play a genuine part in copy protection. Much of that information is not publicly available" (LACA Review, p.40).

Furthermore, it is highly likely that as technology develops the circumvention of older or outdated TPMs will occur incidentally, as an unintended consequence of new methods of dealing with copyright material. For example, the digital processing in the new generation of video players, which is intended to increase efficiency and picture quality, also has the effect of bypassing the Macrovision copy protection technology currently incorporated into all videos (which is based on weaknesses inherent in analogue systems). The proposed provisions, as currently written, would seem to potentially expose any person selling these players (from major department stores to second-hand retailers and private individuals) to criminal penalties – even though they are extremely unlikely to be aware that the player circumvents the Macrovision technology. They would similarly seem to expose those who are aware of the possibility of infringement but have been misinformed as to the nature of the device they are selling (eg a second hand retailer selling a Sony Playstation 2 having been told that it was not chipped).

This is particularly concerning in relation to the proposed criminal provisions, and places them out-of-line with the rest of the s132 offences, which uniformly incorporate a knowledge requirement regarding the infringing nature of the prohibited act (eg that a person 'knew, or ought reasonably to have known' that the article was infringing). We therefore propose that a knowledge standard be included in each of the new criminal provisions, similar to that included in the current TPM criminal provisions in ss132(5A) and 132(5B), eg requiring that

the person knows that, or is reckless as to whether, the device is a circumvention device. The inclusion of such a requirement is consistent with the text of the AUSFTA, which explicitly states that for criminal liability to apply a person must 'wilfully' have performed the prohibited act, arguably requiring both intent and knowledge, and would significantly decrease the risk of innocent parties being unintentionally exposed to criminal liability. We would also recommend the inclusion of a similar requirement in the civil provisions of the Bill.

2. *Incentivising dual-purpose devices*

As currently drafted, the notes relating to 'market segmentation' following the proposed definitions of ACTPM and TPM are of little practical effect. The word 'solely' in the notes limits the scope of the exceptions to such a degree that they are likely to have no application. Establishing a single clear motivation for the design of any device is extremely difficult, particularly for the opposing party. Furthermore, as the experience in *Sony v Stevens* shows, with the complexity of modern technologies it is extremely unlikely that a device exists which cannot at least be argued to have several purposes.

The inclusion of the word 'solely' results in the creation of a strong incentive for copyright owners to make use of dual-purpose technological measures – in order to obtain protection for market segmentation devices, copyright owners will simply combine technologies that impose a method of segmentation with those used for the legitimate protection of copyright. These two objects, however, are distinctly unrelated and, as was noted by the LACA Review (p.36), there is no technical reason why they must be coupled.

Only the copyright owner is able to decide whether to include market segmentation functions within TPMs. The copyright owner can also make a choice to use separate devices for these unrelated purposes. It is our submission that this proposed legislation will provide incentives for copyright owners to unnecessarily merge the two functions.

Removing the word 'solely' will put the onus on the copyright owner to ensure that, if they want legal protection from circumvention, they do not include market segmentation measures within copyright protection measures. It is appropriate that copyright owners should bear this responsibility – they are in the best position to implement measures which protect their legitimate interests without infringing on the rights of consumers. For this reason we submit that the word 'solely' should be omitted from the legislative notes in the definitions of ACTPM and TPM in s 10(1).

We do not believe that this would substantially lessen the ability of copyright owners to protect their legitimate interests. There is no identifiable technical reason why the same device must be used to control market segmentation as is used to inhibit infringement of copyright. Further, the removal of the word 'solely' will not render legitimate devices which merely have an extra effect of segregating the market unprotectable – it would only require that the device not be *designed* to control market segmentation. We submit that there is no valid reason to protect devices which are *designed*, whether solely or not, to control market segmentation. Alternatively, if it is considered necessary to implement the intent of the notes, we suggest that the word 'solely' be replaced with the more balanced and appropriate 'primarily or solely' (as is currently used in part (c) of the proposed definitions of 'circumvention device' and 'circumvention service').

3. Protection from exclusion by agreement

It is now common practice in consumer transactions for digital media to be governed by standard term contracts, or End User Licence Agreements (EULAs). The full terms of these agreements are often located within the sealed package of the media product ('shrink-wrap' agreements) or are listed on a website from which the product can be purchased ('click-wrap' or 'browse-wrap' agreements). Consumers are deemed to have agreed to the terms and conditions contained within these contracts through the act of using or downloading the software or media product.

While EULAs are commonly relied upon by copyright owners, it is clear that they are rarely read, and even less rarely understood, by consumers. These documents are usually dense and contain many technical legal terms, and are generally ignored by consumers. As a result, consumers tend not to fully appreciate the terms upon which they are acquiring media products.

Even where consumers do read and understand the terms and conditions in media contracts, they are unable to negotiate those conditions. Unlike commercial transactions, consumers are rarely in positions of equal bargaining power with copyright owners. Software and media products are not highly substitutable, and are rarely offered on different terms – consumers are simply not able to acquire the same product on more acceptable terms, or to acquire a similar product with acceptable terms. The lack of choice in the market is a signifier of market failure, and necessitates intervention to avoid the unfair treatment of consumers.

There is no protection in the draft legislation from contracting out of the defences to liability in ss 116AK, 116AL, or 116AM, or for the defences to the criminal offences in ss 132APA, 132APB, or 132APC. Given the imbalanced bargaining positions in consumer licensing, each of the exceptions to liability should be protected from exclusion by contract. The exceptions contained within the Act and the Regulations are of little value if they are able to be contractually waived. Conversely, there is no identifiable public benefit to allowing copyright owners to require users to contract out of the defences to liability.

We therefore submit that Government implement Recommendation 33 of the LACA Review (p.135) by inserting a provision into the legislation that stipulates that an agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of the defences, has no effect. As the AUSFTA is silent on this matter, such a move would be consistent with Australia's obligations, and would significantly increase the effectiveness of the exceptions and the protection afforded to consumers under the new provisions.

4. Exclusion of the term "effective"

In the current environment of rapid technological development, it is particularly important that adequate solutions are available to deal with TPMs that have become damaged or obsolete. This is demonstrated by the experience in relation to dongles, a hardware protection measure which requires the user to insert a plug into the parallel or serial interface of the computer before they can use a particular software program. Dongles were used primarily during the 80s and 90s, although more sophisticated versions are still in use today. Many of the more common dongles have been superseded by software mechanisms, and production has ceased on the required hardware mechanism. As a result, the programs encased in these 'locks' can no longer be accessed without a circumvention tool.

We acknowledge that the issue of broken and obsolete TPMs is partly addressed through the inclusion of an exception relating to malfunctioning TPMs in the proposed Copyright Amendment Regulations 2006 (Technological Protection Measures). However, as you are aware, this exception will only provide assistance to individuals wishing to circumvent ACTPMs, and will provide no defence to those distributing devices or services intended to assist these people (eg software intended to circumvent obsolete dongle protection).

We would suggest that this issue could be more completely addressed by incorporating a requirement in the TPM liability provisions that any TPM or ACTPM must be “effective” to receive protection. This could be done simply by amending, for example, subs 116AK(1)(a) to read “the work or other subject-matter is protected by an *effective* access control technological protection measure”. Such an amendment would be an appropriate implementation of both the AUSFTA text and the World Intellectual Property Organisation’s (WIPO’s) Copyright Treaty and Performances and Phonograms Treaty, from which the inclusion of the phrase “effective” in the concept of TPM is drawn, and would provide courts with some discretion regarding the application of the provisions in cases in which the TPM in question is no longer effective through being damaged or obsolete.

Note that we support the decision to exclude the AUSFTA term “effective” from the definitions of TPM and ACTPM, and would not suggest any alterations to these definitions. Neither would we suggest that a definition of the term “effective” is required.

5. *Limitation of s202A*

We strongly support the insertion of s202A, and feel it provides an important mechanism to ensure the TPM provisions are not misused (whether deliberately or as a result of negligence) to discourage competition and innovation. However, we can see no justification for its application only to the act of circumvention in s116AK, and not to the activities covered by ss116AL and 116AM. As is demonstrated by any number of cases (including *Sony v Stevens*, *The Chamberlain Group, Inc v Skylink Technologies, Inc.* and *Lexmark International, Inc. v Static Control Components, Inc.*), where a person wishes to use TPM provisions to suppress a technology (whether legitimately or otherwise), they are more likely to target manufacturers and distributors of this technology than individual users. There seems no reason why sellers or website operators who are distributing legitimate devices or services should not receive protection against groundless threats, alongside individuals using these devices.

6. *Mixed works*

We are concerned that the Government has chosen at this time not to implement Recommendation 32 of the LACA Review that an exception be introduced to allow for circumvention of TPMs for access to mixed works consisting of both copyright material and non-copyright material, where the amount of non-copyright material in the work is substantial (p.131).

Due to our interest in open access content, we are particularly concerned with situations in which copyright material and commons material (eg material in the public domain, or material that has been made available under an open licensing system) are combined in a single article. As currently drafted, it would appear that the full extent of the TPM provisions will apply in such a case, regardless of the amount of copyright material included in the work. This will allow a person to restrict access to public domain material using technological means by adding only the smallest amount of copyright material (eg a title page), and enforce this restriction using copyright law. As LACA noted, this in essence enables copyright owners

to obtain de facto protection for non-copyright material by bundling it with copyright material in mixed works, and hence to unilaterally extend copyright indefinitely.

In relation to articles that contain more than one work that is still protected by copyright, the current silence of the act with regard to mixed works could result in the rights of one copyright owner being given priority over the rights of another, eg where a person has permission from A to access their work, but is unable to do so because it is in an article that also contains B's work. It would seem fair to permit the TPM to be circumvented in such a case as, even in the absence of a TPM, B will be able to enforce their wish to restrict use of their work through standard copyright law; however, with the TPM in place, A will have no ability to implement their own wish to provide more open access to their material.

7. Encryption research exception

We are concerned with the proposed requirement that, to exercise the encryption research exceptions in ss116AK(4), 116AL(3) and 116AM(3), a person must study, or be trained or experienced in, 'the field of encryption technology'. This is one of the few areas in which the proposed Australian legislation is more restrictive than the AUSFTA, which only requires the person to be an 'appropriately qualified researcher'. There are many fields of study in which a researcher may be required to identify and analyse flaws or vulnerabilities in encryption technology, but which would not necessarily satisfy this requirement. These include general information technology studies, IT-focused sociological work, and legal studies.

8. Limited exceptions for manufacturing etc

As you are aware, with the legislation as currently drafted, in many circumstances the act of circumvention will be permitted in cases where the supply of a device or service to enable that act remains banned. This is the case in relation to any circumvention of a TPM that is not also an ACTPM (except for the purposes of creating an interoperable program), as well as circumvention of ACTPMs under the libraries exception and any exceptions prescribed in the regulations. The practical effect of this drafting is that these acts are effectively banned for any person who does not have sufficient technological skill to circumvent the TPM or create their own device to do so (or, possibly, who is unable to obtain such a device from overseas). While we acknowledge that this is an area where the Government may feel particularly constrained by the text of the AUSFTA, we feel that it is important that the Government make every effort to remedy the deficiencies of the treaty in this matter. This is particularly important in relation to the exceptions prescribed by regulation, as these provide the most readily available means of updating the provisions to take account of technological developments. If these exceptions do not function effectively, Australia's TPM provisions will be unfairly and inappropriately balanced in favour of copyright owners.

9. Burden of proof

We are concerned with the inclusion of explicit statements regarding the burden of proof (for the civil provisions) or evidential burden (for the criminal provisions) for the exceptions, without any clear explanation as to the purpose of these amendments. While we have not had sufficient time to form a conclusive opinion about the implications of these provisions, we would not support any amendment that increased the burden of proof placed on users beyond the standard principles of evidence. Any rule which, for example, placed users in the position of having to prove a negative (eg to disprove a mere suggestion by a copyright owner that they may have had more than one motivation for circumventing a TPM) would run the risk of

reducing the practical application of the exceptions to the extent that they are essentially nullified.

We would therefore suggest that, in the absence of clear justification for the inclusion of specific burden of proof rules, the provisions be removed from the legislation, leaving the burden of proof in any action to be determined by the established rules of evidence.

10. Minor drafting issue

Finally, on a minor drafting point, we do not understand why subs203G(1) has been retained as, like the repealed subs203G(2), it refers only to sections that will no longer exist once the amendments have been implemented.

We trust that our comments will be of assistance.

Yours Sincerely

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September 21, 2006

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The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 ("Exposure Draft").

IIPA is a coalition of seven trade associations representing the U.S. copyright-based industries – including the business and entertainment software, audio-visual, sound recording, music publishing and book publishing industries – in bilateral and multilateral efforts to improve international protection of copyright works. Both directly and through our member associations, IIPA has a long history of involvement in the development of copyright law and enforcement policy in Australia.

I. Definitional Provisions on Access Controls

IIPA's main concern about the Exposure Draft lies with its definitional provisions, particularly clauses 1 and 4. These fall well short of bringing Australia into compliance with its obligations under the Australia-US Free Trade Agreement (AUSFTA). Taken together with the proposed statutory notes and with other explanatory comments made in connection with release of the Exposure Draft, these provisions could actually weaken the protections now accorded to access control technologies under current law, and could undermine the entire regime of protection for effective technological measures that is fundamental to the IPR chapter of the AUSFTA.

Article 17.4.7.b of the AUSFTA defines an effective technological measure (ETMs) to include "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" (emphasis added). Articles 17.4.7.a.i and ii require AUSFTA parties to prohibit circumvention of ETMs and trafficking in tools aimed at achieving such circumvention. While a number of exceptions to these prohibitions are authorized under Articles 17.4.7.e and f, none of these take the form of a categorical exclusion of a genus of access control technologies from all protections against circumvention acts and trafficking in circumvention tools.

Australia's copyright law currently covers only a technological protection measure 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" in one of two specified ways. Copyright Act 1968, section 10(1). The requirement to show a design to "prevent or inhibit" copyright infringement has already been one of the main subjects of protracted litigation, which concluded that at least one technology commonly used to control access to copyright material and to prevent the playing of infringing copies of videogames was not

protected. See *Stevens v. Kabushiki Kaisha Sony Computer Entertainment*, [2005] HCA 58. It seems apparent that the “prevent or inhibit” barrier to protection of access control technologies, both on its face and in the way it has been applied by Australian courts, is inconsistent with the AUSFTA obligation to provide protection for all technologies that “control access to a protected work.”

Indeed, this seems to have been the view of the Attorney General’s Department on October 27, 2005, when its submission to the inquiry carried out by the Legal and Constitutional Affairs committee (LACA) stated that FTA definition “differs from and is effectively broader than the definition of TPM in the Copyright Act.” See Submission 52, at para. 24. The AGD also noted that “the AUSFTA requires Australia to introduce liability for the act of circumventing an ETM that controls access to copyright material.” *Id.*, para. 26. However, in testimony before the LACA Committee five weeks later, a senior counsel within the AGD insisted that “the analysis cannot be confined to” the provisions cited in the preceding paragraph, and called attention to “the chapeau, or the introductory words to Art. 17.4.7.”¹ (5 Dec 2005, LCA 25) In this counsel’s view, the chapeau language “suggests that there is to be a relationship between the use of an ETM and the exercise of rights by a copyright holder.” *Id.* Sixteen days later, when the AGD made its third written submission to the LACA committee, this “suggestion” had hardened into a perceived limitation: “the definition of an ETM must be read together with the chapeau to Art. 17.4.7(a) which establishes the limits of the proposed liability scheme.” Submission 52.2 at p. 5 (answer to question 7).

Regardless of how the AGD arrived at this conclusion, there is strong reason to doubt that the “chapeau” language in question imposes any such limitation, beyond a requirement that the material to which access is controlled be protected by copyright. Although the AGD’s submissions before the LACA committee do not indicate this, this language is taken virtually verbatim from the text of the WIPO Internet treaties. WIPO Copyright Treaty (WCT) Art. 11; WIPO Performances and Phonograms Treaty (WPPT) Art. 18. Australia is committed under AUSFTA Art. 17.1.4 to adhere to these treaties, and nothing in the TPM-related provisions of Art. 17.4.7 could plausibly be read to authorize Australia to reduce its TPMs regime below the levels that comply with these treaties.

Since AGD relies on this language taken from the WCT and WPPT to justify its position, it is instructive to note that none of Australia’s major trading partners which have acceded to the WCT and WPPT have found it necessary, in their implementing legislation for these requirements, to categorically exclude from coverage any access control technologies which lack some required “relationship [with] the exercise of rights by a copyright holder.” The legal regimes in these jurisdictions either apply to any technology that effectively controls access to a copyright work (see, e.g., 17 USC § 1201(a) (US law); EU Copyright Directive Art. 6.3), or have even broader coverage (Japan Unfair Competition Law, Article 2(5) (definition of “technical restriction means”). It should also be noted that WIPO’s authoritative Guide to the Copyright and Related Rights Treaties Administered by WIPO explains that all access control technologies used in connection with copyright works must be protected. See para. CT-11.8, page 216, entitled “The meaning of technological measures ‘used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention’”:

¹ The chapeau reads, “In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances and phonograms, each Party shall provide that any person who:”

[T]he Treaty leaves it to authors – and , of course, “authors” also means other owners of copyright – whether or not they apply technological measures, and, if they do, what kind of measures. *The obligation to provide “adequate protection and effective legal remedies” exists, however, as soon as such measures are applied.* (emphasis added)

See also *id.* at para. CT-11.8, page 217 (“There are two basic forms of restricting (making conditional) acts: first, *restricting access to works*; and second, restricting the carrying out of certain acts in respect of works. *The obligations of Article 11 [of the WCT] cover both of these basic forms.*”) (emphasis added).

Upon reviewing these submissions, IIPA was concerned about the AGD’s apparent position that, despite the clear and comprehensive definition of the term “effective technological measure” in the AUSFTA, the word “any” in that definition could safely be ignored, and ETMs might be excluded from protection because they lacked some to-be-defined “relationship to copyright.” Our concern has increased substantially, however, now that we have learned, with the release of the Exposure Draft, that this relationship would be defined in almost exactly the same terms as it is expressed in current law: an access control technology would not be protected unless it was “designed ... to prevent or inhibit the doing of an act ... that would infringe the copyright by preventing [unauthorized] access to the work or subject matter.” Exposure Draft, clause 1.² AGD’s position has come full circle. It started with an acknowledgement that the coverage of access controls under the current act needed to be broadened to satisfy the FTA, and ultimately arrived at a formulation that is no broader than, and indeed perhaps narrower than, current law.

By deciding to retain the “prevent or inhibit infringement” test as a prerequisite to protection of an access control technology, the Exposure Draft would apparently continue to permit trafficking in tools to circumvention of technological measures, such as those at issue in the Stevens v. Sony case, that function by preventing the use of infringing copies. It would also cast a cloud over the legal status of many commonly used access control measures that have become pervasive features of the marketplace for electronic dissemination of copyright works.

Consider, for example, the following. “Streaming” dissemination is an increasingly familiar means by which copyright works of all kinds – sound recordings, cinematographic works, even computer programs – are accessed by consumers and businesses over digital networks. It is commonplace for access to these streams to be controlled by technological measures – password protection, to use the simplest example – so that subscribers or others with authorization may gain access to the streamed material while others are turned away. Cinematographic works and computer programs are protected under copyright law in Australia, and sound recordings are also recognized as protected subject matter, so these password controls and similar protections fully meet the definition of ETMs in the AUSFTA. Accordingly, circumventing these controls, or trafficking in tools designed or marketed to do so, ought to be outlawed (subject to the applicability of any FTA-consistent exceptions).

² Even if the AGD’s analysis were right – and the WIPO Guide and the legislators in the US, the EU and Japan were wrong – that the “chapeau” language constitutes a substantive limitation on the obligation, that language would not justify the reversion to the “prevent or inhibit” language found in the Exposure Draft. Surely it is possible for a copyright owner to use an access control “in connection with the exercise of [its] rights” under copyright, and to use it to “restrict unauthorized acts in respect of [its] works” (e.g., unauthorized access) without having a design to “prevent or inhibit” infringement, as that phrase has been interpreted by Australian courts. The technological measure employed in the Stevens v. Sony case would be an example.

However, under the Exposure Draft, it is far from clear that this would be the outcome. The liability of one who hacks through these controls to gain unauthorized access, or who provides others with the tools for doing so, would turn on whether or not the control was ultimately determined to have been “designed to prevent or inhibit” infringement. Making that determination would necessitate an inquiry (like the one that occupied several years in the Stevens litigation) into whether what the hacker achieves — the ability to enjoy the streamed audio, audio-visual, or computer program material without authorization from the copyright owner — is in fact an infringement of copyright in that work. The answer to that question may turn on many factors, which could include the source of the stream (whether within Australia or off-shore), the technological parameters of the device upon which the hacker receives the stream (e.g., whether or not it makes temporary or permanent copies of a significant portion of the work in the course of receiving the stream), and the factual circumstances in which the hacker enjoys the unauthorized access to the stream (e.g., whether it is an infringement to view a video-on-demand stream without authorization may depend on whether the viewing takes place in a private home or in a commercial establishment).

In sum, a question that ought, under the AUSFTA, to be a simple and clear one — whether obtaining unauthorized access through circumvention of an effective technological measure is illegal if no FTA-compliant exception applies — becomes, under the exposure draft, an exceptionally complicated one. Of course, the issue of liability for trafficking in tools to carry out this unauthorized access is even more complex, since it would turn on whether or not, to the extent that the hacker was engaged in actionable circumvention, the tool was designed, produced, or marketed for such a purpose. It is certainly possible that the outcome of this extended and convoluted inquiry would be the same as it would have been were Australia’s law simply to adopt the definition of ETM contained in the FTA; but since other outcomes are also possible, depending on the resolution of a number of specific factual questions, there is no doubt that the formulation proposed in the Exposure Draft will lead to increased uncertainty and will undermine the real goal of TPMs protection, which is to encourage new and diverse forms of dissemination of copyright works.

The foregoing discussion assumes that the formulation in the Exposure Draft essentially maintains the requirement of current law that any access control measure that is found to have been designed to prevent or inhibit infringement will be protected. There is good reason to doubt this, however, and to be concerned that the Exposure Draft would in fact narrow the scope of current law, at least with respect to the prohibitions against trafficking in tools to circumvent access controls.

This concern arises from the statutory notes included in the Exposure Draft in clauses 1 and 4, as well as from statements in the AGD’s summary of the Exposure Draft. The former rules out any protection for any technological measures that are “solely designed to control market segmentation.” The latter extends this to all TPMs “solely designed for other purposes ... where the TPM does not have a connection with copyright,” providing in an apparently non-exhaustive list of such purposes the “market segmentation” purpose, as well as the purpose of “protection against competition in aftermarket goods (eg spare parts).” Although we recognize that these statements apply only to TPMs designed “solely” for the stated purposes, they still raise the specter of permitting an uncontrolled market in tools to circumvent an access control measure that fully meets the definition of ETM in the AUSFTA (because it controls access to a copyright work), and that may even have a role in discouraging copyright infringement, but that is

denied protection because the prevention or inhibition of infringement is not found to have been the purpose for which it was designed.³

The statutory note is of particular concern to the extent it would deny protection to any TPM whose purpose is to "control market segmentation," a phrase that is nowhere defined. Almost any technological protection measure could be characterized as having the purpose of "controlling market segmentation." For example, a movie made available during a Video on Demand window will often be accompanied by a technological protection measure to prevent recipients from making a permanent copy, thus "segmenting" the market between those entitled to view the movie in a streaming format now, and those who will be entitled to obtain a permanent copy (whether via download or during a conventional video window) at some point in the future. Certainly someone with the desire and the means to circumvent the TPM used during the VOD window, in order to make a permanent copy, would be able to argue, based on the statutory note to Clause 4 of the Exposure Draft, that all she circumvented was a TPM aimed at "controlling market segmentation"; and the party providing that means (even on a commercial basis) would also claim immunity from liability. Other examples could be given of common business models for digital dissemination of copyright works that depend upon the ability to use technology to "segment" the market temporally, spatially, or between different distribution channels. The Exposure Draft thus threatens to open a significant gap in legal protection of TPMs, making vulnerable any such measure that is used to differentiate between (for example) those currently authorized to access a work in a particular way, and those whose access will be authorized later, in a different medium, or at a different price. The risk of disruption to legitimate markets for copyright materials should be obvious.

IIPA fully understands that, to some extent, these provisions of the Exposure Draft have been motivated by a desire to respond to expressed concerns regarding regional coding of DVDs and perhaps other products. But certainly these provisions sweep far more broadly than would have been necessary to address the situation of, for example, an Australian who acquires an out-of-region DVD abroad and encounters difficulties in playing it on his equipment at home. This broader sweep was clearly intended: the AGD's summary gives region coding as one example of market segmentation, with the obvious implication that there are other examples besides region coding that would also be excluded from protection.

IIPA urges the Australian government to re-examine these proposals in the Exposure Draft, and to consider other ways to address the expressed concerns while still achieving full compliance with the AUSFTA, as well as with the WIPO Internet treaties.

II. Other Concerns with Exposure Draft

(1) AUSFTA Arts. 17.4.7.e.i and ii restrict the applicability of the interoperability and encryption research exceptions to acts of circumvention that involve "lawfully obtained" copies. The corresponding provisions of the Exposure Draft (see proposed secs. 116AK(3), AL(2), AM(2), and 116AK(4), AL(3), AM (3)) omit this prerequisite. This could mean that the circumvention of purloined copies of, for example, unreleased beta versions of computer software could fall within the exception, even though there is no public policy justification for facilitating their interoperability with other programs.

³ For example, a region coding access control may have the effect of discouraging infringement of the exclusive importation right, to the extent that this is recognized under Australian law for certain works.

(2) AUSFTA Art. 17.4.7.a.ii calls for prohibitions on manufacturing or importing circumvention devices, but proposed sections 116AL(1)(a)(i) and (ii) reach these acts only if it is also proven that the manufacturer or importer intended to provide the device to another person. This requirement for civil liability is inconsistent with the AUSFTA and should not be imposed; considerable damage could be inflicted even if the manufacturer or importer simply uses the device himself or herself to circumvent technological measures. A similar defect is found in the criminal provisions, proposed section 132APB(1)(a)(i) and (ii), and should also be corrected.

(3) Proposed section 116AO(2) does not direct the court, in considering an award of additional damages, to consider the need for deterrence of similar conduct, as does the parallel provision for copyright infringement, current section 115(4)(B)(ia). This discrepancy should be corrected.

(4) The recurrent use of the phrase "circumvention device of the person" (see, e.g. proposed section 116AL(1)(b)) could inappropriately give the impression that a defendant must have a certain possessory or ownership interest in a circumvention device before being exposed to liability for trafficking in it. This is not necessarily the case (e.g., A could be liable for offering to B a circumvention device possessed by C). We understand this phrasing may be an artifact of the need to add to current law what is proposed to be the first prong of the definition in clause 2 (dealing with marketing or promotional activities) but suggest that the drafting be reviewed to dispel potential confusion.

* * * * *

IIPA appreciates your consideration of its views. Please do not hesitate to contact the undersigned if there are questions about this submission.

Respectfully submitted,

Steven J. Metalitz
on behalf of IIPA

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Australian *Flexible Learning* Framework

supporting e-learning opportunities

Copyright Amendment (Technological Protection Measures) Bill 2006

SUBMISSION OF THE FLEXIBLE LEARNING ADVISORY GROUP
TO THE
ATTORNEY-GENERAL'S DEPARTMENT

SEPTEMBER 2006

flexiblelearning.net.au

1. Executive Summary

FLAG understands and supports the desire of copyright owners to prevent piracy of their works. The legitimacy of legislative provisions directed to that end is not questioned by FLAG.

As was made clear in its submission to the Legislative and Constitutional Affairs Committee inquiry into appropriate exceptions to technological protection measures ("TPM's"), FLAG's concern has been to avoid a TPM regime which does not require technologies to have a link to copyright before being protected as TPM's. FLAG is also concerned to ensure that the TPM regime incorporates appropriate exceptions to ensure that the existing copyright balance is not disturbed.

FLAG believes that the Exposure Draft of the *Copyright Amendment (Technological Protection Measures) Bill 2006* goes a long way towards achieving each of the above. FLAG congratulates the Government for the broad policy approach reflected in the Exposure Draft.

There are, however, some aspects of the Exposure Draft which are of concern to FLAG. These are:

1. the failure of the drafters to ensure that the TPM exceptions can, as a matter of practicality, be exercised by those who are intended to benefit from them (dealt with in sections 4.1 and 4.3 below);
2. the application of the TPM regime to broadcasts (contrary to earlier assurances that this would not occur) and the failure to include Part VA of the *Copyright Act* as an exception (dealt with in section 4.2 below);
3. the potential uncertainty caused by the drafting and placement of the "educational purposes" and "course of study" exceptions (dealt with in section 4.4 below);
4. the potential uncertainty caused by the wording of the malfunctioning TPM exception, and the failure to make clear that this exception applies in other situations such as where a TPM is obsolete, lost, damaged, defective or unusable (dealt with in section 5 below);
5. the vague and uncertain limitations imposed on the exception for encryption research (dealt with in section 6 below);
6. uncertainty regarding the status of region coding (dealt with in section 7 below); and
7. uncertainty regarding the process of seeking further exceptions (dealt with in section 8 below).

Finally, while not a comment on the Exposure Draft as such, FLAG would like to urge the Government to ensure that the recommendations of the Copyright Law Review Committee regarding copyright and contract are given effect to by ensuring that the exceptions which are included in the Exposure Draft are not able to be excluded by contract.

2. Who we are

The **Flexible Learning Advisory Group (FLAG)** is the lead national body for flexible and e-learning in the vocational and educational training (VET) sector. It is an advisory group to the National Senior Official Committee (NSOC), the Department for Education, Science and Training (DEST), and the Australian Information and Communications Technology in Education Committee (AICTEC).

FLAG has been responsible for facilitating national collaboration for flexible and e-learning and for developing and overseeing the implementation of the *2000 – 2004 Australian Flexible Learning Framework* and subsequent *2005-2006 Australian Flexible Learning Framework (2005-2006 Framework)*. The 2005-2006 Framework is a two-year national strategy collaboratively funded by the Australian Government and all States and Territories at AUD\$15 million annually. It builds on the work

of the 2000-2004 Framework but also strikes out in some exciting new directions, including working to meet the e-learning needs of students and communities, business and industry, Indigenous learners and people with disabilities. The Framework's 2006 Business Plan can be found at:
<http://flexiblelearning.net.au/aboutus>

The VET sector includes some 1900 colleges and institutes of Technical and Further Education (TAFE's), adult and community education providers (ACE), private training colleges, and industry bodies, all providing nationally recognised vocational education and training. Most VET institutions are either government owned or in receipt of substantial government funding. Some, however, are private organizations. The VET student population is in the order of 1.7 million.

3. Introduction

FLAG welcomes this opportunity to make representations to the Attorney General's Department ("the Department") regarding the Copyright Amendment (Technological Protection Measures) Bill 2006 ("the draft Bill") and the Copyright Amendment Regulations 2006 ("the Draft Regulations").

FLAG applauds the efforts of the Department in seeking to ensure that the regime that prevents circumvention of technological protection measures ("TPM's") is confined to TPM's that have a connection with copyright. FLAG is also pleased to note that the Department has recognised that the education sector is deserving of special treatment: the exceptions applying to educational sector use of TPM's will be of fundamental importance in ensuring that the proposed anti-circumvention regime does not unduly disturb the existing balance between the rights of copyright owners and copyright users.

FLAG does not intend to comment upon every clause of the draft Bill or the draft Regulations. This submission will be confined to comments on those aspects of the draft Bill that are of particular relevance to the education sector.

Those comments follow.

4. Circumvention by education institutions

4.1 How do educational institutions take advantage of the exceptions contained in the new anti-circumvention regime?

FLAG is disappointed to note that the drafters have not overcome the so-called "lamentable, inexcusable flaw" identified by the Legislative and Constitutional Affairs Committee ("LACA"), namely that the prohibitions on manufacture and supply of anti-circumvention devices and services are not subject to the exceptions which apply to the act of circumvention. FLAG acknowledges that the Government is bound by the language of the AUSFTA and appreciates the difficulty facing the drafters. However, FLAG urges the Government to give further consideration to finding a workable solution to this egregious flaw in the anti-circumvention regime.

4.2 Circumvention for the purpose of relying on the Part VA statutory licence

FLAG notes that the contrary to earlier assurances that the proposed new anti-circumvention scheme would not apply to broadcasts (as this is not a requirement of the Australian-US Free Trade Agreement ("AUSFTA")) it would appear from the definition of access control technological protection measure and the definition of technological protection measure contained in the draft Bill that the scheme *will* apply to broadcasts.

If this is the intention then, in FLAG's submission, the proposed exception for the purpose of accessing a work in order to copy or communicate that work pursuant to Division 2A of Part VB of the Act should be extended to include accessing a broadcast in order to copy or communicate that broadcast pursuant to Part VA of the Act.

Many educational institutions (eg universities) have entered into agreements with Screenrights (the declared collecting society pursuant to s 135P of the Act) whereby equitable remuneration for copies and communications pursuant to Part VA of the Act is not tied to actual copy levels. Other educational institutions are likely to reach similar agreements with Screenrights. In the event that Australian broadcasters adopt broadcast flags or similar technology to control access to digital broadcasts, these institutions will find themselves "locked-out" of content for which they have agreed to pay equitable remuneration.

FLAG notes with concern the fact that notwithstanding submissions from education sector stakeholders (including FLAG) regarding the importance of including Part VA as one of the "permitted purposes" in the proposed new anti-circumvention regime, LACA declined to make such a recommendation because the Government, through the Department of Attorney General, had informed LACA that "broadcasts would not need to be included in the new TPM liability scheme as they do not come within the compass of the protected copyright material under Article 17.4.7" (LACA Report para 4.113).

In light of these assurances, FLAG has not undertaken the inquiries which would be necessary if it were to make a detailed submission on the current status of TPM's and broadcasts and the likely anticipated impact of TPM's on the ability of educational institutions to make full use of the Part VA statutory licence. In FLAG's submission, however, there is absolutely no basis for assuming that broadcasters will not seek to take advantage of broadcast flags and similar access control technology to restrict unauthorised access to digital broadcasts.

An example of a broadcast flag being used as an access control measure is when the flags are used to "tether" recordings to a single device. For example, a TAFE library may copy a television broadcast using a VCR or DVD burner but then the flag may prevent that program from being played on any other device than the one that recorded it. If a student then borrowed the DVD or video from the library and attempted to play the program on their VCR or DVD player at home, then the flag may operate as an access control measure to stop the student from accessing the television program.

If as is likely such flags are used, educational institutions will have access to *less* material than they are paying for. This will create the opportunity for broadcast copyright owners to offer to make this material available to educational institutions in return for a further payment, which would be a windfall.

4.3 Manufacturing etc a circumvention device

FLAG is pleased to see that the drafters have adopted the recommendation of LACA and sought to confine the prohibitions on manufacture, import etc of circumvention devices contained in s 116AL of the Act in such a way as to give *some* meaning to the exceptions contained in the draft Regulations (eg by not prohibiting the act of manufacturing a circumvention device). FLAG urges the Government to resist any pressure by copyright owner groups to deviate from this approach.

FLAG notes with concern, however, the fact that the prohibitions contained in ss 116AL and 116AM are not subject to a permission exception. In light of the failure of the draft Bill to address the so-called "lamentable, inexcusable flaw" discussed at section 4.1 above, it is in FLAG's respectful submission *imperative* that the draft Bill include an exception allowing for a person who has obtained the *permission* of a copyright owner to do one of the acts set out in s 116AL(1)(a) or 116AM(1). A failure to incorporate such an exception will arguably lead to the ludicrous situation where it will not be open to educational institutions to seek to overcome the "lamentable and inexcusable flaw" by obtaining the permission of a copyright owner to manufacture etc a circumvention device with the intention that this device be used by other educational institutions for the purpose of exercising their Part VB (and Part VA) rights. Whether or not copyright owners would have permitted educational institutions to act efficiently by sharing a circumvention device or providing circumvention services to each other, they will be prevented from doing so. The draft Bill will force educational institutions to duplicate resources in a most inefficient fashion.

FLAG submits that any concern that such a permission exception could operate over-broadly could be addressed by confining the operation of the exception to works and subject matter owned by the copyright owner who has given permission to circumvent the TPM.

4.4 Drafting and placement of the “educational purposes” and “courses of study” exceptions

FLAG is disappointed that the drafters have relegated the exceptions intended to benefit educational institutions to the Regulations and not included these in the Act. FLAG notes that in its June 2004 report, the Joint Standing Committee on Treaties Report ("JSCOT") gave special mention to the education sector, and urged the Government to legislate to protect “the rights of the universities, libraries, educational and research institutions to readily and cost effectively access material for academic and related purposes.” In FLAG's submission, the educational exceptions to the proposed anti-circumvention regime are a fundamental part of the copyright balance. FLAG is concerned that those exceptions are at risk of being repealed with relative ease given their placement in the Regulations rather than the Act. FLAG urges the Government to re-consider this decision.

If these exceptions are to remain in the Regulations, FLAG asks that consideration be given to noting, in the Second Reading Speech to the draft Bill as well as in the Explanatory Statement to the draft Regulations, the Government's intention that the new anti-circumvention regime not be construed in such a way as to interfere with the ability of educational institutions to take full advantage of the educational statutory licences contained in Parts VA and VB of the Act and that the exceptions in the Regulations are critical to giving effect to that intent.

FLAG also submits that the decision of the drafters to provide a stand-alone exception in the Regulations in relation to s 135ZMB of the Act will, potentially, cause confusion. It is uncontroversial, in FLAG's submission, that the exception which is currently contained in subsection (b) of Regulation 20Z would be construed by a court as applying to conduct pursuant to s 135ZMB of the Act. FLAG respectfully submits that the following amendments should be made to the draft Regulations:

- (a) delete the exception contained in subsection (c) of Regulation 20Z;
- (b) amend the heading to the exception contained in subsection (b) of Regulation 20Z to read “Educational institutions”; and
- (c) amend the wording of the exception contained in subsection (b) of Regulation 20Z to read “the reproduction or communication by or on behalf of an educational institution pursuant to Part VA or Part VB of the Act.”

5. Malfunctioning etc TPM's

Regarding the exception contained in subsection (j) of Regulation 20Z, FLAG makes the following submissions:

- FLAG's preferred position is that malfunctioning etc TPM's be excluded from the TPM regime. For the reasons which are outlined below, the approach adopted in the Draft Bill and Regulations is likely to result in users who have purchased copyright works being locked out of access to those works if a TPM malfunctions or becomes obsolete.
- FLAG submits that the exception, as drafted, suffers from the “lamentable, inexcusable flaw” - ie a person who is entitled to circumvent a malfunctioning etc TPM can only take advantage of this exception if he or she is able to manufacture a circumvention device. This, in FLAG's submission, will render the exception of little practical use.
- It is unclear what is intended by the words “not operating normally” and “not reasonably available”. Given that the onus of establishing the exception is on the user, it is important to ensure that the Regulations specify with clarity the elements of the exception. FLAG understands that the words “not operating normally” may have been chosen by the drafters

with the intention that they would apply in diverse circumstances, including where a TPM is obsolete, lost, damaged, defective, malfunctioning or unusable. FLAG notes that LACA recommended that an exception be available with respect to each of the circumstances listed above, provided the copyright owner did not provide effective support to rectify the problem or supply a replacement TPM (LACA Report para 4.180-4.181). FLAG respectfully submits that if the intention of the drafters was to give effect to this recommendation (which reflected submissions made by FLAG and other education sector groups) then this has not been achieved by the wording in the draft Regulations. If it is not considered appropriate to provide a separate exception for each of the circumstances referred to above, then FLAG submits that the subsection (j) of Regulation 20Z should be amended to include the following: "Without limitation, the words "not operating normally" include the following circumstances: (a) that the TPM is obsolete, (b) that the TPM is lost, (c) that the TPM is damaged, (e) that the TPM is defective, (f) that the TPM is malfunctioning, and (g) that the TPM is unusable."

- FLAG submits that the words "a replacement technological protection measure is not reasonably available" should be replaced with the words "the copyright owner or TPM owner has not provided effective support to rectify the problem or a replacement TPM." FLAG submits that once a user has satisfied the first limb of this exception, the exception should be available if a replacement TPM is not available. The use of the words "not reasonably available" raises the possibility that if a vendor was willing to make a replacement TPM available for a fee, then a replacement TPM would be found to have been "reasonably" available. It should not, in FLAG's submission, be open to copyright owners to profit as a result of TPM's that are "not operating normally". A user who has purchased the right to access a work must not be placed in a situation where – due to a TPM "not operating normally" – he or she is required to make a further payment in order to be able to continue to access the work.

6. Exceptions for encryption research

FLAG notes that the exceptions for encryption research contained in ss 116AK, 116AL and 116AM of the draft Bill require that the person relying on the exception be "engaged in a *legitimate* course of *study* in the *field* of encryption research" or "employed, or *appropriately* trained or experienced, in the field of encryption technology." FLAG submits that the words which are italicised have the potential to create unnecessary uncertainty as to the scope of the exception. The concepts are vague, and will, in FLAG's submission, impose an unwarranted chill on encryption research. FLAG is also concerned that the wording in ss 116AK 4(c)(i) (which wording also appears in ss 116AL and 116AM) could, potentially, be construed as applying only to persons engaged in a course of study and not persons engaged in research. FLAG submits that the exception should be available to a person who is "engaged in research or study in the field of encryption technology, or "employed, trained or experienced in the field of encryption technology".

Regarding the requirement in s116AK 4(d) (which also appears in ss 116AL and 116AM) that a person seeking to rely on this exception make a "good faith effort to obtain permission to do the act from the owner or exclusive licensee of copyright", FLAG is concerned that this requirement might be construed by the courts as giving rise to a veto on the part of copyright owners. If, as FLAG understands, it is not the legislative intention that a copyright owner can render the exception unavailable by declining to give permission, then the inclusion of this requirement would appear to serve no purpose.

7. Region coding

FLAG notes with concern that the status of region coding under the proposed anti-circumvention regime is far from clear. In FLAG's submission, the draft Bill does not provide sufficient certainty. FLAG urges the Government to enshrine, with greater certainty and clarity, its stated legislative intention that region coding *not* be subject to the anti-circumvention regime.

8. Process for seeking further exceptions

Finally, regarding the process for prescribing further exceptions to the proposed anti-circumvention regime (as set out at s 116AK (11) to (13), FLAG submits that the Act should clarify the person to whom submissions are to be made (ie the Attorney General). FLAG also submits that the sub-paragraph (13) should be deleted lest it be construed as conveying a legislative intention that it is appropriate for the Attorney General (or other relevant Minister) to take up to four years to decide whether to recommend an exception which has been the subject of a submission.

Our Ref: KG 30/05026

22 September 2006

Attention: Kirsti Haipola

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Dear Kirsti

Submissions on the Exposure Draft – Technological Protection Measures

Thank you for the opportunity to comment on the Exposure Draft ("ED") of the technological protection measure (TPM) provisions of the Copyright Amendment Bill 2006.

The Australian Broadcasting Corporation (the "ABC") comments as follows:

1. Definition of Access Control Technological Protection Measure

- [1] The ABC supports the Government's approach that the prohibition on technological protection measures should be linked *only* with copyright protection. The difficulty lies in the application of this approach where there is overlap between technological protection measures that are designed to achieve anti-competitive outcomes, which have as a bi-product an effect on copyright protection, and technological protection measures that prevent copyright infringement alone.
- [2] In practice, a TPM is likely to have a combination of those two effects. The ABC submits the policy should be based on a dominant purpose test, rather than excluding those devices which are "solely" designed to control market segmentation.
- [3] The ABC submits the term "market segmentation" should be replaced with a term more easily understood such as "anti-competitive behaviour".
- [4] In subsection 10(1)(b) of the ED the phrase "gaining access to" should be "infringing copyright in"...the work or other subject-matter "without a defence".
- [5] Also, to ensure that the scope of the legislation complies with the Australian USA Free Trade Agreement, the definition should relate to effective TPMs, and exclude ineffective TPMs.

2. Section 116AK(13) and section 132APA(13) of the Exposure Draft

- [6] The ABC has previously submitted that it holds the view in the current digital environment that a review period of 4 years in relation to technological developments is too long a time to deal with new issues relating to TPMs. The ABC suggests 2 years would be more appropriate.

3. Section 116AK(8)(b) of the Exposure Draft

- [7] Without prejudice to the ABC's capacity to assert that the ABC falls within the definition of library or archive in sub-sections 8(b)(i) and (ii) of the ED, the ABC submits that there should be a provision here that allows a broadcaster such as the ABC to circumvent TPMs for the purpose of making an acquisition decision in relation to the work or other subject-matter.

4. Section 116AP(iv), section 132APA(8), section 132 APB(6), section 132APC(6) of the Exposure Draft – the use of term "public non-commercial broadcaster"

- [8] The ABC clearly provides a national broadcasting service, so it would come within the meaning of "public non-commercial broadcaster (including a body that provides a national broadcasting service, within the meaning of the *Broadcasting Services Act 1992*, and a body that holds a community broadcasting licence within the meaning of that Act)."
- [9] However, to avoid argument about the meaning of "public non-commercial broadcaster", the ABC submits that the provision should explicitly reference the Australian Broadcasting Corporation, as is the case elsewhere in the Copyright Act, such as section 152 of the Copyright Act.

5. Overlap of copyright and contract

- [10] The ABC submits that to ensure legal risk can be limited, the Exposure Draft must clarify the issue whether exceptions to TPMs override terms of contracts.
- [11] This question continues to be a live issue for the ABC. The ABC submits that reliance on the exceptions would retain a level of legal risk for the ABC unless this issue is clearly resolved.
- [12] The most contemporary example is that of digital download providers requiring 'shrink-wrap' type contracts, which contractually prohibit circumvention of TPMs, even though the ABC has a licence in place allowing the ABC to exercise the copyright in the material legitimately.
- [13] As a precedent to introduce clarifying wording into legislation, we bring to your attention section 47H of the Copyright Act which purports to deal with the overlap of contract and copyright. This section makes void agreements which exclude the operation of Part III Division 4A in relation to acts not constituting infringements in computer programs.

Please do not hesitate to contact Kate Gilchrist, Senior Lawyer, on 02 8333 5850, if you require further information.

Yours sincerely



Gary Dawson
A/Director Corporate Strategy & Communications



22 September 2006

Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General Department
Robert Garran Offices
National Circuit
Barton ACT 2600

Attention: kirsti.haipola@ag.gov.au

Dear Helen,

SBS' Submission on the Exposure Draft Copyright Amendment (Technological Protection Measures) Bill 2006.

Thank you for the opportunity to make a submission on the Government's **Exposure Draft Copyright Amendment (Technological Protection Measures) Bill 2006**. We understand that the Department is consulting with stakeholders prior to the introduction of this legislation. SBS' comments on the Draft Bill are based on our previous Submissions to the Attorney-General's Department and also to the House of Representatives' Standing Committee on Legal and Constitutional Affairs (**LACA**).¹

Comments on the proposed amendments to the *Copyright Act 1968 (Act)*:

1 Definitions

Subsection 10(1)

We note the introduction of a new definition of "**access technological protection measure**", as well as an amendment to the definition of "**technological protection measure**" and the accompanying legislative Note that states:

To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not an access control technological protection measure.

By reference to a device etc **solely** designed to control market segmentation this legislative note clarifies that the definition of both an "**access technological protection measure**" and/or a "**technological protection measure**" does not include region coding devices per se.

SBS fully appreciates the government's reasoning behind the exclusion of access control measures that are not copyright-related from the Draft Bill² and we support this approach. Nonetheless, SBS submits that the 'region coding problem' may not have been fully resolved because broadcasters frequently require access to DVDs sourced from different territories for programming purposes³, and that imported DVD can have TPMs comprised of anti-piracy

¹ SBS Submission in response to the Attorney-General's Dept's *Outline Paper: Implementation of the Australia-United States Free Trade Agreement Technical Protection Measure Provisions*, July 2006, 7 August 2006 and SBS Submission to the Standing Committee on Legal and Constitutional Affairs *Review on Technological Protection Measure Exceptions*, 21 October 2005.

² See *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA58 and LACA's Recommendation 4

³ See SBS Submission to the Standing Committee on Legal and Constitutional Affairs *Review on Technological Protection Measure Exceptions*, 21 October 2005 at point 3: *Examples of TPMs having adverse effects on SBS' practices where SBS*

measures that inextricably link copyright protection and market segmentation features ie. combined access and regional codes. Therefore, the current drafting could be an issue for SBS in future because it is the intention of the legislators that SBS should not be liable if we are simply accessing a TPM to change region coding.⁴ Since the drafting refers to the exclusion of a device etc **solely** designed to control "market segmentation" which has a broad meaning, SBS suggests that this legislative note should be redrafted so that it specifically excludes region coding.

As foreshadowed in our previous Submissions, SBS is also proposing an additional exception for broadcasters to circumvent access control TPMs for a range of purposes, including acquisitions. See SBS' recommendation on s 116AK (8) below.

Definition of public broadcasters used in the Defences for certain public institutions

In the Defences for certain public institutions the Draft Bill introduces a working definition of public broadcasters derived from the *US Free Trade Agreement Implementation Act 2004*⁵ that differs from the Copyright Act's current definitions⁶ and their usage. Specifically, the new clauses relating to the limitations on liability for public broadcasters found in Subdivision A, s 116AP (iv) and Subdivision E in s 132APA (8) (d) etc of the Draft Bill refer to public broadcasters in the following manner:

a public non-commercial broadcaster (including a body that provides a national broadcasting service, within the meaning of the Broadcasting Services Act 1992, and a body that holds a community broadcasting licence within the meaning of that Act);

As both the SBS and the ABC, being the bodies which provide a national broadcasting service within the meaning of the *Broadcasting Services Act 1992*, engage in significant commercial revenue-raising activities in the form of ancillary merchandise and other enterprises, we are concerned that the inclusion of the expression 'non-commercial broadcaster' should be clarified. Clearly, the expression is intended to distinguish public broadcasters from commercial broadcasting services under the *Broadcasting Services Act*.⁷

identified the following example of TPMs currently affecting the legitimate activities of SBS, or likely to have an effect as a result of the introduction of the AUSFTA TPM Regime by 1 January 2007:

- (a) **Access to DVDs sourced from different "regions"**. SBS needs to access DVDs sourced from different countries for purposes such as previewing overseas sourced television programs for broadcast licensing, and previewing DVDs to be marketed in Australia by SBS Program Sales.

Example: SBS Program Purchasing and Program Sales can currently play most DVDs received for preview from overseas licensors on multi-region DVD players. However, SBS's PC DVD-Roms and some other broadcasting equipment are not multi-region coded and therefore we have experienced difficulty in playing overseas-sourced DVDs on these.

⁴ See Kimberlee Weatherall's blog at < <http://weatherall.blogspot.co..> Weatherall's Law, The TPM (OzDMCA) Exposure draft: Some comments, "What does all this mean for regional coding?", September 6, 2006. She says, "Frankly, I'm not aware of any technology or component that is designed solely to effect region-coding. Currently, with respect to movies, region-coding is enforced using a combination of CSS and contracts that require the makers of DVDs to enforce Regional Playback Control (for details, see (her) submission to the TPM Inquiry last year). CSS is also designed to prevent use of unauthorised disks. In fact, when it comes to next generation DVD technology (HD DVD or BluRay), the same system is going to be used to enforce all kinds of controls - including region-coding. In that event, this 'qualification' in the Note will simply not be useful."

⁵ Schedule 9, *Copyright Amendments*, include a 'Defence for certain public institutions' etc that includes at

- "(d) a public non-commercial **broadcaster**, including:
(i) a body that provides a national broadcasting service, within the meaning of the *Broadcasting Services Act 1992*, and
(ii) a body that holds a community broadcasting licence within the meaning of that Act."

after subsection 132 (5E), a new (5EA)

⁶ Current definitions of SBS and public broadcasters in the *Copyright Act 1968* ("Act") include; section 10 of the Act states: the Special Broadcasting Service Corporation means the body corporate preserved and continued in existence as the Special Broadcasting Service Corporation under section 5 of the *Special Broadcasting Service Act 1991* ("SBS Act") and it specifically referred to by name in sections 91, 199 etc of the Act. However, in s 135ZZ1 "**free to air broadcast**" means a national broadcasting service, a commercial broadcasting service or a community broadcasting service within the meaning of the *Broadcasting Services Act 1992* (BSA)". (s 13 of the BSA provides that national broadcasting service includes SBS). So, the proposed definition might be consistent with s 135ZZ1 but for certainty SBS would require a reference by name.

⁷ SBS Act: see SBS' Charter at clause 6 (5): "A subsidiary function of the SBS is to carry on, within or outside Australia, any business or other activity incidental to the fulfilment of the Charter."

In order to avoid confusion, we suggest it be reworded as follows:

"a public broadcaster (being a body that provides a national broadcasting service, within the meaning of the Broadcasting Services Act 1992), or community broadcaster (being a body that holds a community broadcasting licence within the meaning of the Broadcasting Services Act 1992); and ..."

We have highlighted the changes this would involve to the current draft in **bold** below:

"a public (delete "non-commercial") broadcaster (delete "including" and replace with "being") a body that provides a national broadcasting service, within the meaning of the Broadcasting Services Act 1992, and (add " a community broadcaster being") a body that holds a community broadcasting licence within the meaning of the Broadcasting Services Act 1992); and ..."

2 Subdivision A – Technological protection measures

Section 116AK Circumventing an access control technological protection measure

Notwithstanding that Australia's requirements to comply with Article 17.4.7 (e) (vii) of the AUSFTA only require the Act to provide an exception for:

"access by a non-profit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it for the purpose of making acquisition decisions ..."

SBS proposes a further amendment to this section that would provide as necessary for broadcasters to access region-coded DVDs of television programs and films in order to make acquisition decisions.⁸

We suggest that section 116AK be amended by inserting a new subclause at s 116AK (8) (b) (iv) to follow after s 116AK (8) (b) (iii) that states:

- "(iii) an educational institution; or*
- (iv) a public broadcaster (being a body that provides a national broadcasting service, within the meaning of the Broadcasting Services Act 1992, and a community broadcaster being a body that holds a community broadcasting licence within the meaning of the Broadcasting Services Act 1992); and ..."*

⁸ See SBS Submission to the Standing Committee on Legal and Constitutional Affairs Review on Technological Protection Measure Exceptions, 21 October 2005 at point at 5: **'Proposed exceptions'**

SBS submits that the Committee should recommend exceptions for broadcasters on the basis of the adverse effects outlined in Note 3 above using circumvention devices as follows. Our exceptions were drafted on the basis that the AUSFTA TPM Regime would **not** result in prohibition of circumvention of TPM **copy-controls**, including where a copy-control is part of a TPM access regime.

(1) Access to DVDs sourced from different "regions"

...as necessary for broadcasters to access region-coded DVDs of television programs and films in order to make acquisition decisions.

We note that there is already an existing exception under the AUSFTA TPM Regime protecting the right of libraries to circumvent TPMs for the purposes of their acquisition decisions. This exception would be analogous and is equally justifiable. The exception applies only to a limited class (region-encoded DVDs of television programs and films). It does not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs, as only a clearly defined and highly visible class of users (broadcasters) is permitted to purchase and use such devices.

SBS would also like to comment on some possible omissions from the draft legislation, as follows:

3 Copyright and 'Contracting Out'

The issue of excluding or limiting permitting exceptions by agreement was considered by the LACA which recommended that:

"the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement should nullify any agreements purporting to exclude or limit the application of permitted exceptions under the liability scheme"
(Recommendation 33).

As SBS has stated in a number of submissions to government,⁹ we are strongly of the view that contract law should not override fundamental rights and exceptions provided for in the Act.

SBS supports the CLRC recommendation in 2001 that the Act should be amended to preserve the integrity of certain exceptions which are fundamental to the balance between the interests of copyright owners and users.

SBS maintains that rightsholders should not be able to contract out the statutory exceptions to the TPM liability scheme. This principle has already been adopted in s47H of the Act, which provides that an agreement is void where it excludes or limits users from making copies of computer programs for particular uses. In addition, similar legislative protections have been adopted in other Australian statutes such as the *Trade Practices Act* (1974) s68, *Corporations Act* (2001) s199C, and *Occupational Health and Safety (Commonwealth Employment) Act* (1991) s80. Moreover, international precedents already exist to ensure that copyright is not overridden by contract such as the interpretative rules and preemption doctrine in the United States.¹⁰

Examples of the interaction of commercial and/or statutory licences (including exceptions) with contract

Statutory licence exceptions and Contract

SBS relies on the Act's statutory licence exceptions for broadcast programming of musical works and sound recordings. Therefore, rightsholders should not be able to exclude these exceptions by means of their contracts with broadcasters and/or under their distribution agreements to supply music content in digital format to users in niche markets, such as iTunes for iPods that might be the only format available in some circumstances for broadcasters to obtain music for program purposes. Whilst the rightsholders will be keen to protect their commercial interests, their ability to contract out of the exceptions would undermine the government's ongoing policy justification for these broadcasters exceptions i.e. to 'promote efficiency in broadcast programming'; and because they are 'necessary and desirable given Australia's dispersed geography and different time zones that operate'.¹¹

Commercial Licences and Contract

SBS also has a range of commercial licences with music collecting societies amongst other parties. For instance, SBS has two key blanket licences with APRA and PPCA to broadcast music.

SBS does not agree with the conclusion of the LACA (point 4.173) that as blanket licences for the use of music by broadcasters are contractually negotiated, that there is no justification for an exception to ensure that broadcasters can, if necessary, break TPMs to use copyright products purchased under those licences. We point to four issues:

⁹ SBS made a submission to government on *Copyright and Contract* to DCITA's Portfolio Discussion Paper on the Copyright Law Review Committee's (CLRC) final report on *Copyright and Contract* in 2003; and also see our Submission to the Attorney-General's Department on *Fair Use And Other Copyright Exceptions* in July 2005.

¹⁰ See: http://www.copyright.com.au/reports%20&%20papers/issuesPaper_Lindsay.pdf at 40 – 42.

¹¹ Copyright Law Review Committee, *Copyright and Contract*, (Commonwealth of Australia, Canberra 2002), Appendix D, 'Table of Exceptions' at 296 and 299.

- (1) Existing licences do not contain TPM permission clauses:

Unless a blanket licence contains an express contractual term permitting SBS to prospectively break any kind of TPM in any product in APRA or PPCA's vast local and international repertoire of represented licensors, there is a risk of breach of the TPM provisions. As SBS current agreements with APRA and PPCA are of many years standing and continue to roll over, the issue of TPMs is not mentioned. These kinds of agreements tend to be long running and therefore the opportunity to respond to new TPM issues may not arise.

- (2) Anticipating TPM usage:

As APRA and PPCA represent licensors of huge international repertoires of music, they are not necessarily in a position to know what each licensor is doing with TPMs applied to their products in all jurisdictions. As SBS often uses music bought from overseas this issue may be exacerbated as different jurisdictions may take different approaches to TPM rights management.

- (3) Getting permission from licensors:

We have concerns as to whether PPCA and APRA will be able to obtain consents from their licensors to the appropriate TPM permission clauses SBS will require. As broadcasters are a relatively small and specialised user set, they are not in a position to dictate substantive changes to the general consumer regime that licensors will apply to TPMs.

- (4) Time required to obtain a licence to break a particular TPM:

On the assumption that SBS' blanket licences are unlikely to contain appropriate TPM clauses to cover every eventuality as set out above, the only other option would be to contact individual licensors directly to ask permission to circumvent. This is impractical. SBS requires the exception to ensure that it will not be in breach of the Copyright Act if it is to circumvent a TPM in order to access and use a legally licensed CD at short notice. It is not practical for SBS to have to contact individual licensors to seek permission to break a TPM or supply a non TPM product, or ask APRA or PPCA to do so for them, within the time frame of broadcasting. While SBS has not yet encountered TPM issues with CDs or other music products, it appears likely that the music industry will soon follow the film industry and apply them even if a CD will play on a consumer product, the TPM may not respond to broadcasting equipment.

Under these agreements SBS is already paying rightsholders significant sums for the right to broadcast musical works and sound recordings and so we would expect to be able to obtain that copyright material unhindered by either TPMs or contract.

Since the principle of rendering void agreements that purport to contract out the copyright exceptions has already been adopted in s47H of the Act, we suggest that the Exposure Draft of the *Copyright Amendment (Technical Protection Measures) Bill 2006*, Subdivision A, be amended to provide that an agreement is void where it excludes users from unlocking TPMs to exercise the lawful exceptions. A new subclause addressing agreements excluding the operation of the TPM exceptions could be introduced under a new header: **"Agreements excluding operation of certain provisions"** that would be complemented by inserting a new subclause, at s 116, possibly after ss 116AP, that states:

"An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of [Subdivision A] or section [TBA] or subsection [TBA], [TBA], [TBA] or [TBA], has no effect."

4 Effective vs Ineffective TPMs

Since the AUSTFA only protects "effective" TPMs, we suggest that this Draft Bill distinguishes "effective" TPMs from "ineffective" TPMs so that only "effective" TPMs are captured by the proposed legislation.

Thank you for providing us with the opportunity to participate in this consultation. We understand that the Department is also conducting a limited further review of some possible exceptions to the TPM scheme and so we will make another submission to the Attorney-General's Department in support of granting broadcasters exceptions to the TPM scheme.

Yours sincerely

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Australian Government

**Department of Education,
Science and Training**

**SUBMISSION BY
DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING**

**COPYRIGHT AMENDMENT (TECHNOLOGICAL PROTECTION MEASURES) BILL 2006
SEPTEMBER 2006**

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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 the activity of circumvention, in addition to *dealings* in circumvention devices and services;
 - allowing exceptions in respect of the activity of circumvention, but not *dealings* in circumvention devices and services;
 - imposing several criteria on the exceptions which may be granted in that area.
2. The Department of Education, Science and Training's (DEST) overriding concerns in this Submission are to ensure that the legislation does no more than is required under AUSFTA; that there is flexibility in the area of exceptions to moderate the shift in the copyright balance; and there is a focus on commercial piracy, not on ordinary users.

Introduction

3. DEST supports the broad objectives of the copyright system. Education and research interests broadly accept 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.
4. 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.

General comments on the TPM scheme

5. DEST commends the AGD on its drafting of a TPM scheme that is linked to protection against infringement of copyright material. DEST appreciates that the wording of the AUSFTA allows very little scope for flexibility, making it extremely difficult for AGD to implement a regime that preserves the balance between copyright owners and users.
6. DEST has consistently asserted that the scheme implemented under Article 17.4.7 of the AUSFTA should:
 - not create additional rights for copyright owners beyond the scope of the *Copyright Act 1968* (the Act); and

- not impede access to digital material, particularly as required by the educational sector.
- 7. DEST considers that the requirements under Article 17.4.7 of the AUSFTA shift the balance overwhelmingly in favour of copyright owners. The protection required against the circumvention of TPMs under the AUSFTA places a layer of protection over copyright material beyond current protections available in copyright law. Copyright owners' rights are significantly increased by allowing them to take actions beyond those merely relating to infringement of their copyright material.
- 8. DEST believes that the protection of TPMs, in particular access control TPMs (AC-TPM), could have the undesired or unintended effect of protecting copyright owners in areas other than copyright law. Digital material is usually covered by a number of technological layers, not all of which are designed to protect against infringement of copyright. Such technological layers, used more and more frequently as digital rights management (DRM), can have the effect of functioning as a TPM without necessarily being used with the intention of the copyright owner to prevent or inhibit copyright infringement.
- 9. Consequently DEST believes that the proposed TPM scheme should attempt to retain, as far as possible, the effect of the High Court decision of *Stevens v Kabushiki Kaisha Sony Computer Entertainment*¹ (Sony). In particular DEST notes statements made by a spokeswoman of the Attorney-General following the decision that the 'decision simply shows that the Copyright Act is effective in giving copyright owners the right to protect against copyright infringement while allowing Australian consumers to use legitimately acquired products'.²
- 10. DEST also welcomes the focus of the legislation, outlined by the Attorney-General on 14 May 2006, and the range of exceptions to the TPM scheme. However DEST notes the ability to make use of exceptions is significantly reduced by the need to either make the circumvention device yourself or to import it for non-commercial use. This will become more apparent after the enactment of this legislation when we anticipate copyright owners will begin wide-scale application of TPMs. This concession presupposes a level of technical capacity which is not widely evident in Australia.

Access to copyright material in digital form

- 11. DEST considers that it is extremely important that the proposed legislation inhibit as little as possible access to copyright material (as opposed to the exploitation or copying of copyright material which has traditionally been the concern of copyright law). It is not in the best interests of Australian education or science sectors that access to information be impeded in any way.

¹ [2005] HCA 58 (6 October 2005).

² Priest, Marcus and Crowe, Davide, "Copyright ruling runs foul of free-trade pact" *The Australian Financial Review* (7 October 2005)

12. DEST regards the anti-circumvention regime as having important consequences for the delivery of copyright material in digital form. The migration of information onto an increasing range of digital platforms has been accompanied by new mechanisms for communicating copyright material. Development of these new mechanisms should be encouraged as integral to fostering technical and cultural innovation. If misused by copyright owners the legislation could have the unintended consequence of stifling the dissemination of digital material to the public.³ Copyright legislation has not in the past prevented access to information, merely given the copyright owners certain rights over the exploitation of their material.
13. It is important to preserve the right of access to copyright material, particularly for the education, training and research sectors. This is becoming increasingly difficult as digital material is subject to a greater number of protections. Consequently DEST is concerned that the TPM scheme could create further obstacles to copyright users in their ability able to access digital material beyond the complications already faced by users in this area. DEST notes that it is not the policy intent of the Government to impede the right of copyright users to access digital copyright material.

Confining the TPM scheme to protection of copyright

14. DEST supports the view, expressed in the draft Bill, that protection of AC-TPMs should be limited to those that are actually intentionally used by copyright owners to protect against potential infringement of their digital material.

Explanatory material

15. DEST considers that due to the technical nature of the material covered in the draft Bill it is essential that stakeholders, the judiciary and the public be given as much interpretative guidance of the provisions as possible. This objective can be assisted by the drafting of explanatory material that:
- provides real-life examples of the types of measures the legislation intends to cover;
 - outlines the rights being conferred to copyright owners under the legislation;
 - specifies the types of actions that should be excluded under the legislation; and
 - outlines the policy rationale behind the legislation and how the TPM scheme relates to copyright law.

³ For real-life scenarios where the US anti-circumvention scheme has been used outside the scope of copyright law see www.chillingeffects.org.

The need for further exceptions

16. Legislative exceptions will be crucial in providing the educational sector with access to copyright material in a digitally networked environment. Given the potential for unintended consequences from the implementation of this scheme, and the potential impacts on users of copyright material if exceptions are not allowed, DEST submits that there should be a general opportunity to make submissions for further exceptions on an *ad hoc* or 'as needed' basis.

Definitions

Technological protection measure

'designed'

17. DEST's understanding of the technology is that technological aspects of a digital product may entail a variety of purposes, of which one such purpose is prevention of access to copyright content. There may be difficulties in applying a test which rests on the assumption that the purpose is wholly one thing or another. DEST suggests that the requirement should be 'primarily designed'. This would provide a proper balance with the test suggested for devices aimed at segmenting markets - see below, para 24.

'works or other subject-matter'

18. The definition of TPM refers to its use in relation to 'works or other subject-matter'. This phrase has been used consistently in the Act to refer to the full spectrum of copyright material protected under the Act. DEST notes the comments by AGD in their supplementary submission to the LACA Committee on December 2005. In response to question 4 posed by the LACA committee AGD stated that the AUSFTA only required protection of 'works, performances and phonograms' under international law.
19. The AUSFTA does not require protection of TPMs used over broadcasts and published editions. This is consistent with their treatment at international law. Under Australian domestic law, although broadcasts and published editions are protected, the protection given is less extensive than to other types of copyright material. Those classes of copyright are typically derivative in nature; they embed pre-existing substantive copyright material, to which a 'thin' layer of presentation or delivery is applied. The Act accordingly treats broadcasts and published editions as minor copyrights in several respects, e.g. they are disregarded for the purpose of allocating royalties under statutory licences.
20. The Act currently provides protection to broadcast decoding devices in Part VAA. The protection given under this part could potentially overlap with the protection

under the TPM scheme. DEST submits that broadcasts already receive equivalent protection against unauthorised decoding in Part VAA of the Act.⁴

21. Protecting TPMs over published editions of works is also problematic. The protection of published editions allow people to format public domain material and place a TPM over that material by claiming copyright in the published edition. This prevents the public gaining access to material in which the term of copyright has expired. Preventing material from entering the public domain upsets the copyright balance. DRM protections are already used to selectively determine access to digital material. Technological measures over published editions should not further erode the availability of access to public domain material.
22. Further, copyright in a published edition is the exclusive right to make a facsimile copy of the edition, i.e. a hard copy. It is difficult to see how a TPM could protect such a copyright. In practice it is likely that TPMs would be applied to a published edition in order to protect the underlying copyright material, and the TPM scheme can be applied in that regard without any extension to cover published editions as such.
23. DEST accordingly submits that the Bill should only protect works, performances and phonograms, and not extend to broadcasts and published editions. That interpretation is consistent with the AUSFTA and is in the interests of education and scientific users of copyright material.

'solely designed'

24. DEST appreciates that the draft legislation is intended to exclude devices aimed at segmenting markets from the definition of TPM. The clarification that measures which are 'solely designed' to prevent market segmentation are excluded from the definition of TPM is of limited effect, indeed it would rarely apply.
25. Market segmentation devices are usually combined with some form of access control measure which creates the strong possibility that those measures will fall under the definition of TPM. For a measure to fall within the definition of TPM it only needs to prevent or inhibit copyright infringement 'in the normal course of operation'. DEST has suggested above that for a measure to fall within the definition of TPM it should be a "primarily designed" to prevent or inhibit copyright infringement. DEST also suggests that the explanatory note should use the same wording. In this way the measure will be classified as either a TPM or market segmentation device according to what is the primary purpose.

⁴ DEST notes that the protection given to broadcasts under Part VAA will soon be increased in accordance with changes announced by the Attorney-General on 30 June 2005 to criminalise unauthorised access to Pay TV broadcast signals.

'circumvention device' / 'circumvention service'

26. The definition of circumvention device and service has been extracted from Article 17.4.7(a)(ii) of the AUSFTA. The definitions have been drafted as a circumvention device / service 'of a person'. DEST appreciates the wording of the definitions to link the circumvention device / service to the person marketing, promoting the device / service in paragraph (a) of the definition. However, it is unclear how the reference to 'the person' applies to paragraphs (b) and (c) of the definitions. DEST submits that (b) and (c) must consistently refer to 'a person' to be consistent with the chapeau of the definition. Additionally, the relationship of the 'person' to the circumvention device / service is unclear. DEST submits that further clarification of this relationship is required.

'circumvention'

27. The draft Bill does not contain a definition of 'circumvention'. DEST submits that 'circumvention' should be understood as a *relevant* circumvention - that is, a circumvention that is knowingly or intentionally directed towards copyright infringement of the relevant work or other subject matter. An example will illustrate the point.
28. Assume that a measure designed to prevent access is applied to a collection of materials. DEST considers this to be a very likely scenario. The collection may be composed of a mixture of materials, including:
- some works *etc.* that are protected by copyright, that the user is not entitled to access ('protected works');
 - some works *etc.* that the user is entitled to access, for example, because they are in the public domain, or because the user is actually the owner of copyright or because they have the licence of the copyright owner to access and use the works ('non-protected works').
29. The question arises as to how the draft TPM regime would apply where the user merely desired to access the latter works. It would be anomalous in DEST's view if the TPM had the effect that copyright owners could prevent legitimate access to non-protected material by combining that material with other, protected material.
30. It is important to remember that the term 'TPM' and the term 'AC-TPM' are defined not *in vacuo* but *in relation to* a particular work or other subject matter. Clearly the access measure would be an AC-TPM *in relation to* the protected works *etc.* However, on our interpretation the access measure would *not* be an AC-TPM *in relation to* the non-protected works *etc.* This follows from the definition of AC-TPM, which requires that the measure be designed to prevent acts of copyright that infringe the copyright in the work or other subject matter. Thus the same access measure is an AC-TPM for one purpose, but not an AC-TPM for another purpose.
31. The terms 'circumvention device' and 'circumvention service' are defined in relation to a particular TPM, and ultimately, therefore, in relation to a particular

work or other subject matter. It follows that a device (or service) may be a circumvention device (or service) in relation to the protected works but not in relation to the non-protected works.

32. DEST therefore submits that 'circumvention' (like the underlying concepts above) must be understood *in relation to a relevant work or other subject matter*. This applies to all usages of the term in the liability scheme, including those relating to dealings. This is consistent with the fact that any action under the liability scheme must be brought by the copyright owner of the relevant work.
33. In our example above:
- in relation to the non-protected works, the 'circumvention' can be disregarded because, to the extent an access measure is applied to those works, it does not fulfil the purpose of an AC-TPM (that it prevent or inhibit infringements);
 - in relation to the protected works, the 'circumvention' should also be disregarded, because it was not undertaken in order to access those works and perform the infringing acts that the AC-TPM is designed to prevent or inhibit.
34. To put the latter point beyond doubt DEST recommends that 'circumvention' be defined along the following lines:
- 'circumvention' means to avoid, bypass, remove, deactivate or impair a technological protection measure used in relation to a work or other subject-matter, with the intention of doing an act:
- (a) that is comprised in the copyright of that work or other subject-matter; and
 - (b) that would infringe that copyright.

Liability Scheme

35. The liability scheme as reflected in the Exposure Draft Bill is required under Article 17.4.7(a)(i) of the AUSFTA. While the liability scheme does not prohibit circumvention of TPMs that protect copyright, the scheme protects against the circumvention of TPMs that control access.

Dealings in circumvention devices

36. The liability scheme attaches liability to certain activities where the device is intended to be provided to another person or where the device is provided to another person. This is presumably to exclude the situation where devices are manufactured or imported for personal or internal use (as indicated in the AGD second supplementary submission to the LACA Committee).
37. To exclude personal dealing in circumvention devices from liability would, to some extent, allow some flexibility towards solving the 'flaw' in the AUSFTA. DEST submits that although a small number of institutions may be in a position to manufacture or import circumvention devices themselves, many institutions will not be as fortunate.

38. The reality is that people who want to be supplied will have to be supplied from jurisdictions outside the country without similar copyright regimes.

Civil liability

39. DEST submits that the TPM scheme would be more effective in meeting the policy intention of the Act if liability under s 116AL applied only where the circumvention device is 'provided to the public' rather than 'to another person'. 'The public' is a phrase used consistently in other areas of the Act and has been interpreted by the courts to mean 'the copyright owner's public'.⁵ While this can apply to a single person, the issue in question is the relationship between the public and the copyright owner.

Providing a circumvention service

40. The comments in paragraph 39 above apply equally to liability under s 116AM in relation to provision of a circumvention service.

Exceptions

Permission

41. DEST notes the inclusion of an additional exception available against the activity of circumvention of an AC-TPM where the defendant has reasonable grounds to believe they have the copyright owner's permission to circumvent. This is more limited than the permission referred to in the definition of an AC-TPM. The permission in the definition of AC-TPM is that of permission to gain access to the copyright material. DEST submits that the wording of this exception should be consistent with the wording used in the definition of AC-TPM. In other words, the exception should apply where the defendant has reasonable grounds to believe that the copyright owner has given *permission to access* the copyright material.

Interoperability

42. DEST notes that this exception applies only to the limited definition of computer programs as defined in s 10 of the Act. DEST submits that the extended definition in s 47AB of the Act should also apply to 'computer programs' under this exception.

Encryption research

43. DEST notes that the person involved in the activity to which this exception applies must be engaged in the field of encryption research. DEST believes that this wording is more limited than the wording required under the AUSFTA. The AUSFTA only requires that the activities be performed by an 'appropriately

⁵ *Telstra Corporation Ltd v Australasian Performing Right Association Ltd* (1997) 146 ALR 649 (Music on hold case)

qualified' researcher. DEST believes that the scope of this phrase should extend to persons beyond those employed or trained in 'encryption research' to those employed or trained in information technology or mathematics.

44. As currently drafted the provisions assumes that the beneficiary of the exception is the same 'person' who is 'appropriately trained . . .' *etc*, and the same as the person who makes 'good faith efforts' to obtain permission. DEST requests that the provisions be expressed in more flexible language to accommodate team based situations that might arise in a research body such as CSIRO.

Online Privacy

45. We would appreciate greater clarification in the Explanatory Memorandum of the work or other subject-matter referred to Section 116 AK (6)(b)(iv) of the exception relating to online privacy. It is not clear what the intended operation is of the criteria.

Groundless threats

46. DEST submits that s 202A should also apply to groundless threats made under ss. 116AL and 116AM of the draft Bill.

A V S D A

Australian Visual Software Distributors Association Ltd

22 September, 2006

VIA ELECTRONIC MAIL: copyrightlawbranch@ag.gov.au

TO: Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Submission made by AVSDA to the Attorney-General's Department on the Copyright Amendment (Technological Protection Measures) Bill 2006

Introduction:

The Australian Visual Software Distributors Association (AVSDA) represents 14 distributors of DVD and VHS films in Australia and in 2005 its members manufactured over 65 million DVD's for the Australian market. The home entertainment film industry now exceeds that of the theatrical industry and achieved revenues in 2005 in excess of \$1.2 billion. Its members include the five major Hollywood Studios, Village Roadshow, and a number of other Australian independent distributors. AVSDA is the industry's peak group.

AVSDA members and their business partners are embracing new business models and technologies for the benefit of consumers. Film distribution companies and copyright owners are actively seeking ways to distribute their films and TV shows using digital distribution methods (including the internet and mobile platforms). In order to deliver content digitally, however, the distributor has to 1) protect the copyright and 2) control access to the work so that it is legitimately purchased or viewed at the appropriate time by the appropriate person.

It is on this second point which AVSDA would like the Government to reconsider its approach to dealing with access controls which as currently drafted does not provide the Copyright Owner any protections should someone circumvent the control to gain free or inappropriate access to a work.

Australian Government is non-compliant with the AUSFTA:

AVSDA believes that with respect to the Government's position on access controls as detailed in this Bill - not containing a link to copyright and therefore under the AUSFTA is not a TPM and should receive no protection under the law - is flawed and will have serious consequences.¹

AVSDA is aware of detailed submissions made by the International Intellectual Property Association, the Australian Federation Against Copyright Theft and The Australian Copyright Council on this matter of access controls and supports their submissions.

¹ Section 10 (1) of the Copyright Act 1968, Access Control and TPM definition, paragraph (b).

This submission will not go into the technical interpretations of the AUSFTA and WIPO treaties again and make comparisons against this Bill except to refer to Article 17.4.7.b of the AUSFTA. This Article defines an effective technological measure (ETMs) to include *"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"* (emphasis added). Articles 17.4.7.a.i and ii require AUSFTA parties to prohibit circumvention of ETMs and trafficking in tools aimed at achieving such circumvention. While a number of exceptions to these prohibitions are authorized under Articles 17.4.7.e and f, none of these take the form of a categorical exclusion of a genus of access control technologies from all protections against circumvention acts and trafficking in circumvention tools as attempted by the Copyright Amendment (Technological Protections Measures) Bill 2006.

AVSDA was pleased to hear the Attorney-General, Hon Phillip Ruddock MP, make a speech to a Copyright Forum in Sydney on 22nd September 2006 in which he included access controls under the definition, or category, of a technological protection measure. This comment contradicts, it appears, the drafting of this Bill.

Business models not protected by this Bill:

AVSDA and Sandra Aistars, Senior Counsel, Intellectual Property, from AOL Time Warner in the US held briefings with the Australian Government in Canberra on Tuesday, 8th August 2006. In that briefing, Ms Aistars detailed AOL TW's business models and deals which aim to distribute content in a digital format using various methods. In each of these models, TPMs are critical in ensuring that access is given only to those who are authorized to see or download the content. This Bill would undermine many of the models presented.

AVSDA is aware of business models being developed around the world and in Australia and content deals being created for local consumers. This Bill removes protections understood to exist to copyright owners around access controls. If this Bill becomes law, and TPMs restricting access are not protected, then AVSDA companies will reconsider offering content and services in the Australian market. Australian consumers would be the ultimate loser. Surely this outcome is an unintended consequence of the drafting?

A simple example of a business model not protected by this Bill would be a company offering its films or TV shows to consumers in a streaming service over the internet or a portable device when they have paid a fee or that consumer has been determined eligible to receive the content. The distributor of the content places a TPM or access control on the stream to ensure that only those that have paid for or are eligible to view the content can do so. This Bill would allow consumers to legally break the access control and view the content for free.

Government intent behind a broad definition of access controls in this Bill:

AVSDA does not understand the rationale for making the activity of circumventing TPM access controls legal, yet legislating at the same time to criminalize signal theft of subscription TV signals. Therefore, AVSDA does not accept the argument put forward by AGD officials that an amendment such as the one proposed in this exposure draft Bill regarding access controls is appropriate, where it has no link to copyright, that industry can seek remedial action elsewhere (in other legislation) for circumvention of TPM and access controls designed to protect the types of business models previously described. It seems strange that on the one hand an amendment is proposed in this Bill which results in a problem the Government recognizes, results in another Act requiring an amendment to fix. The criminalization of signal theft for subscription television amendment shows it can be fixed through the Copyright Act should the Government insist on this definition of TPMs and access controls.

If the intent of the Government - and of the LACA Committee - is to allow Australian consumers to use multi-region or zoned DVD players and broadly defining access controls as a result, the method used to do so in the Bill will lead to, AVSDA submits, wider and adverse implications and suggests another legislative device to achieve this intent.

The debate around chapeau interpretations of the AUSFTA by the international legal representative of AGD's is not one AVSDA wishes to join at this time. It simply wants to ensure that should the Government wish to do something around region coding, that it not damage legitimate business models by so doing and thereby reducing choice and services for the Australian consumer.

Yours sincerely,

[Electronically delivered]

SIMON BUSH
Chief Executive

Cc: Mr Tim Mackinnon, Office of the Attorney-General, Hon Philip Ruddock MP



AUSTRALIAN PUBLISHERS ASSOCIATION

Australian Publishers Association

Submission on

Copyright Amendment

(Technological Protection Measures) Bill 2006

September 2006

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About the Australian Publishers Association

The Australian Publishers Association (APA) is the peak industry body for Australian book, journal and electronic publishers. Established in 1948, the association is an advocate for all Australian publishers: large or small; commercial or non-profit; academic or popular; locally or overseas owned. Over the years the APA has grown from modest beginnings and a membership of twenty, to over 160 members and represents 91% of the industry, based on turnover.

The sector has seen exports greatly increase, particularly in the education/textbook arena. 64% of all books sold in Australia are originated and published in Australia (compared with 10% in the mid 1970s). By comparison, Australian films generated 1.3% of box office receipts (2004) and Australian music recordings accounted for 16% of sales (2002).

Exports have increased 261% over the past seven years. Exports as a percentage of total sales rose from 8.5% to 15% over the same period.

The success of the Australian book industry depends on effective copyright law.

Executive Summary

This submission addresses matters that are associated with the Exposure Draft of the *Copyright Amendment (Technological Protection Measures) Bill 2006* ("Exposure Draft").

The APA has several broad and overarching submissions to make:

- Apart from the carve outs through the exceptions to the proposed section 116AK the Exposure Draft does not comply with the Government's stated objectives.
- In its current form the Exposure Draft is unlikely to provide confidence that copyright protection in the digital environment will occur.
- The Government's assertion that increased penalties will provide a form of surety for the growth of digital content is misplaced. It will be harder under the new regime for Technical Protection Measures (TPM) to obtain a conviction. The opportunity to maintain a successful prosecution on the basis of the proposed section 166AK (1) is highly unlikely given the interpretative challenges and litigation difficulties contained in clauses 1 to 4 of the Exposure Draft.
- Such is the current form of the Exposure Draft that any determined entity on seeking legal advice might be encouraged rather than discouraged to circumvent TPMs to gain access to protected copyright material.

- The digital book or extracts of same are not mentioned in the Media Release 167/2006 yet the emerging trend and current commercial practice of publishers of the written form, is towards a digital medium.
- The Exposure Draft if redrafted so that the definitions in clauses 1 to 4 inclusive mirrored the relevant provisions of Article 17.4.7 of the Australia-United States Free Trade Agreement ("AUSFTA"), then the Government's stated objectives would be secured. This would mean the proposed section 166AK and definitions in clauses 1 to 4 of the Exposure Draft would be of a more general and wider nature than as currently drafted. This would address all of the detailed issues raised in this submission. The 'carve out' provisions or exceptions would provide the narrowing of the application of the legislation in specific circumstances, to reflect the Government's policies.
- The Exposure Draft fails to distinguish between copyright works released into libraries where the purpose is for profit or not-for-profit. The release of works for the purpose of profit is against the spirit of balancing competing interests and against the Government's own policy ambitions in respect to the Exposure Draft. Its own unofficial Government Library policy strongly supports the interests of copyright owners.
- The AUSFTA calls for an on-going review function of the 'exceptions' to TPMs, however the Exposure Draft has no provisions for such a process. The APA calls for a review function for all 'exceptions' on the grounds that the Government's stated policy objectives for each 'exception' needs to be reviewed due to the rapid changes that occur in the application of technology generally. What is a relevant exception today may be a barrier tomorrow to the development of new ideas. A review function by Parliament is a legislative solution to the challenge of drafting legislation that is, in a sense, timeless. The APA makes the submission that at the very least the 'prescribed acts' measures in proposed section 116AK (9) to (12) should have an on-going review function.
- The APA endorses and supports the submissions made by the Australian Copyright Council and the International Intellectual Property Association ("IIPA").

APA's Philosophical Position

The dilemma of drafting legislation that readily defines an entitlement is best described in the case *Lockhart J in Parker Pen (Aust) Pty Ltd v Export Development Grants Board* 46 ALR 612 at 620

"To propound a highly sophisticated test to determine a practical question of someone's entitlement to a grant under the Act would tend to confuse, not assist, those who must determine the question".

Even though His Honour was talking about a grant it also applies to any entitlement encased in legislation.

The Chairman of the February 2006 Report titled '*Review of technological protection measures exceptions*'¹ ("LACA Report") wrote at the start of this Report:

"Copyright is all about balancing competing interests - in particular, balancing the legitimate expectations of copyright owners that there should be appropriate copyright protection for material and the expectations of copyright users that there should be public access to material for legitimate public benefit reasons."²

The APA supports this statement but with one overriding consideration: At all times there must be a foundation for all these competing interests to exist. Government policy, although statutory based, must seek to develop an environment that allows a career for authors. The hard creative labour of authors required to produce new works adds to the body of Australian literature and allows for economic reward through reader recognition. This is a key component in the balancing these competing interests.

The APA is also keen to add to the on going debate, the concept that Australian public policy is as much about:

"fostering Australian content for an international market",

as it is about balancing competing interests.

The Chairman of the LACA Report also wrote:

Australia's system of copyright law is regarded as one of the fairest in the world, providing significant protections to copyright owners while allowing access to copyright material for specific purposes. Australia also has a well-established system of statutory licensing under which copyright owners are financially compensated for specific use of their materials.

¹ 'Review of technological protection measures exceptions', House of Representatives Standing Committee on Legal and Constitutional Affairs, February 2006, Parliament of the Commonwealth of Australia.

² Op cit, Foreword.

The fairness of Australia's copyright law exists in an environment of rapid technological change — one that requires constant reviews when allowing access to copyright material for specific purposes. Each aspect of the Australian system of copyright law recognised by the Chairman makes up the whole system. The way forward in today's commercial and technological environment is to have a legislative template of a general copyright law which not only offers protection to copyright owners but specific and on-going reviewed exceptions. A structure such as this lends itself to flexibility, adaptation of technological advances through legislative instruments and a forum where ideas and interests can be teased out and examined at predetermined and regular intervals.

Emerging Trends in Publishing

The Australian publishing industry at the trade level is made up of two broad components; international publishers and Australian publishers. The significance of this for the Australian publishing industry is that, as with so many sectors of the Australian economy, the practices of international companies with offices in Australia will ensure the transfer of technological practices and advances to the Australian publishing industry.

Already within Australia, we have seen in one lifetime, the move from the hot plate press to the layout of published works through the use of computer software. The rise of the self publishing industry is a further example of change in industry structure and operation.

Producing copyright material for commercial distribution is already undergoing a further radical change.

When contemplating copyright material, in the form of literary expression, most people visualise a book. It comes out in hard cover and if you wait you might get a cheaper version in paperback. The work is in a complete, unitary form. However this is set to change radically and this change is already underway.

A book may have many differing forms of copyright within it. It may have a photograph, it may have printed words on a page or it may have a drawing or graphic works. Imagine disaggregating this book into each of these items — including discrete parts of pages — and one can start to imagine the copyright forms that actually make up this unitary form known as a book.

What might be contained in an electronic book is all of these and more copyright material — such as a video clip with sound or one without the other.

When considering electronic processes and how some web pages are built, one sees a 'convergence of technologies' and ideas. There is nothing new in any of this, just where the application of this convergence is likely to take the respective industries dependent on sound copyright protection.

A web page can now be built from 'cascading pages'. This simply means pages behind a home page instead of hyperlinked pages within the web page structure. Within 'cascading pages' can be vast databases. The prime issue here is not how the technology works but rather what it can achieve.

If a person has a great deal of information, places it in a database software package where the database is relational, then that person has created an extraordinary range of applications. For example, take a series of photographs covering a backpacker holiday around the world for a period of eighteen months. It is unlikely that such a collection of photographs will be published commercially. However, software now allows anyone to load photographs onto a web page or html environment. However the data within this type of facility is still extremely difficult to manipulate. It is effectively like the old family album; rows and rows of photographs.

Put these same photographs into a relational database, then provide key words and add a search facility and immediately a very powerful tool has been created coupled with a vast array of information. The data can be arranged and rearranged simply at the command of the search engine. It can be organised by date, person, place and the limitation is only subject to the software, and the data entered and attached to each item in the database.

Our point in relation to emerging trends in publishing is that the copyright of the data has not changed. Rather, the item that has copyright protection is simply being moved about. To build any relational database the information has to be uniquely identified but there is nothing extraordinary about this. As with any information or item stored in any software, there has to be a unique identifier. In Microsoft Word the phrase 'pathway' is used. Some people now refer to this naming or identifying as 'tagging'. Once an item has had a tag attached to it then it is uniquely identifiable and it is forever treated as a separate item and manipulated as such.

Returning to the hot plate press process, the final product in its entirety (whether a book or a newspaper) had just one tag because the items making up that product could not be separated. So in such an environment, it is possible to reason at a policy level, that the entire item had copyright protection and therefore part of this product might be exempted or an exception under certain circumstances. The concept of 'fair dealing' in respect to publishing is such an example. It is acknowledged that the policy goal was and is the balancing of the 'competing interests' previously referred to and the reference is not to question 'fair dealing' or the policy goal. *Lockhart J in Parker Pen (Aust) Pty Ltd v Export Development Grants Board* 46 ALR 612 at 620

To propound a highly sophisticated test to determine a practical question of someone's entitlement to a grant under the Act would tend to confuse, not assist, those who must determine the question.

The application of these matters in a changing environment will require flexibility and review to maintain the overall intent as the underlying circumstances alter irrevocably.

Currently, where each item in that final product is tagged and there is the potential to commercialise separately each item or have it as part of an extract or as a different product, then the issue of building legislative structures that can accommodate such changeability are an essential requirement for economic growth within the publishing industry.

The key factor in encouraging the rapid digitalisation of the content in the Australian publishing industry is to examine the current legislation and build the certainty Government policy is seeking.

Watermarking is one technological aid in tagging digital material. An example of this can be found on the Australian War Memorial's website³ where photographs picked up through the website search engine are watermarked "AWM" in the event that anyone prints the image. This allows free access to the image (both on-screen and in printed form) but makes it difficult to use the image commercially. If a commercial use is required it would cause the bona fide publisher to contact the commercial arm of the Australian War Memorial to negotiate use rights.

The issue with this technology is how this will impact on the issue of TPMs. Can a watermark be a TPM? Should it attract the statutory protection of the proposed section 16AK(1)? Can a watermark 'prevent or inhibit' an infringement of copyright? It is certainly not a circumvention device or circumvention service. Yet it is a device that if removed from the digital item, should constitute an infringement of copyright. Would it be necessary to have the item used without the watermark before an offence might be established?

These issues would appear not to have been addressed in the Exposure Draft, and is just one of the difficulties with emerging trends and technologies.

One of the key recommendations of this submission is to urge the Government to redraft the Exposure Draft to put in place a legislative structure that is wide enough in its definitions and provisions to accommodate emerging trends, as these measures will be principled based. The policy carve outs would be specific and reviewable exceptions that allow the flexibility all parties clearly want in this legislative structure.

The Government's Stated Policy Objectives

The Bill, if implemented in its current form, will amend and add to the Part V Division 2A and s132 of the Copyright Act 1968.

The Government's stated policy objectives of this Bill are several:

³ <http://www.awm.gov.au>

- Implement Australia's Australia-United States Free Trade Agreement ("AUSFTA") obligations relating to technological protection measures ("TPMs"). These are found in Article 17.4.7 of AUSFTA.⁴
- Increase the availability of film, music, games in digital form;⁵
- The Government is introducing a new TPM scheme to create a more secure environment for copyright owners to release their copyright materials.⁶
- "Region coding" devices aimed solely at stopping people from playing legitimate DVD's or computer games bought from overseas will not be protected by the regime.⁷
- The new regime will have some specific exceptions allowing institutions such as libraries and law enforcement bodies to circumvent TPMs.⁸
- The new scheme also has a mechanism for creating additional exceptions that provides the flexibility necessary to respond to technological developments.⁹

⁴ *Summary of exposure draft provisions on technological protection measures*, AGD, 3 September, 2006, paragraph 4, first sentence

⁵ Australian Attorney-General News Release 167/2006 dated 4 September 2006 and *Summary of exposure draft provisions on technological protection measures*, AGD, 3 September, 2006, paragraph 3, last sentence

⁶ *Summary of exposure draft provisions on technological protection measures*, AGD, 3 September, 2006, paragraph 3, first sentence

⁷ Australian Attorney-General News Release 167/2006 dated 4 September 2006.

⁸ Australian Attorney-General News Release 167/2006 dated 4 September 2006.

⁹ *Summary of exposure draft provisions on technological protection measures*, AGD, 3 September, 2006, paragraph 4, last sentence.

Submission on the Exposure Draft

In this submission the APA does not examine the current law in Australia on TPMs and how that law will be altered by the Exposure Draft. Rather it takes as a starting point and at face value, the Government's overriding stated objective that the purpose of the Exposure Draft is to see Australia comply with its AUSFTA obligations. If the Attorney General's Department (AGD) requires the APA commentary on the current legislation, these can be provided. However, the overall position of APA does not change.

Definitions

Technical Protection Measure

Clauses 1 and 4

The definitions contained in clause 1 '**access control technological protection measure**' and clause 4 '**technological protection measure**' do not comply with the standard set in the AUSFTA. The relevant and equivalent provisions respectively are contained in Article 17.4.7.b and Article 17.4.7.a.

In particular, the AUSFTA definition for a TPM, referred to in the AUSFTA as an ETM (effective technology measure) is:

Any technology, device or component that, in normal course of its operations, control access to a protected work, performance, phonogram, or other protected subject matter.

The new definition contained in clause 4 differs fundamentally from this, as it is a much narrower definition and therefore limited in its application. These limitations include:

A measure used by or on behalf of a copyright owner¹⁰, and

A measure designed to protect or inhibit the doing of an act comprised in the copyright¹¹ and

'includes an access control technological protection measure.'¹²

By the use of the conjunctive 'and' between the subclauses and the unnumbered but additional element in the last line, it is clear that the scope of the clause, read

¹⁰ Clause 4(a) of the Exposure Draft of the Copyright Amendment (Technology Protection Measures) Bill 2006

¹¹ Clause 4(b) of the Exposure Draft of the Copyright Amendment (Technology Protection Measures) Bill 2006

¹² Clause 4 of the Exposure Draft of the Copyright Amendment (Technology Protection Measures) Bill 2006.

as a whole, is restrictive. Therefore, there are three elements and all must be in place for a measure to constitute a TPM as defined.¹³

When comparing the meaning of '**technical protection measure**' and '**access control technological protection measure**', (see table below), it is apparent that the latter is a technical protection measure which prevents unauthorised access to a work or subject matter in which copyright subsists.

This simpler form is a matter of style but if 'plain English' legislation is one of the objectives of the legislature, then this has not been achieved. The lay person and possibly most lawyers will be confused in trying to read the definitions in clauses 1 and 4. It requires several re-reads to understand the difference between the two definitions due to the almost identical repetition of the same words.

This point is made because the accessibility of the Copyright Act to the community can only increase as the digital medium takes more content and this content is utilised in many differing forms as discussed above.

<p><i>technological protection measure</i> means a device, product or component (including a computer program) that:</p> <ul style="list-style-type: none"> (a) is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and (b) is designed, in the normal course of its operation, to prevent or inhibit the doing of an act: <ul style="list-style-type: none"> (i) that is comprised in the copyright; and (ii) that would infringe the copyright; <p>and includes an access control technological protection measure.</p>	<p><i>access control technological protection measure</i> means a device, product or component (including a computer program) that:</p> <ul style="list-style-type: none"> (a) is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and (b) is designed, in the normal course of its operation, to prevent or inhibit the doing of an act: <ul style="list-style-type: none"> (i) that is comprised in the copyright; and (ii) that would infringe the copyright; by preventing those who do not have the permission of the owner or exclusive licensee from gaining access to the work or other subject-matter.
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¹³ The fact that the last element of the definition is unnumbered as a subclause does not alter the effect of the use of the conjunctive "and" in the clause which makes all parts of the clause part of the definition.

Government's stated summary on a TPM

Several inconsistencies arise when the text of the *Summary of exposure draft provisions on technological protection measures*¹⁴ ("the Summary") is compared with the Exposure Draft.

The two-paragraph description of a TPM does not accord with the definitions. The material accompanying the Exposure Draft¹⁵ states:

What is a TPM?

Technological protection measures (TPMs) are technical locks copyright owners use to stop their copyright material from being copied or accessed (eg. passwords, encryption software and access codes).

TPMs are used by copyright owners to support business models for distributing materials such as films and music online and self-protect against increased piracy. The *Copyright Act 1968* currently establishes liability for the manufacture and commercial supply of devices or services which circumvent TPMs. The Bill creates new offences for circumventing TPMs and new exceptions to those offences.

In the rationale for issuing the Exposure Draft the *Summary* states in the fourth paragraph:

The Government is replacing the current TPM scheme to implement the Australia-United States Free Trade Agreement (AUSFTA).

This is in line with the media release 167/2006 issued by the Attorney-General. However the *Summary* also contains the statement:

Why is the Government changing the law?

The Government is introducing a new TPM scheme to create a more secure environment for copyright owners to release their copyright materials. TPM protection plays an important role in assisting copyright owners to protect their works from piracy. This means more material will be made available digitally and through online distribution channels.

Unfortunately, it is very questionable if the new TPM scheme will 'create a more secure environment for copyright owners to release their copyright material' in a digital environment.

The TPM scheme proposed offers nothing new in the form of protection and practical advancement of digital protection. The reality of the market is quite the contrary.

In a recent *Sydney Morning Herald* feature article 'Code cracking is the new pot of gold'¹⁶ the author Patrick Gray starts his article with the following:

¹⁴ AGD, 3 September 2006

¹⁵ *Summary of exposure draft provisions on technological protection measures*, AGD, 3 September, 2006.

"If you think the password protection on your MS Word file is keeping it safe from prying eyes, chances are you're wrong. The time it takes to crack password-protected Microsoft Office files has tumbled from a 25-day average to a matter of seconds, thanks to a decades-old code-cracking technique that until recently was not viable.

The technique, described in a 1980 paper, *A Cryptanalytic Time – Memory Trade-Off*, involves pre-generating a massive "rainbow table" of passwords and their corresponding hashes – the encrypted strings of numbers computers use to verify passwords.

Until now, the terabytes of storage needed to write the tables haven't been available. But cheap storage means rainbow tables are in vogue in the IT security industry".

Given the progress of technology within the computer industry it will be merely a matter of time before cheap storage is an everyday feature of the home enthusiast, if this is not already the case.

However it is self evident that tagging and watermarking are important IT security features for the publishing industry. But the real focus is that these features will not stop the determined person acting to circumvent a TPM and are tools for 'post-circumvention' legal enforcement.

In returning to the Exposure Draft and the point previously made about the need for 'plain English' legislation, the ability to have legislative provisions that are easy to apply is an important aspect of any deterrent compliance feature and legal enforcement. The case for a general description of the device and offence provision and a more particularised carve out is imperative.

The future direction of the publishing industry is also an important consideration. In the foreseeable future it might be possible to use a 'tag' as a technical protection measure. According to the Exposure Draft's definition of a TPM, a tag would not be a TPM in Australia until it is comprised with copyright and prevents and inhibits infringement of copyright. Under the AUSFTA it has more chance of being a TPM. The same comments could apply to watermarks.

'Market segmentation'

Mention is made in the Exposure Draft in statutory notes to clauses 1 and 4 of 'market segmentation'. There is no definition of 'market' within the Exposure Draft. It is noted that case law considers this term in the context of the Trade Practice Act ("TPA").¹⁷ When looking at the TPA view of what comprises a market, one can conclude that any act that makes a distinction between sectors of that market has to be market segmentation. Logically, this must carry through to the Exposure

¹⁶ The Sydney Morning Herald, Tuesday September 19, 2006 page 25.

¹⁷ See Russell Miller, *Millers' Annotated trade Practices Act*, 26th Edition 2005, Para 1.4E.11, p 104

Draft. Therefore, it must be a sound conclusion that having access to copyright material through a TPM and not having access through the same TPM to the same material is a segmentation of the market.

From this it follows that a further inconsistency between the Government's policy and the Exposure Draft occurs. On the one hand the Government's intention is to improve TPM processes and copyright protection and this means market segmentation through the use of passwords and such like. But then this is contrary to the statutory note which states:

Note: To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not a technological protection measure.

Any litigation on whether a TPM seeks to control market segmentation will turn on the meaning of the word 'solely'. Rather than narrow the definition, we submit that the better method is to narrow the application through the exceptions. If Government or AGD feel the need to use the definitions of the Exposure Draft to advance an Australian regime of the AUSFTA, justified through an 'introductory words' argument, the APA's position for general principled definitions and policy carve outs does not run contrary to such an approach by the Government. Rather it makes the regime workable at all levels for copyright owners notwithstanding any inter-Government issues with the implementation of the AUSFTA.

In terms of enforcement and compliance why introduce this concept into a definitional clause where it takes on the nature of a defence?

This inconsistency is evident in the Government's *Summary of exposure draft provisions on technological protection measures* states:

TPMs must be connected with copyright infringement

The scope of the scheme is limited to preventing circumvention of TPMs designed to stop copyright piracy. The scheme will not cover TPMs which are not designed to prevent or inhibit people from infringing copyright. The scheme will not apply to TPMs solely designed for other purposes, such as market segmentation (eg region coding) or the protection against competition in aftermarket goods (eg spare parts) where the TPM does not have a connection with copyright.

To reiterate, the remedy to these issues is to broaden the protection and use carve out provisions in the exception section, which are to be reviewed on an on-going basis, to achieve the policy outcome sought by the Australian Government.

In respect to Clauses 1 and 4, we submit that the Exposure Draft goes further than that required by the AUSFTA.

When the provisions of the Exposure Draft are compared to what is current law the Australian copyright owner is going to suffer a weakening of the current protection afforded within Australia.

One has to query whether this is the desired outcome for Australians of the AUSFTA.

Circumvention device and Circumvention service

Clauses 2 and 3 of the Exposure Draft which are set out in the Table below define what is a circumvention device and a circumvention service respectively.

The AUSFTA test against which these provisions are to be measured is contained in Article 17.4.7.a.ii.(A). This article requires sanctions against a person who

(ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:

(A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;

Here the legal sanction is against any person who carries out any of the acts itemised and, if there is more than one carrying out any of the acts concurrently, all of them. So a manufacturer and a trafficker face prosecution if engaging in the relevant acts. In the clauses set out below, the provision of the AUSFTA Article is much changed.

<p><i>circumvention device</i> of a person for a technological protection measure means a device, component or product (including a computer program) that:</p> <ul style="list-style-type: none">(a) is promoted, advertised or marketed by the person, or by another person acting in concert with the person, as having the purpose of circumventing the technological protection measure; or(b) has only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention of the technological protection measure; or(c) is primarily or solely designed or produced for the purpose of enabling or facilitating the circumvention of the technological protection measure.	<p><i>circumvention service</i> of a person for a technological protection measure means a service that:</p> <ul style="list-style-type: none">(a) is promoted, advertised or marketed by the person, or by another person acting in concert with the person, as having the purpose of circumventing the technological protection measure; or(b) has only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention of the technological protection measure; or(c) is primarily or solely designed or produced for the purpose of enabling or facilitating the circumvention of the technological protection measure.
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Both definitions are almost identical and both seek to limit the application of the device and service through three alternate tests.

The first alternate test requires the person to act in concert with the trafficker in promoting the device. The AUSFTA test is anyone engaged in the acts in question is liable to legal sanction.

The second alternate test is one that involves two internal tests.

The device has

- (1) only a limited commercially significant purpose or use, or
- (2) no such purpose or use, other than the circumvention of the technological protection measure.

The reading of this subclause is difficult. Why introduce a provision that introduces a test of commercial significance? What does this mean? How many experts could argue over this phrase?

Rather, what should be the test is whether the item being trafficked, promoted, manufactured and used is a TPM.

The third alternate test encourages much the same comments. Why the drafting instructions would seek to set up a purpose test of 'primarily or solely', which is a complicated evidentiary and legal test, is not clear. Again, the general principle should be that if the device can be used to circumvent a TPM then the person or persons associated with the device should be liable to prosecution. If there is a solid and specific policy reason why there should be exceptions then this should occur elsewhere and in the exceptions in the proposed section 160AK.

Matters of Compliance

Australia's compliance to the AUSFTA

The AUSFTA Article on TPMs is clear in its expression and intent. It is a coverall provision. Yet the Australian Government's interpretation of this clause is anything but clear in its expression and intent.

Government's Officers from AGD¹⁸ suggest that the introductory words to Article 17.4.7 have to be read together with the Article. This is the justification for the narrow drafting of the definition contained in Clauses 1 and 4 for 'access control TPM' and 'TPM'. The key words in support of this argument in the introductory words are "in connection with the exercise of their rights". The full text of the introductory words in Article 17.4.7. (a) reads:

- 7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of

¹⁸ LACA Report, ADG's submission 27 October 2005, Evidence given 5 December 2005 and Submission 52.2 at 5.

their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

However, Article 17.4.7 (a) is not an introductory sub-clause. Rather it is an operative part of the whole Article. With respect to the learned ADG Counsel view, the words of Article 17.4.7 (a) are to be viewed as introductory words, although there is another possible construction of Article 17.4.7.

There is no rule of construction that states when interpreting a legislative or quasi-legislative instrument one has to start at the beginning of the instrument and work down the page. If one commences an analysis of Article 17.4.7 at Article 17.4.7.b and then move on to Article 17.4.7.a then, the suggestion that there are introductory words in this Article simply falls away.

Furthermore, when looking at the drafting style of the whole AUSFTA then it is evident that the style of drafting has what might be called introductory words wherever the Articles break down to sub-Articles. So what constitutes an 'introductory section'? Well it is certainly not sections of what forms part of the articles. A Preamble to a Constitution might be a better example of what might be introductory words.

The test must be whether the words, read as a whole, elicit a meaning which allows a restriction of what is a TPM, to just a device or such like that has to be only comprised in copyright associated with infringement of copyright. It becomes a matter of semantics because the distinction that might be made when reading the Article, might be between the protection of the rights rather than the protection of the exercise of the rights. In lay terms this means the copyright as against protection of the copyright.

The better view is obtained by removing any notional isolation from around this sub-Article and look at the entire context.

If the object it to reflect AUSFTA and this is a requirement of the Treaty, then the issue of how the definition of a TPM is worded must fall away. The Treaty essentially provides the wording. The compliance with AUSFTA does not permit the argument of introductory words with a result of substantial amendment in the implementation.

Finally there is a serious conflict between the Attorney-General's apparent reasoning for the Bill and what AGD has produced.

The Attorney-General Philip Ruddock in a media release¹⁹ issued when releasing the Exposure Draft stated the general policy of the Bill as:

¹⁹ Australian Attorney-General News Release 167/2006 dated 4 September 2006;
http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2006_Third_Quarter_1672006_-_DVDs

The Bill implements the technological protection measures scheme in the Australia-United States Free Trade Agreement (AUSFTA).

Prima facie this has not occurred unless the 'introductory words' argument has validity which is not supported.

If the AGD argument is one mounted to support the segregation of 'Regional coding' away from TPMs, then this shows the AGD's introductory words argument as political reasoning rather than legal reasoning. If this analysis holds then such material should form part of the proposed section 116AK exceptions rather than the definitions. It is the exceptions where the Government policy is reflected and the definitions of the legislation are where the international obligations of copyright should sit.

General Act of Compliance within the Framework of Technological Protection Measures

There are constant criteria in establishing a workable compliance regime in a legislative environment. Much work has been attempted over the years by the Parliament and AGD to encourage legislative instruments that are written in what is referred to as 'plain English'. This is achieved by having definitions that are easily understood.

As a general rule a wide ranging definition might capture more than is intended but there can be no misunderstanding of what is involved. It is common practice with Commonwealth legislation to use this form of drafting and then carve out the exceptions where necessary.

Both the AUSFTA ETM and the Copyright Act definition of TPM are straightforward. However, introducing the three-element definition for a TPM is a questionable move when the practicalities of what is involved are considered.

What is the thrust of this Bill? It creates an offence for using a device as defined to carry out an act that infringes copyright. The principle is already in the Copyright Act. Narrowing the definition clause seems to add nothing to the concept of prohibiting contravention of a TPM. Rather, it seems to aid and abet the opportunity for those persons who would seek to engage in such activities.

Enforcement Issues

This part of the submission seeks to look at compliance issues in the area of enforcement and really is summed up by the expression: "the devil is in the detail".

'in the normal course of its operation'

The phrase 'in the normal course of its operation' is an important threshold in both the Exposure Draft and the AUSFTA. A tag is an identification facility in the normal course of its operation. Does normal course of operation mean the primary

or sole operation of the item in question? If a tag was to be adapted and used as a TPM then the debate becomes what is the normal course of operation and how and when is the transition made. Whilst a hypothetical issue now, it does illustrate what is possibly just around the corner for publishers.

'prevent or inhibit infringement'

The phrase 'prevent or inhibit infringement' which is used as a threshold measure for the protection of an access control technology is also of concern when it comes to any contested litigation. The full expression in the clauses is:

is designed, in the normal course of its operation, to prevent or inhibit the doing of an act:

- (i) that is comprised in the copyright; and
- (ii) that would infringe the copyright;

Firstly, if the elements of this part of the definition are not met, then the TPM and access control technology are not granted the protection the Government states it is providing.

To take this one step further: what would occur in any contested proceedings seeking to prove an offence? The applicant or prosecutor needs to prove:

- The item was 'in the normal course of its operation'
- To prevent or inhibit copyright,
- (i) that is comprised in the copyright; and
- (ii) that would infringe the copyright.

This list of items to prove is not an easy exercise. The Crown or the applicant needs to prove copyright and evidence as to what are normal operation and the workings of the device

Is the object of this Bill to create a potential litigation maelstrom and a feast for lawyers — or is it to protect copyright owners?

Principles-Based Legislative Drafting

Professor Braithwaite of ANU in a recent lecture²⁰ which, whilst it addressed tax laws and principles-based drafting, also made the following points which are relevant to all legislative drafting:

²⁰ Professor Braithwaite, Lecture "How much certainty can taxpayers expect from the law", The Centre for Tax System Integrity, ANU, 13 September at Commonwealth Treasury, Canberra.

- The paradox of the law is that language is open to multiple interpretations, more precision in tax law provides less certainty, which allows greater exploitation of the law.
- As law is more complex, the less an average person or common people are able to understand the law.
- The more complex law becomes, the greater the interaction between laws, which creates greater uncertainty.
- Good practice is for businesses to adapt their existing (or natural) systems rather than requiring them to acquire new systems.

The Government has supported principles-based drafting in respect to its tax laws. Yet the comments made by Professor Braithwaite which are in line with other commentators on the subject are relevant to the commentary on the Exposure Draft. The APA's recommendation for a general definition and offence provisions with carve outs for specific issues is in line with the Government's adoption of principles-based legislative drafting.

Exception - Libraries Proposed section 160AK (8)

The APA notes that general variation away from the terms of the AUSFTA with the Exposure Draft occurs again with the exception for libraries.

The AUSFTA in Article 17.7.e.vii states:

(e) Each Party shall confine exceptions to any measures implementing sub-paragraph (a) to the following activities, which shall be applied to relevant measures in accordance with sub-paragraph (f):

(vii) access by a non-profit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and

(f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (e) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:

The proposed section 160AK (8)

Exception—libraries etc.

- (8) Subsection (1) does not apply to the person if:
- (a) the person circumvents the access control technological protection measure to enable the person to do an act; and
 - (b) the person is:
 - (i) a library (other than a library that is conducted for the profit, direct or indirect, of an individual or individuals); or

- (ii) a body mentioned in paragraph (a) of the definition of **archives** in subsection 10(1), or in subsection 10(4); or
- (iii) an educational institution; and
- (c) the act is for the sole purpose of making an acquisition decision in relation to the work or other subject-matter; and
- (d) the work or other subject-matter is not otherwise available to the person.

Note: A library that is owned by a person conducting a business for profit might not itself be conducted for profit (see section 18).

Three of the foundation arguments for the APA in the area of exceptions for libraries in the field of copyright protection are:

- consistency of definitions,
- the consistency of Government policy and its legislation and
- the need to retain integrity when balancing the competing interests between copyright protection and the promotion of ideas.

The definitional lack of consistency is highlighted in the submission of the Australian Copyright Council paragraphs 40-43 and this material is reproduced here for the convenience of the reader.

40. Proposed new s166AK (8) (b) refers to a "library" as a "person" (that is, an entity). There is no definition of "library" in the Copyright Act. Other references to "library" in the Copyright Act suggest that a library is a collection that is owned by a person (the library itself is not a person). S 18, for example, provides that library is not taken to be established or conducted for profit by reason only that it is owned by a person carrying on a business for profit.

41. The "person" in relation to archives, on the other hand, is a body referred to in the definition of "archives" in s1091) (such as the Australian Archives), or a body referred to in s10(4).

42. Similar concerns apply to other references to "library" in the exposure Draft.

43. The reference to "educational institution" suggests that the definition in s10 (1) would apply. That definition, however, applies to non-profit and profit-making entities, whereas the AUSFTA requires the exemption to apply only to non-profit entities. Similar concerns apply to other references to "educational institution" in the Exposure Draft.

The challenge is to define a library is self evident. However it is easier to define what a library is not, for the purposes of Toms and the Copyright Act. The first part of such a definition must be the exclusion of any 'profit making' associated with the unlimited and unrestricted use of copyright material. The inconsistencies in the application of this principle between the high standard the Government sets itself and the lower standard it requires of the community is odd.

In a different context concerning the Government's response to the *Uhrig Report*²¹, Dr Peter Shergold, Secretary of the Department of the Prime Minister and Cabinet has been speaking of 'finding ways to integrate policy and programmes between portfolios and achieve more efficient and effective implementation and service delivery. This can be both within governments and across governments.'²² This is essentially a move to build consistency across government.

One of the means of doing this is to move from 'silo cultures' to an overall culture and practice. This is the holistic approach of which Dr Shergold and others speak and write. At the implementation end of this policy is the fine detail. One of these fine details, which is a significant change agent within Australia, is the form and substance of legislation and government operation policy.

One example which again is not about copyright or books but which is a product of AGD is the 'Model Litigant Policy'.²³ The Policy requires the Commonwealth, through its instructing officers and lawyers, to act as a model litigant. Basically, this means that the Commonwealth must act fairly, but is not precluded from acting firmly.

The relevance of this is that this Policy, first announced in 1999, has been adopted by other Governments and is a standard feature of government litigation. It has set a standard for behaviours across Australia. It is a balancing point between the might of government resources compared to those of a citizen.

In considering corporate or quasi-corporate libraries, there is again an interesting unspoken policy at play within the Australian Government. One of the premier law libraries within Australia is the Lionel Murphy Library at Barton situated within AGD. Other libraries operate within the Australian Government Solicitor, the Australian Securities and Investment Commission, the Australian Taxation Office and, in fact, all government departments. The operating policy is to acknowledge copyright at all times and the protections associated with it.

This means, for example, that the practice is to subscribe to services rather than circumvent TPMs to gain access, and this has librarians ensuring that photocopying entire books does not occur. In an unofficial way in the Australian Government there is a high standard being followed and leadership provided in respect to copyright, when, on a black letter law analysis, one view is that there is

²¹ Review of the Corporate Governance of Statutory Authorities and Office Holders, Commonwealth of Australia, June 2003

²² IPAA SA Connecting Government Conference - Creating a Culture for Success' Adelaide, 8 April 2005. Full Text: http://www.connected.gov.au/research_and_reports/speeches_and_presentations

²³ For details see <http://www.ag.gov.au/publications/agspubs/legalpubs/legalbriefings/br48.htm> or http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Department_Civil_Justice_and_Legal_Services_Group_Legal_Services_and_Native_Title_Division_Office_of_Legal_Services_Coordination_Publications_OLSC_Bulletin_-_Issue_1

no such requirement. Certainly with the Exposure Draft this is a firm interpretation where TPMs are involved.

If one compares this Commonwealth practice, which is non profit, to the issue of exempting corporate libraries operated in profit making entities, then it is evident that both sets of conduct are highly inconsistent. On the one hand, the practice of the Commonwealth is in the spirit of copyright protection — and yet on the other hand, its own legislation breaches the same concept of honouring this protection in circumstances where financial gain is clearly been made out of the use of the copyright. The *raison d'être* of corporate libraries is not reading for pleasure. To obtain a book or digital service, in a law firm's library, one needs to build a business case why the purchase is to be made. In some circumstances that book is then charged out (if not directly, then certainly indirectly) in whatever remuneration for the service is being levied.

The connection between these comments and those made by Dr Peter Shergold, is to point out that this inconsistency between the standard set by the Commonwealth's daily operations and what it requires in its legislation of the Australian community is 'silo thinking'. Libraries engaging in profit making ventures or associated with profit making entities should be required to meet the standard set by the spirit of copyright protection.

This point becomes even more emphatic when the emerging trends are contemplated. There will be established a market for individual tagged items in what are now hard copy books. The Australian book market will become digitalised. The practice is already underway. All of this work incurs a cost just as there is producing a traditional book. In some respects the cost of digitalisation is higher than producing a traditional book. The technology around the latter is established and the cost of these innovations have long since been capitalised and recovered. This is not so with the digital environment. Development costs are very high.

Clearly from the AG media release 167/2006 the Government is seeking the growth of digital material in the Australia economy even if the media release specifically omitted the publishing industry.

Yet to clearly and apparently deliberately look through the commercial reality of the cost of building this new area of commerce is at odds with what is sought as a policy direction. The words 'clearly and apparently deliberately' are used as the distinction between "non-profit" and "profit" are well known to and well briefed within the AGD.

When examining the general library policy of the Commonwealth combined with the views of Dr Shergold and the effort made within this Government to remove 'silo thinking'; the only conclusion that can be drawn is that lumping profit and non-profit copyright into the same basket, is silo thinking.

The policy justification is not apparent. Where profit making activity is involved, TPMs should be a permitted exception.

The remedy is to take up the Australian Copyright Council's points on better and clearer definitions, even if only restricted to the text of the TPMs exception and not in the body of the Act.

Exemption - Prescribed Act

Proposed section 116AK (9) to (12)

These provisions allow The Governor-General to make regulations prescribing the doing of an act by a person provided the Minister has made a recommendation. Subclause 12 states:

The Minister may make a recommendation to prescribe the doing of an act by a person only if:

- (a) a submission has been made (whether before or after the commencement of this section) to prescribe the doing of the act by the person; and
- (b) the doing of the act by the person will not infringe the copyright in a work or other subject-matter; and
- (c) the doing of the act by the person is in relation to a particular class of works or other subject-matter; and
- (d) an actual or likely adverse impact on the doing of the act by the person has been credibly demonstrated; and
- (e) the adequacy of the protection and the effectiveness of the remedies provided by this Subdivision would not be impaired if the doing of the act by the person were prescribed.

The AUSFTA in this regard states in Article 17.4.7.e.viii:

(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.

Again, the Exposure Draft differs in respect to the AUSFTA in two substantial regards.

The first is that sub-clause (10) states:

the regulations may prescribe:

- (a) a particular act or a class of acts; and
- (b) a particular person or a class of persons.

Whereas the AUSFTA only refer to 'class of works'.

There is no explanation in the Summary, why this difference has occurred.

Review Provision

The second substantial difference is AUSFTA requires a review or proceeding to be conducted at least once every four years as a condition precedent to the use of a legislative or administrative review. In the Australian sense this includes the power to make regulations. The Exposure Draft is silent and again no reasoning is provided.

The APA views this last difference as a serious issue. The section on Emerging Trends highlights that the publishing industry is in a rapid state of change through the advent of fast changing technology. What may be a credible prescribed act today, may, within a few years, be a technological barrier.

The need to regularly review prescribed acts is an important act of public policy, "to balance the competing interests" which clearly underlies much of the drafting instructions for this Exposure Draft. Clearly the issue of Regional Coding and market segmentation issues raised in the Exposure Draft and the Summary, reflect these issues of competing interests. Yet in the absence of any review mechanism it is difficult to see how the Government's intent to look at the balancing of these competing issues can be effectively maintained.

With the restraints and restrictions imposed by the constraints of the legislative process it is hard to see how the flexibility required to deal with change can be maintained without some form of review process.

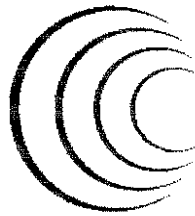
The APA proposes the recommendation that the review be by the Parliament on a regular basis and that changes be, by way of regulation, through the exceptions provisions and the use of the Legislative Instruments Act.

The addition of a review period for prescribed acts provisions would be an important and welcomed addition to the final Bill.

Maree McCaskill

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22 September 2006

Attorney-General
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices, National Circuit
Barton ACT 2600
AUSTRALIA

Dear Attorney

Re: Exposure Draft - *Copyright Amendment (Technological Protection Measures) Bill 2006 and related Regulations* **(the Bill and the Regulations)**

We appreciate the opportunity to provide comment on the Bill and Regulations drafted to comply with Australia's obligations under Article 17.4.7 of the Australia – United States Free Trade Agreement (**AUSFTA**). This article contains the parties' obligations in relation to Technological Protection Measures (**TPMs**) which Australia must implement by 1 January 2007.

We welcome a number of the amendments which we believe are positive for copyright owners – such as making the use of circumvention devices, as well as their manufacture and provision, illegal without the permission of the copyright owner. We also support strengthening the enforcement provisions so that copyright owners are in a better position to take infringement actions.

However, CAL is concerned that many of the amendments will not meet Australia's obligations under the Berne and WIPO Internet treaties, or the AUSFTA, and as a result CAL believes there will be a negative impact on the publishing industry in Australia.

THREAT TO THE PUBLISHING INDUSTRY

We believe the proposed amendments will erode security for Australian authors and publishers to invest in the online publishing environment. This is a major economic impact that can not be ignored as our industry has to compete in an international marketplace.

If the amendments proceed as drafted, Australia will have less copyright protection for authors and publishers than do our major trading partners, the United States and the United Kingdom.

Why?

The amendments allow TPMs to be circumvented for the purpose of viewing pages. While TPMs may NOT be circumvented for the purpose of copying or communicating the material, subject to limited exceptions, the law will not prevent the user from cracking TPMs to read the material.

Under the Bill, circumventing a TPM simply to gain access to a work would not be prohibited. This means that subscription services where readers purchase the right to view material online, "pay per view" are effectively devalued.

The incentive for Australian publishers and authors to publish commercial material to be viewed online will be diminished. Pay per view services such as reading newspapers and newsletters will be threatened if the amendments are adopted.

Some of the specific concerns CAL has with the proposed amendments are:

The Bill

Definitional clauses in the Bill

The definitions of an access technological protection measure and technological protection measure (TPM) contained in ss.1 and 4 of Schedule 1 of the Bill do not comply with the terms of AUSFTA, or the WIPO Internet Treaties.

Article 17.4.7(b) of AUSFTA requires a definition of a TPM that covers "any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other subject matter." The Bill's definition of a TPM is "a device designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject matter."

CAL believes the definition under the Bill is narrower than that required by AUSFTA. The AUSFTA definition would prevent the circumvention of TPMs where no exception is granted. There is no requirement that a copyright use of the work needs to have occurred for the circumvention of an access TPM to be prohibited.

The effect of the position taken in the Bill is that online markets being developed by copyright owners which do not require copyright rights to be exercised once the access TPM to a work has been circumvented will be stifled. For example, there are subscription pay per view services which do not rely on the copyright system as their basis, but rather on contract. In these markets the copyright owner contracts with a user to access the work.

Under the Bill, circumventing a TPM simply to gain access to the work would not be prohibited, and therefore, the incentive for copyright owners to develop such access services would be removed. This outcome is contrary to the interests of copyright owners and consumers as it diminishes the different forms in which works are produced by publishers and authors.

Review Mechanism for additional Exceptions

The AUSFTA contemplates a mechanism for additional exceptions to the prohibition on the use of circumvention devices to be adopted by Australia. It requires at least a four yearly review to be conducted.

In the review mechanism contained in the Bill there is no obligation for the body entrusted to undertake the review to consult with copyright owners whose works will be subject to an exception. CAL believes it is a requirement of procedural fairness that copyright owners be given the opportunity to comment on any proposed exceptions to the general prohibition on the use of circumvention devices that affect their works.

Additionally, the set of considerations that are to be taken into account by the review does not expressly require consideration of the impact any additional exception might have on the legitimate interests of the copyright owner, or the market for their works. This is clearly not consistent with Berne and WIPO treaty obligations contained in the three step test.

CAL urges the Government to include the Three-Step test in the legislation. We believe this inclusion, with respect to all exceptions is a minimum requirement to meet our obligations under all international treaties and at the same time satisfies the AUSFTA.

CAL believes that additional exceptions to allow circumvention of TPMs should automatically expire at the end of the four year review period for which they were granted. This would be consistent with the approach adopted by the United States under their comparable review mechanism. CAL believes that users who want to continue to rely on an exception should have to make out the case for the exception at each review. In this way, if markets develop, for example with licences or product offerings developed which address the adverse impact which was found at a previous review, the exception, which would now not be needed, is not extended into a new review period.

Jurisdictional limit of Bill

Terms of the Bill are stated to apply only to acts which are done in Australia. This would potentially mean that acts of circumvention which might be technically found to have occurred outside of Australia, for example because the internet server being used for the act of circumvention is situated in a non-Australian jurisdiction, would not be covered by the proposed law. This would leave both Australian and overseas copyright owners' works at risk of infringement with no action able to be taken, as there is the potential that the

user of the work could be using a computer situated in Australia to circumvent legitimate TPMs.

Remedies for illegal circumvention of TPMs

CAL is alarmed at a draft provision which would mean that a Court could refuse to award damages or an account of profits for educational, libraries and archives. CAL believes this will only encourage these organisations to take their obligations around TPMs less seriously than they otherwise would, and that they are unnecessary as the previous provision of the Bill grants a Court a broad discretion in relation to the damages it can award.

Scope of exceptions

CAL is also concerned that the Bill refers to prescribed exceptions which relate to a particular class of acts and a particular person or class of persons being exempt from liability for circumventing TPMs where the AUSFTA only permits a certain class of works being exempted from the prohibition against circumvention of TPMs. CAL is concerned that the approach adopted under the Draft Exposure Bill will therefore have broader application than permitted under the AUSFTA, and will lead to greater exemptions than are necessary, and would have an unduly detrimental impact on copyright owners' interests.

The Regulations

CAL does not support the exemption from the prohibition on the use of circumvention devices extended to educational institutions and libraries to exercise the statutory licence and library copying exceptions contained in the Australian Act. CAL believes this is contrary to the interests of copyright owners who have chosen to apply TPMs to their works, and creates insecurity and lack of confidence for publishers and authors to invest in the production of digital products.

CAL notes that you state in your letter of 13 September 2006 that you have considered the recommendations of the LACA Committee in this regard and believe these broad exceptions to be justified and appropriate. CAL continues to believe that this is detrimental to the interests of copyright owners, and particularly for educational authors and publishers involved in the creation of works for the educational sector. Their markets are schools, universities, libraries and other bodies engaged in the educational sector.

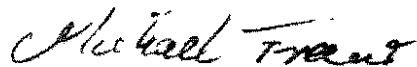
The proposed broad exceptions for educational institutions and libraries would place Australian authors and publishers at a competitive disadvantage to their overseas counterparts from the US and the UK who have more secure home markets for their works. This security is created by the copyright laws of their countries. The result for Australia will be that Australian publishers and authors are discouraged from creating works for Australian classrooms and that the pool of Australian material available will diminish. Australia will become a secondary market for the works of US and UK authors and publishers.

Conclusion

CAL believes these amendments, if adopted, will impact negatively on the digital environment for copyright works in Australia. They will prejudice the interests of Australian authors and publishers and prejudice the interests of their readers. CAL believes that these amendments are contrary to the obligations contained in international treaties and will see Australia as a territory with weakened copyright protection for our authors and publishing industry.

I thank you again for the chance to comment on the Bill and Regulations.

Yours sincerely,

A handwritten signature in cursive script that reads "Michael Fraser".

Michael Fraser
Chief Executive



22 September 2006

Ms Kirsti Haipola
Copyright Law Branch
Attorney-General's
Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms Haipola

IEAA's views on the exposure draft of the Copyright Amendment (Technological Protection Measures) Bill

The Interactive Entertainment Association of Australia ("IEAA") appreciates the opportunity to comment on the exposure draft of the Copyright Amendment (Technological Protection Measures) Bill ("TPM Bill"). IEAA is committed to the full implementation of the technological protection measure ("TPM") liability scheme in the Australia-United States Free Trade Agreement ("AUSFTA"), not least because of the significant benefits that it will provide to the Australian gaming industry and beyond.

However, at the present time, IEAA has some serious reservations with key aspects of the TPM Bill. In particular, IEAA strongly opposes the lack of protection afforded to access controls and the Australian Government's approach to region coding TPMs. These inadequacies threaten to put Australia in breach of its obligations under the AUSFTA and to stifle the online exploitation of copyright material.

IEAA has also identified a number of clauses in the TPM Bill that would benefit from further harmonisation with the existing provisions of the *Copyright Act 1968* (Cth) ("Copyright Act"), or otherwise require amendment to comply with the provisions of the AUSFTA. Each of these clauses is discussed in more detail below.

1 The need to protect access controls

AUSFTA compliance and the Australian Government's proposed approach to access controls

- 1.1 IEAA has serious concerns with the proposed definitions of access control technological protection measure and technological protection measure. Those definitions fail to provide clear protection for pure access controls and instead treat access controls as a subset of copy controls. This result is achieved by the inclusion of the 'prevent or inhibit' language in both the definitions of access control technological protection measure and technological protection measure.
- 1.2 In IEAA's opinion, the Australian Government's failure to provide clear protection for pure access controls is a clear contravention of the AUSFTA. Articles 17.4.7(b) and 17.4.7(i)(a) of the AUSFTA require the Australian Government to provide broad protection to all manner of access controls applied to copyright works or other subject-matter. In IEAA's opinion, any implementation of the AUSFTA that derogates from this basic proposition will result in a contravention of the AUSFTA. IEAA is confident that the Australian Government is concerned to avoid such an outcome, particularly given the importance the United States Government attaches to this issue.

The likely adverse impacts of the Australian Government's proposed approach to access controls

- 1.3 IEAA wishes to emphasise to the Australian Government the likely adverse impacts of its proposed approach to access controls. First and foremost, IEAA is concerned that the Australian Government's wholesale exclusion of protection for pure access controls will undermine the narrow protection the Australian Government proposes to afford to copy controls. This is because consumers who receive the message that it is lawful to use a device or service that enables unauthorised access to copyright materials are inherently unlikely to appreciate that they may in fact be infringing copyright (and therefore contravening the prohibition on circumvention) if the device they use to obtain access to the copyright material reproduces a substantial part of a copyright work in its memory. Put another way, consumers are unlikely to appreciate the nuances of the Government's proposed approach to access controls, with the result that efficacy of the circumvention and dealing prohibitions will be significantly undermined.
- 1.4 On a macroeconomic level, IEAA is concerned that the Government's proposed approach to access control TPMs will have negative repercussions on the growth of the Australian gaming industry (which is now a \$100 million export industry for Australia).

New business models currently under development by IEAA's members rely on access controls to guard against unauthorised access. Australia's failure to protect those controls is likely to undermine Australia's competitiveness as destination for games development, and significantly reduce the deployment of new business models that benefit users and rights holders alike.

- 1.5 Another adverse impact that is likely to flow from the Australian Government's proposed approach to access control TPMs is that it will not be illegal for children to circumvent parental locks that are applied to games. Similarly, an individual's personal information may be jeopardised if access controls protecting that information can be circumvented with impunity.

The policy case for protecting access control TPMs

- 1.6 IEAA considers that there is a strong policy case for protecting access control TPMs. As mentioned earlier, access control TPMs are essential to emerging business models in the interactive entertainment industry. These models do not typically result in users receiving a permanent copy of a copyright work, but instead allow users to 'experience' copyright material by accessing that material, or a part of it, for a definite or indefinite period. For example, the online distribution of a computer game may allow a user to play a game once only. However, such an 'experience' of copyright material, if unauthorised, may not necessarily constitute an infringement of copyright. Whether or not a copyright infringement occurs will depend on the technical operation of the device used to access the work, and the nature of the work to which access is obtained.
- 1.7 Distribution models of this kind are beneficial for a number of reasons. Copyright holders are given new ways to distribute their works and are encouraged to create more copyright material. Users are provided with increased access to copyright materials and choice as to how to they would like to access those materials. However, if pure access controls which are an essential part of these models are not protected, the danger is that potential service providers will be reluctant to make the substantial investment required to establish and promote a delivery platform. Without this investment, the opportunities available to smaller copyright holders to expose their works to large markets will be reduced.
- 1.8 Sony Computer Entertainment ("SCE") operates an online model for authorised users who obtain access through a PlayStation® Portable. That service contains video clips, films and even music video clips, the copyright in which may be owned by SCE or third party licensors. Such content does not always include a copy control TPM, but it is usually a licence condition imposed on SCE that access be restricted to authorised users of the service. This is particularly the case where smaller film makers or games developers wish to showcase their work. Without restricting access to users of a PlayStation® Portable, SCE would have no way of protecting these works from unauthorised access and would be in jeopardy of breaching the terms of its licences with

third parties. SCE's incentive to invest in the online model would be diminished if SCE had no reliable method of controlling access to its service. In many respects, SCE is in the same position as the provider of a subscription broadcasting service, such as Foxtel or Austar, in that it makes available third party content to its customers and relies upon access control measures to ensure that access is authorised. In SCE's view, it is not tenable to rely solely on the threat of copyright infringement to prevent unauthorised access. The ability to take copyright infringement actions will only allow SCE to deal with unauthorised access after the event. Rather, the legal framework should aim to prevent unauthorised access occurring in the first place, by prohibiting the manufacture, distribution and use of circumvention devices and services.

- 1.9 In the debate about whether to protect access control TPMs, concerns have been raised about the possibility that users will be 'locked out' of copyright materials. We believe that these concerns are without basis for the following reasons:
- (a) there is little incentive for rights holders to lock users out. In most cases rights holders will want to make a profit out of their copyright works. If users are locked out of the copyright work for the entirety of its copyright protection period, they will not be able to achieve this goal;
 - (b) if the restrictions on use imposed by the TPM are explained to users, they can make an informed decision about whether they still wish to have the restricted access to the work. The Apple iTunes service, and the SCE service described above, are real-life examples where users have embraced services that rely on access control TPMs; and
 - (c) the concerns about locking out users must be balanced against the benefits of providing these alternative forms of distribution of copyright material. We submit that this decision should result in favour of the use of access control TPMs and distribution models of the kind discussed above.
- 1.10 Thus, in deference to the strong policy case for protecting access controls, and to avoid the likely adverse impacts of the Government's proposed approach to access controls, IEAA urges the Australian Government to redraft the definitions of access control technological protection measure and technological protection measure to provide clear protection for pure access controls.
- 2 The Australian Government's proposed approach to region coding TPMs**
- 2.1 IEAA maintains its strong view that not protecting region coding TPMs is a contravention of the AUSFTA. Nevertheless, the Australian Government appears determined to exclude region coding TPMs from the definition of access control technological protection measure and IEAA has serious concerns with the particular mechanism by which it proposes to do so. These concerns primarily arise from the

vague and uncertain language of the statutory note to the definition of access control technological protection measure. IEAA considers that the term "market segmentation" is open to a number of interpretations, many of which extend beyond region coding and leave the scope of the proposed exclusion open to abuse.

3 The permission exceptions to the prohibition on circumventing an access control technological protection measure

- 3.1 IEAA submits that the permission exceptions to the prohibition on circumvention require amendment. In IEAA's opinion, it is not appropriate (and contrary to the existing scheme of the Copyright Act) for a person to be excused from circumvention liability merely on the basis that that person had *reasonable grounds* for believing that he or she had the permission of the copyright owner to do so. As expounded in section 36 of the Copyright Act, the relevant question is whether that person was *licensed* by the copyright owner to do so. Thus, IEAA urges the Australian Government to amend the permission exceptions to the prohibition on circumvention to ensure that those exceptions only apply where a person circumvents an access control technological protection measure with the licence of the copyright owner.

4 Unlawfully obtained copies - application of the interoperability and encryption research exceptions

- 4.1 To ensure compliance with Article 17.4.7(e) of the AUSFTA, the Australian Government needs to restrict the proposed interoperability and encryption research exceptions to lawfully obtained copies of works (instead of non-infringing copies). That amendment will ensure that the interoperability and encryption research exceptions are not available to persons who unlawfully obtain non-infringing copies of works, such as where a person steals a pre-release or beta versions of game software.

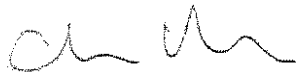
5 The additional damages provision

- 5.1 IEAA is encouraged by the Australian Government's proposal to enact an additional damages provision as part of the new TPM liability scheme. IEAA is a keen supporter of additional damages provisions due to the clear incentive they create for rights holders to shoulder the burden of civil litigation.
- 5.2 One aspect of the proposed additional damages provision that could be strengthened is the list of factors that a court is required to have regard to when awarding additional damages. IEAA considers that the need to deter similar acts is an important consideration for any court that is empowered to award additional damages, and therefore submits that that factor should be expressly listed in proposed section 116AO(2). This amendment would also further harmonise proposed section 116AO(2) with the existing additional damages provision in section 115(4) of the Copyright Act.

6 **Further consultation**

- 6.1 IEAA appreciates the Department's consideration of its views on the exposure draft of the TPM Bill. IEAA would welcome any opportunity to further discuss the points raised in this letter. To do so, please contact Chris Hanlon, Chief Executive Officer, on (02) 9209 4325 or email chris@ieaa.com.au.

Yours sincerely



Chris Hanlon
Chief Executive Officer
Interactive Entertainment Association of Australia

MALLESON'S STEPHEN JAKES

Ms Kirsti Haipola
Copyright Law Branch
Attorney-General's
Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

22 September 2006

Dear Ms Haipola

Copyright Amendment (Technological Protection Measures) Bill ("TPM Bill")

The Business Software Association of Australia ("BSAA") appreciates the opportunity to make a submission on the exposure draft of the TPM Bill. BSAA considers that the full implementation of the technological protection measure ("TPM") liability scheme mandated by the Australia-United States Free Trade Agreement ("AUSFTA") is an issue of prime importance for Australia. BSAA is aware that Australia's treaty partner, the United States of America, feels strongly about this issue, as do local stakeholders whose use of innovative online delivery platforms is likely to be heavily impacted by the proposals set out in the TPM Bill.

BSAA considers that some aspects of the TPM Bill require significant redrafting to bring them into line with Australia's obligations under the AUSFTA. Other provisions would benefit from further harmonisation with the existing scheme of the *Copyright Act 1968* (Cth) ("Copyright Act"). To these ends, BSAA wishes to comment on the following aspects of the TPM Bill:

- (a) the definitions of access control technological protection measure and technological protection measure and the failure to protect access control TPMs;
- (b) the use of the phrase 'of a person' in the definitions of circumvention device and circumvention service, and in the trafficking liability provisions;
- (c) the permission exceptions to the prohibition on circumventing an access control technological protection measure;
- (d) the application of the interoperability and encryption research exceptions to lawfully obtained copies; and
- (e) the scope of the additional damages provision.

- 1 **The definitions of access control technological protection measure and technological protection measure (clauses 1 and 4 of the TPM Bill)**
- 1.1 BSAA has serious concerns with the proposed definitions of access control technological protection measure and technological protection measure. The definition of access control technological protection measure seeks to import a 'link to copyright' far beyond that contemplated in the AUSFTA and disregards the ordinary meaning of Articles 17.4.7(b) and 17.4.7(a)(i). The same 'link to copyright' is repeated in the umbrella definition of technological protection measure, which serves to perpetuate the shortcomings of the definition of access control technological protection measure.
- 1.2 In result, the proposed definitions of access control technological protection measure and technological protection measure afford no real protection to pure access controls. This is a significant concern for BSAA: it means that neither the circumvention nor the trafficking prohibitions apply to pure access controls with the result that users can circumvent pure access controls and trade in devices or services designed to do so without facing liability. Given the inherent complexity in distinguishing between these non-infringing activities and infringing activities in respect of copy controls, BSAA is concerned that the Australian Government's approach to pure access controls will significantly undermine the narrow protection it intends to afford to copy controls.
- 1.3 The 'link to copyright' that BSAA strongly opposes, and considers to be in contravention of the AUSFTA, is that imposed by the 'prevent or inhibit' language in the definitions of access control technological protection measure and technological protection measure. That language conflates access controls as a mere subset of copy controls and is likely to create confusion among consumers and rights holders. Consumers, in particular, are unlikely to be in a position to undertake the complicated legal analysis required to determine whether an access control falls within the definition of access control technological protection measure.
- 1.4 BSAA's view is that the only 'link to copyright' that the AUSFTA permits is that an access control TPM be applied to a copyright work or other subject-matter. The United States' Digital Millennium Copyright Act of 1998 ("DMCA") introduced such a link, and it has since been sensibly interpreted not to permit copyright owners to control aftermarkets for electronic goods. BSAA is confident that the Australian courts would take a similar approach.
- 1.5 Leaving aside BSAA's central submission that the proposed approach to access controls contravenes the AUSFTA, BSAA considers that there is a compelling policy case for protecting access controls.
- 1.6 The need to protect access control TPMs primarily arises from the emergence of new distribution models. These new models benefit rights holders and copyright users alike: rights holders can exploit new methods of disseminating their copyright works and are

therefore encouraged to continue innovating and creating new copyright works, while users can enjoy increased choice as to how and when they access copyright works.

- 1.7 Some of the distribution strategies currently employed or under consideration by BSAA members include 'rent to own' and 'subscription/all you can eat' models. In a 'rent to own' distribution model, the copyright owner would use an access control TPM to ensure that the user could not obtain unrestricted access to the relevant work until such time as the relevant licence fee had been paid in full. For example, a user may be entitled to utilise some functions of a business software application, but an access control TPM would prevent that user from accessing the all of that software's functions until he or she paid the relevant licence fee. Similarly, 'subscription/all you can eat' distribution models rely on access control TPMs to restrict access to copyright works in accordance with the scope of the licence granted.
- 1.8 Access control TPMs are essential to each of these distribution models. This is because, in direct contrast to traditional distribution models (that focus on the provision of a permanent copy of a copyright work), these new distribution models focus on users experiencing a copyright work (for example, by viewing an artistic work, reading a literary work or using a computer program), without necessarily providing the user with a permanent copy of that work. In some circumstances, a user's experience of a copyright work or other subject matter may constitute a substantial reproduction of that work in material form, but that will not always be the case, and in those circumstances, the absence of protection for access control TPMs is likely to undermine the viability of that product offering altogether. Clearly the expense of applying an access control TPM to a copyright work will be difficult to justify if it is possible to circumvent that TPM without attracting liability. Thus, in the interests of fostering the development of innovative distribution methods that benefit rights holders and users alike, BSAA submits that Australia should ensure that its implementation of Article 17.4.7(a) of the AUSFTA affords protection to both access control TPMs and copy control TPMs.
- 1.9 To the extent that the Department is concerned about the potential of access control TPMs to 'lock' users out of content that they have purchased, BSAA's opinion is that the prospect of, and the negative consequences associated with, 'digital lock out' in the TPM context have been overstated by some commentators. In the first instance, it would be in direct conflict with most right holders' desire to make a return on their investment to impose a technological lock on the entirety of a copyright work for the duration of its copyright protection. Second, users appear to accept TPM-governed restrictions on the use of copyright works where the extent of those restrictions are clearly communicated (and therefore are not misleading or deceptive) and the resulting access to the TPM-protected work is still of value to the relevant user. Consider, for example, the success of the Apple iPod and iTunes model where TPMs are used to prevent unauthorised access to, and copying of, sound recordings, while still providing users with a service that is well-utilised and considered valuable. Finally, BSAA agrees

with one commentator's view that "[a]ny concerns about consumers being 'locked out of content' because of TPMs (or DRMs [digital rights management systems]) need to be balanced against the major potential benefits to consumers through the choices that DRMs make possible."¹

- 1.10 The toner cartridge and garage door opener litigation in the United States also illustrates that the anti-circumvention provisions in the DMCA have not had the effect of defeating user expectations about how aftermarket items, such as toner cartridges and garage door openers, can be used where an access control TPM is applied to products that those aftermarket items are designed to work with. The toner cartridge case, *Lexmark International, Inc v Static Control Components, Inc*² clarified that in order to rely on the anti-circumvention provisions in the DMCA it is necessary that the access control TPM is used to protect copyrightable content. In *Chamberlain Group, Inc v Skylink Technologies, Inc*³ - the garage door opener case - the Federal Circuit rejected Chamberlain's argument that the DMCA allowed copyright owners to prohibit fair uses even in the absence of any feared foul use.⁴
- 1.11 Thus, for the reasons cited above, BSAA submits that the Australian Government should redraft the definition of access control technological protection measure to provide broad protection for access controls applied to copyright material. Such a definition would reflect the deal struck with the United States and from which Australia cannot resile. It would also facilitate the development of innovative online delivery platforms that are reliant on clear protection for access controls applied to copyright material.
- 2 **The use of the phrase 'of a person' in the definitions of circumvention device and circumvention service, and the trafficking liability provisions** (clauses 2 and 3 of the TPM Bill, and proposed sections 116AL, 116AM, 132APB and 132APC)
- 2.1 BSAA is concerned that the Department's use of the phrase 'of a person' in the definitions of circumvention device and circumvention service (and in the trafficking liability provisions) adds unnecessary complexity and may have unintended consequences. For example, the phrase 'of a person' only appears relevant to paragraph (a) of the definitions of circumvention device and circumvention service, yet it is used as a qualification for paragraphs (b) and (c) as well.
- 2.2 BSAA understands that the concern underpinning the Department's use of the phrase 'of a person' is to avoid a situation whereby a person, such a manufacturer, attracts liability

¹ Barry Sookman "Technological Protection Measures (TPMs) and Copyright Protection: The Case for TPMs" C.T.L.R. 2005, 11(5), 143 at 151.

² *Lexmark International, Inc v Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004)

³ *Chamberlain Group, Inc v Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004)

⁴ Above note 2, 1201.

for supplying a device merely because an unrelated third party promotes the manufacturer's device (which does not fall within paragraphs (b) and (c) of the definition of circumvention device) as having the purpose of circumventing a technological protection measure. Put another way, the Department appears concerned to create a link between the trafficker and promoter where the only reason that the trafficker's device is considered a circumvention device is because the promoter advertises it as such.

- 2.3 BSAA considers that this link is best achieved by redrafting the definitions of circumvention device and circumvention service as follows (using the definition of circumvention device as an example):

Circumvention device means a device, component or product (including a computer program) that:

- (a) is promoted, advertised or marketed by a person *who does any act described in section 116AL(1)(a) (the first person)*, or by another person acting in concert with the *first person*, as having the purpose of circumventing the technological protection measure; ...

- 2.4 The phrase 'of a person' could then be deleted from proposed sections 116AL(1)(b), 116AM(1)(b), 132APB(1)(c) and 132APC(1)(c), which would, in turn, remove the complexity and potential for misinterpretation inherent in the current drafting of those provisions.

3 **The permission exceptions to the prohibition on circumventing an access control technological protection measure (proposed sections 116AK(2) and 132APA)**

- 3.1 Proposed sections 116AK(2) and 132APA of the Copyright Act provide that a person will not be liable for circumventing an access control technological protection measure if that person has, or has reasonable grounds to believe that the person has, the permission of the copyright owner or exclusive licensee to circumvent the access control technological protection measure.
- 3.2 BSAA disagrees with the "reasonable grounds" threshold for satisfying these exceptions. In BSAA's opinion, that threshold has no basis in Article 17.4.7(a)(i) of the AUSFTA and is inconsistent with the existing scheme of the Copyright Act.
- 3.3 To address these shortcomings, BSAA submits that the permission exceptions in proposed sections 116AK(2) and 132APA should adopt the test in section 36 of the Copyright Act. Section 36 provides that the copyright in a work is infringed by a person (other than the owner of the copyright) who does (or authorises the doing of) any act comprised in the copyright *without the licence of the copyright owner*. This test is the most clear-cut method of determining whether a person has permission to do the act

complained of, and its use in proposed sections 116AK(2) and 132APA would maintain consistency between the new TPM liability regime and the existing provisions of the Copyright Act.

4 **The application of the interoperability and encryption research exceptions to lawfully obtained copies** (proposed sections 116AK(3), 116AK(4), 116AL(2), 116AL(3), 116AM(2), 116AM(3) 132APA(3), 132APA(4), 132APB(2), 132APB(3), 132APC(2) and 132APC(3))

4.1 One of the requirements for each of the interoperability and encryption research exceptions listed above is that the acts done pursuant to those exceptions must be done in relation to a copy of a computer program (in the case of the interoperability exceptions) or a work or other subject-matter (in the case of the encryption research exceptions) that is a non-infringing copy.

4.2 BSAA considers that the interoperability and encryption research exceptions should be amended to only apply in respect of lawfully obtained copies of copyright material, rather than non-infringing ones. This higher test is required by sub-paragraphs (e)(i) and (e)(ii) of Article 17.4.7 of the AUSFTA and is necessary to protect pre-release or beta versions of software, films and other copyright material, which although non-infringing, is capable of being unlawfully obtained. Where this is the case, that copyright material should not be the subject of interoperability and encryption research exceptions in the Copyright Act.

5 **The proposed additional damages provision** (proposed s 116AO(2))

5.1 BSAA welcomes the Australian Government's proposal to enact an additional damages provision as part of the new TPM liability scheme. The prospect of recovering additional damages in flagrant cases is likely to encourage rights holders to commence proceedings against those who circumvent technological protection measures or traffic in circumvention devices or services.

5.2 However, there is one aspect of proposed section 116AO(2) that strikes BSAA as unusual: the need to deter similar acts is not one of the factors that a court is required to have regard to in making an award of additional damages under section 116AO(2). BSAA considers that deterrence is one of the key rationales for enacting an additional damages provision, and in BSAA's experience, the courts have routinely relied on this factor in making awards of additional damages under section 115(4) of the Copyright Act. Indeed, BSAA cannot see any reason why the proposed section 116AO(2) should diverge from section 115(4) on this point.

5.3 For these reasons, BSAA strongly recommends that section 116AO(2) be redrafted to include 'the need to deter similar acts' as a factor that a court must have regard to when determining the availability and quantum of additional damages under section

MALLESONS STEPHEN JAQUES

Attorney-General's Department

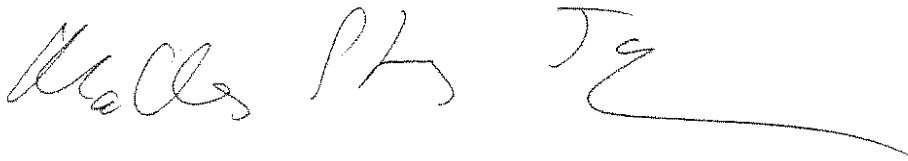
22 September 2006

116AO(2).

6 Further engagement

- 7.1 BSAA appreciates the opportunity to work with the Australian Government to ensure the successful implementation of the AUSFTA TPM liability scheme. BSAA and its members welcome any further engagement on the issues raised in this letter. To do so, please contact Maurice Gonsalves of Mallesons Stephen Jaques on (02) 9296 2166 or maurice.gonsalves@mallesons.com.

Yours faithfully

The image shows a handwritten signature in black ink. The signature is written in a cursive style and appears to be 'Maurice Gonsalves'. The letters are connected, and there is a long horizontal stroke at the end of the signature.