

Schedule 12—Technological protection measures

Exceptions to the technological protection measures scheme

Once enacted, exceptions to liability under the technological protection measures (TPM) scheme will be included in both the *Copyright Act 1968* and the *Copyright Regulations 1969*.

2. The Bill contains the exceptions specifically provided for in the Australia-United States Free Trade Agreement (AUSFTA). In accordance with the AUSFTA, not all of these specific exceptions apply to all three categories of liability (ie, act of circumvention, dealings in access control devices or services and dealings in copy control devices or services). For this reason, following each category of liability in the Bill, there is a list of exceptions to civil liability or defences to criminal liability for that category. This means that, where applicable, there is repetition of provisions throughout the amendments. The table below outlines which exceptions apply to each type of liability.

	Exceptions/defences to liability for circumventing of access measures	Exceptions/defences to liability for dealings with devices that circumvent access measures	Exceptions/defences to liability for dealings with devices that circumvent copyright measures
reverse engineering for the purposes of achieving interoperability	✓	✓	✓
security testing of encryption technology	✓	✓	
security testing of computers/networks	✓	✓	
privacy issues	✓		
law enforcement and national security	✓	✓	✓
libraries for making acquisition decisions	✓		
other exceptions identified under an legislative or administrative review as addressing a credibly demonstrated actual or likely adverse effect on non-infringing use.	✓		

3. New sub-sections 116AN(9) and 132APC(9) and new section 249(2)-(9) provide that additional exceptions to liability for the act of circumventing an access control TPM may be prescribed in the *Copyright Regulations 1969*. Including these additional exceptions in the Regulations provides greater flexibility for amendment and will improve the responsiveness of the scheme to changes in technology.

Proposed additional exceptions from 1 January 2007

4. The Government has accepted some of the additional exceptions identified in the *Review of Technological Protection Measures Exceptions* by the House of Representatives Standing Committee on Legal and Constitutional Affairs. These are proposed to be implemented in the Copyright Regulations and, subject to the regulation making process, are expected to commence on 1 January 2007.

5. The Government proposes to introduce the following additional exceptions for:

- reproduction of computer programs to make interoperable products (as authorised by section 47D of the *Copyright Act 1968* in so far as it applies to articles)
- the reproduction and communication of copyright material by educational and other institutions assisting people with disabilities (as authorised by Part VB, Divisions 1-3 of the *Copyright Act 1968*)
- the reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes (as authorised by sections 49, 50, 51A, 110A and 110B of the *Copyright Act 1968*)
- the inclusion of sound recordings in broadcasts and the reproduction of sound recordings for broadcasting purposes (as authorised by sections 107 and 109 of the *Copyright Act 1968*)
- access where a TPM is obsolete, lost, damaged, defective, malfunctioning or unusable and a replacement TPM is not provided, and
- access where a TPM damages a product, or where circumvention is necessary to repair a product.

6. The amendments to the Copyright Regulations implementing these exceptions have been released in exposure draft form. A copy of the exposure draft is attached for the Committee's information.

Further limited review of additional exceptions

7. The Attorney-General's Department is currently conducting a further limited review of some additional exceptions recommended by the Committee. The review is limited to specific cases where copyright users, who did not satisfy the case for an exception have identified that further evidence is now available. There is a strong public policy interest in considering this further evidence before the legislation commences.

The exceptions being considered in the review process could allow circumvention to gain access for:

- making back-up copies of computer programs
- correcting errors in computer programs
- allowing institutions to assist people with an intellectual disability
- making copies of works for inclusion in broadcasts, and
- making copies of copyright material for criticism, review or news reporting by broadcasters.

8. If the need for these additional exceptions is substantiated in the review process and the Government agrees with the outcome, the exceptions will be added to the Copyright Regulations.

The process for future reviews

9. Future reviews to identify additional exceptions will be held at least once every four years, although the Bill allows the flexibility to hold earlier reviews.

10. Similar to the limited review held this year these reviews will proceed as follows:

- (i) Request for submissions for a grant, revocation or variation of additional exceptions
- (ii) Publication of submissions received
- (iii) Request for comments in reply to submissions received
- (iv) Publication of reply comments
- (v) Review evidence received
- (vi) Decision by Attorney-General on whether to grant, revoke or vary exception
- (vii) Amendment of Copyright Regulations to give effect to Attorney-General's decision.

11. For future reviews, people or organisations seeking exceptions will be required to respond to the following questions.

(1) Is the work, performance or phonogram for which an exception is being sought protected under the Copyright Act?

If no, an exception is not required.

If yes, proceed to (2).

(2) Can the non-infringing use which is asserted be made of the work, performance or phonogram under the Copyright Act?

(a) Is the use an infringement under the Copyright Act?

(i) the answer is no, proceed to (3).

(ii) If yes, proceed to (b).

(b) Does an exception exist?

(i) the answer is no, proceed to (3).

(ii) If yes, proceed to (c).

- (c) Does a statutory licence exist?
 - (i) If the answer is yes proceed, to (3).
 - (ii) If the answer is no, the criterion is not met and an exception cannot be granted.
- (3) 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 (b).
 - (ii) If the answer is no, any person may seek the exception. Proceed to (4).
 - (b) Has the specific user or representative of the user sought an exception?
 - (i) If the answer is yes, proceed to (4).
 - (ii) If the answer is no, an exception cannot be granted.
- (4) Has an access control TPM been applied to the work, performance or phonogram? (The person or body seeking an exception must show evidence that TPMs are currently being applied to the work, performance or phonogram that would be subject to the exception.)
 - (i) If the answer is yes, proceed to (5).
 - (ii) If the answer is no, an exception cannot be granted.
- (5) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact? (Reasonably believable evidence of such an impact needs to be shown to justify an exception.)
 - (i) If the answer is yes, proceed to (6).
 - (ii) If the answer is no, an exception cannot be granted.
- (6) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?
 - (i) If the answer is yes, an exception cannot be granted.
 - (ii) If the answer is no, an exception could be granted.