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Australian *Flexible Learning* Framework

supporting e-learning opportunities

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CONSIDERING APPROPRIATE EXCEPTIONS TO TECHNOLOGICAL
PROTECTION MEASURES

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

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1. Executive Summary

The task with which the Legislative and Constitutional Affairs Committee has been charged – considering appropriate exceptions to technological protection measures – is of *central* importance to the Australian education sector.

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 in question in this submission.

What is in question is *how* that protection is delivered, and, in particular, *what exceptions* should apply to the proposed prohibition on the circumvention of access control measures.

FLAG notes that the debate is sometimes characterised as being about the right of a property owner (in this case, a copyright owner) to prevent others from "breaking in" to his or her property. According to such an argument, circumventing an access control measure is akin to using bolt-cutters to access an owner's property without permission.

This is, of course, a deeply flawed analysis. Copyright cannot be understood in such simplistic, property-based terms. The statutory monopoly delivered to owners under the *Copyright Act 1968* has always been subject to limitations and exceptions - such as the substantiality requirement, the fair dealing exceptions and the educational statutory licences - which are *intended* to operate as a *limitation* on the rights of copyright owners to control use of their works. Those exceptions are central to the so-called "copyright balance": the balance between the rights of copyright owners and users which the legislature has deemed appropriate.

FLAG is concerned that the technological protection measure provisions contained in the Australia-US Free Trade Agreement will, in the absence of appropriate exceptions, unduly disturb that balance by preventing Australian educational institutions – schools, universities and TAFE colleges – from engaging in legitimate activities which **do not infringe copyright**. The limitations which are a central part of the copyright balance will be lost.

At the time Australia entered into the Australia-US Free Trade Agreement, the Government assured the education sector that its concerns regarding the scenario outlined above were misplaced. FLAG urges the Committee to take account of those assurances in recommending exceptions which protect the legitimate interests of the Australian education sector.

Australia is well placed to learn from the US experience. In what follows, FLAG outlines some of the unintended consequences of the US *Digital Millennium Copyright Act*. We urge the Committee to take account of the US experience and to recommend exceptions which are designed to avoid some of the unintended consequences discussed below.

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 Australian Flexible Learning Framework (2005 Framework)*. The 2005 Framework is a one year AUD \$15 million national strategy which is designed to support the uptake of e-learning in VET and builds on the work of the 2000-2004 Framework. The 2005 Framework is collaboratively funded by the Australian Government and all States and Territories and the Framework's 2005 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 Legislative and Constitutional Affairs Committee ("the LACA Committee") regarding exceptions to technological protection measures.

FLAG accepts and supports the need to safeguard the rights of copyright owners and creators. Indeed, VET sector teachers (and students) are both users and creators of copyright material. FLAG also acknowledges that digital technology has made it easier to copy and transmit copyright works, and that anti-circumvention provisions of the kind introduced 2001, by way of the Digital Agenda amendments to the *Copyright Act 1968* ("the Act"), were, prima facie, an appropriate legislative response to that development.

However, FLAG is greatly concerned that the technological protection measure ("TPM") provisions contained in the Australia-US Free Trade Agreement ("AUSFTA") will, potentially, hinder the ability of Australian educational institutions to remain competitive in a global market and to continue to deliver a quality education to Australian and overseas students. In our submission, a regime which safeguards the rights of copyright owners and encourages innovation is *not* inconsistent with a regime which acknowledges the special position of the education sector and fashions appropriate exceptions with a view to:

- (a) ensuring that the sector has ready and cost effective access to copyright material for educational purposes; and
- (b) avoiding disincentives to the use of the most efficient ICT technologies by educational institutions.

In making this submission, FLAG hopes to draw to the attention of the LACA Committee important differences between the US and Australian legislative landscape, and to show that these differences are such that it would *not* be appropriate to simply seek to transport the *Digital Millennium Copyright Act 1998* ("DMCA") TPM provisions into the Act. FLAG also hopes to urge upon the Committee the importance of striking a balance between the interests of copyright owners and users which avoids

some of the unintended consequences which have followed the introduction of the DMCA TPM provisions. Australia is well poised, in FLAG's view, to learn from the DMCA experience.

Finally, we note with some concern that the terms of reference of the LACA Committee do not extend to inquiring into the most appropriate way to implement Australia's obligations generally with respect to the AUSFTA TPM provisions, but rather are confined to consideration of appropriate exceptions to access control measures. FLAG considers that it would be most unfortunate if no opportunity were provided for *public* discussion and consideration of the broader issues relevant to the question of how Australia should give effect to its AUSFTA TPM obligations. As has been noted by Ms Kimberlee Weatherall, Associate Director, Intellectual Property Research Institute of Australia, these issues include:

- what 'counts' as a TPM;
- what 'counts' as a circumvention device – what technologies won't be allowed to be distributed and/or used; and
- how will the exceptions which have already been agreed to in the ASUFTA actually be drafted?

FLAG urges the LACA Committee to recommend to the Attorney General that he provide an appropriate opportunity for such public discussion and review.

4. What is at stake in this review for the education sector?

In signing up to the AUSFTA, Australia has agreed to reform its copyright law to bring Australian TPM provisions more closely in line with those contained in the DMCA. Central to the AUSFTA TPM provisions is an obligation to extend the current prohibition on *supply* of anti-circumvention devices or services to a prohibition on *use* of such devices or services for the purpose of circumventing an access control measure.

It is clear, however, from the US experience since the DMCA provisions were enacted in 1998, that absent suitably crafted exceptions, DMCA-style TPM measures have the potential to **stifle scientific research, impede competition and innovation** and render **ineffective the fair dealing and other exceptions** which are an essential part of the so-called "copyright balance".

FLAG submits that it is imperative that Australia learn from the DMCA experience and craft exceptions which are tailored to the Australian legislative landscape and designed to avoid the negative outcomes discussed below.

- **Scientific research at risk**

Many of the DMCA claims which have been brought in the past seven years have been claims against academics and researchers engaged in the legitimate exercise of testing the efficacy of copy protection and computer security programs. In one of the most high profile such incidents, a Princeton University led team of researchers bowed to threats of litigation under the DMCA and backed away from plans to present the results of their research into the efficacy of digital watermarks at an international conference. Other examples include:

- Hewlett Packard issuing a DMCA threat when researchers published their discovery of a security flaws in a Hewlett Packard operating system;
- Educational software company, Blackboard Inc, using a DMCA threat to stop researchers from presenting their findings of a security flaw in Blackboard products; and
- Russian programmer Dmitry Sklyarov jailed for several weeks and detained for five months after speaking at an academic conference.

These and other incidents have reportedly led to foreign scientists avoiding the US for fear of facing prosecution under the DMCA: see *Unintended Consequences: Five Years After the DMCA*, Electronic Frontiers Foundation, September 2003.

- **Competition impeded**

Another unintended consequence of the DMCA has been the way in which it has been used to stifle competition. To the extent that the development of a competing product requires access to the (typically) software which underlies an existing product, the ability to circumvent access controls becomes critical. Educational institutions will often be involved in this type of research. In such cases circumvention is not posing any threat to the copyright interests of the owner.

- **Copyright exceptions undermined**

The exceptions to copyright - including fair use in the US and fair dealing in Australia - are integral to an appropriate balance between copyright owners and copyright users. In not providing for a blanket exception for fair use/fair dealing, the drafters of the DMCA and the AUSFTA have delivered to copyright owners the means to prevent users from exercising the rights granted to them under the respective copyright statutes. So, in a post-AUSFTA world, a user might legitimately be blocked from accessing or reproducing, for the purposes of research or study, or criticism of review, *any* part of a work, however insubstantial, if the work is subject to an access control measure. Previous copyright reviews have stressed the importance of the fair dealing exceptions in maintaining an appropriate copyright balance, and recommended legislative intervention to *protect* those exceptions.¹

FLAG notes that the LACA Committee's terms of reference appear to limit consideration to *specific* exceptions to the AUSFTA TPM provisions. In FLAG's submission, however, it is imperative that any consideration of appropriate specific exceptions to the AUSFTA TPM provisions take into account the fact that the TPM provisions, when implemented, will have the effect of significantly undermining the existing *general* copyright exceptions.

We note that in its report on *Simplification of the Copyright Act*, the Australian Copyright Law Review Committee commented that "fair dealing is not a defence to infringement; rather it defines the boundaries of copyright owners' rights."² Absent specific exceptions to the AUSFTA TPM provisions, the boundary will be radically defined, without justification, in favor of copyright owners.

5. Government assurances at the time of entering into the AUSFTA

In seeking to assuage the concerns expressed at the time Australia entered into this agreement, the Government assured the education sector and others that the AUSFTA was flexible enough to allow Australia to craft exceptions which were suited to the Australian climate. In its August 2004 report, the Senate Select Committee inquiring into the AUSFTA noted that it had been assured on numerous occasions by representatives of the Department of Foreign Affairs and Trade ("DFAT") that the

¹ In 2002, the **Copyright Law Review Committee**, in its Report on Copyright and Contract, recommended that the Act be amended to prevent copyright owners from seeking to contract out of the exceptions to copyright. In many cases, copyright owners can use TPMs to achieve the same result (ie. lock users out through the imposition of contractual provisions of this sort.) In 2004, when considering the scope of the exemptions or permitted purposes presently contained in s 116A(3) of the Act, the authors of the **Digital Agenda Review** recommended extending the permitted purposes to include *the supply or use of a circumvention device or service for any use of an exception allowed under the Act, including fair dealing and access to a legitimately acquired non-pirated product.*

² Copyright Law Review Committee, *Simplification of the Copyright Act 1968 Part 1: Exceptions to the Exclusive Rights of Copyright Owners*, Canberra, 1998.

AUSFTA contained such flexibility and that there would be extensive consultation with stakeholders in advance of formulating such exceptions.

Similarly, in its June 2004 report, the Joint Standing Committee on Treaties Report ("JSCOT") noted that it had received assurances that the Government would take advantage of the two year transitional period provided for Australia to give effect to its AUSFTA TPM obligations to ensure that "no sector, including consumers, will be disadvantaged" when the TPM provisions eventually come into effect. The education sector received special mention in the JSCOT report, with the committee urging 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."

FLAG urges the LACA Committee to ensure that the Government honors these promises.

6. The stated policy objective: target piracy, not prevent legitimate uses

In oral submissions before the Senate Select Committee, DFAT assured Committee members that the proposed anti-circumvention provisions "are designed to assist copyright owners to enforce their copyright and target piracy, *not* to stop people from doing legitimate things with legitimate copyright material".

This stated policy objective is of central importance: it looks to the **purpose of the user** and the **legitimacy of the use**. In FLAG's submission, it should guide the LACA Committee in its consideration of the proposed exceptions which are outlined in section 10 below. As noted above, one of the most obvious failures of the DMCA has been the *unintended* way in which the anti-circumvention provisions contained in s 1201 have been used to stifle academic research, to impede competition and to prevent legitimate users from exercising fair use and other rights. It is incumbent upon those implementing Australia's AUSFTA obligations to ensure that the legislation is drafted in such a way as to prevent such over-reaching claims as have arisen in the US.

7. Educational institutions – a special case warranting special exceptions

The existing anti-circumvention provisions, which were the result of extensive consultation and debate during the Digital Agenda Review process, treat educational institutions as a special case warranting special exceptions. For example, the existing prohibition on *supply* of a circumvention device or service contained in s 116A of the Act does *not* apply to the supply of such device or services to an educational institution where the institution intends to use the device or service to exercise its rights pursuant to the educational statutory licence contained in Part VB of the Act (see s 116A(3)).

Such special treatment for educational institutions is, in FLAG's respectful submission, entirely warranted. In enacting the Digital Agenda Amendments to the Act, the legislature rightly recognised that in creating exceptions for certain permitted *education* purposes, Australia would not be creating 'loopholes' which would facilitate the significant digital piracy which copyright owners feared. On the contrary, in treating supply for the purpose of an educational institution exercising its Part VB rights as a 'permitted purpose', the legislature had recognized that such institutions were engaged in legitimate uses of copyright material, and that there was little if any risk that they would abuse this exception to engage in, or allow others to engage in, copyright piracy. This makes perfect sense when one considers the checks and balances which are a fundamental part of the educational statutory licence scheme. These checks and balances include:

- (a) **Equitable remuneration** – The copying and communication undertaken pursuant to the educational statutory licences is paid for.

- (b) **Educational purposes** – Each copy or communication must be made by or on behalf of the educational institution, and it must be made solely for the educational purposes of the institution or another educational institution.
- (c) **Non-profit** – The benefit of the licence will be lost if the copy is, with the consent of the institution, used for a purpose other than the educational purposes of the institution; made, sold or otherwise supplied for a financial profit; or given to an educational institution which does not at that time have a remuneration notice in force.
- (d) **Limits on amount of copying** – Part VB imposes limits on how much of a particular work can be copied or communicated in reliance on the statutory licence. If these limits are not adhered to, the benefit of the licence will be lost.
- (e) **Restricting access** - Educational institutions are required to take "all reasonable steps" to ensure that access to materials made available online in reliance on the statutory licences is restricted to those people entitled to receive access, eg staff and students of the institution or of another institution with a remuneration notice in place. Copyright works made available on-line in reliance on the statutory licences cannot be made available for access by the general public.
- (f) **Notice requirements** - Educational institutions must also comply with the various notice requirements contained in the Act and the Regulations.

It can be seen from the above that the educational statutory licences are *quite different in nature* to the fair dealing exceptions. Not only is the copying/communication paid for, but the limitations which are set out above are designed to protect the interests of copyright owners and avoid abuse of this special exception to copyright.

FLAG submits that there is nothing in Article 17.4 of the AUSFTA which would prevent Australia from adopting education-specific exceptions to the AUSFTA TPM provisions.

8. Matters relevant to the interpretation and implementation of article 17.4.7(e)(viii) of AUSFTA

FLAG acknowledges that in considering the proposed exceptions contained in this and other submissions, the starting point for the LACA Committee must be the words of paragraph 7(e)(viii) of Article 17.4 of the AUSFTA. However, the following matters are, in FLAG's respectful submission, relevant to the Committee's task in seeking to construe and give effect to those words:

- (a) The very different background to the inclusion of a "future exceptions" provisions in the US and Australia. In the US, such a provision was enacted years after the enactment of the DMCA, with the apparent intent of dealing with the perceived potential for TPMs to be abused in certain limited situations. At that time there already existed a broad prohibition on use of circumvention devices that did not look to balance and exempt circumvention for certain educational purposes. This was not surprising: there is no US equivalent to the educational statutory licences contained in Parts VA and VB of Australia's Copyright Act. By contrast, in Australia there already exist educational purpose exceptions to the existing anti-circumvention prohibitions, and in agreeing paragraph 7(e)(viii) the government made it clear that the paragraph was intended to protect educational interests.
- (b) While the wording of the DMCA and AUSFTA "future exception" provisions is quite similar (both provisions require there to be an actual or likely adverse impact on non-infringing uses), the body charged with considering proposed new exceptions in the US, the Library of Congress, has *itself* imposed what appears to be a more onerous standard.

The Final Rule of the US Library of Congress states that in order to make a prima facie case for an exemption, "proponents must show by a preponderance of evidence that there has been or is likely to be a *substantial* adverse effect on non infringing uses". Whilst the Library of Congress stated that the term "substantial" means no more than that the proof must have substance, a review of proposed exceptions which have been rejected shows that the addition of the word "substantial" has led the Library of Congress to require evidence of *significant* activities being foreclosed. In FLAG's submission, not only is it the case that the different background and intent of the inclusion of paragraph 7(e)(viii) in the AUSFTA (discussed above) *permits* a different and more generous approach to the granting of exceptions, these factors, in our view, *mandate* the adoption of a more generous approach.

- (c) Each of the DMCA and the AUSFTA require that any future exception be limited to a "particular class of works ..." In the US, this has been construed by the Register of Copyrights in such a way as to rule out exceptions which are defined by a particular use or user group, on the ground that the statutory language and legislative history of the US copyright statute did not provide support for classification on this basis. FLAG submits that it would *not* be appropriate to construe paragraph 7(e)(viii) in that way. Firstly, Australia has a very different legislative framework for dealing with educational use of copyright. Where the US has no special purpose educational exceptions to copyright infringement, Australia has the educational statutory licences contained in Parts VA and VB of the Act as well as s 28 and s 200 of the Act. Secondly, the Australian government made it quite clear that the exceptions anticipated by paragraph 7(e)(viii) were intended, at least in part, to meet the special needs of the educational sector. This suggests that the *purpose* of a use must be taken into account where appropriate.
- (d) To the extent that an exception creates some additional risk of infringement for copyright owners, the ability to manage that risk by imposing conditions under paragraph 7(f) should be carefully explored. The AUSFTA does not require that the circumvention exception creates *no* additional risk – there is a cost/benefit analysis to be made. The existing educational exceptions to copyright infringement arguably create *some* additional risks of infringement, but the Australian experience shows that in practice these risks are not significant, and can be managed by appropriate checks and balances. Paragraph 7(f) allows for similar checks and balances in relation to exceptions to the circumvention prohibition.
- (e) The wording of paragraph 7(e)(viii) allows for exceptions where it is shown that the future use of TPMs in relation to the relevant type of work is likely and that such use will be likely to have the necessary adverse impact. This is important because the incidence of the use of TPMs to block access to works is only beginning and yet the likelihood of much greater future use can hardly be doubted.
- (f) The approach outlined above to the interpretation of paragraph 7(e)(viii) is not inconsistent with the purpose or spirit of the paragraph or the policy objective of the AUSFTA. Rather, it recognises that the AUSFTA has intended to allow exceptions which address Australia's particular circumstances, provided that the need for the anti-circumvention provisions to remain effective in meeting their purpose is properly taken into account.

9. The High Court's Sony decision

FLAG notes that on 6 October 2005, the High Court handed down its decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors*. While the High Court's decision is, strictly speaking, confined to the proper construction of s 116A *as it is presently drafted*, and thus – on one view – of little relevance to any discussion of the post-AUSFTA anti-circumvention provisions, the Court's reasoning is, in FLAG's view, of relevance to this review.

In their joint judgment, Chief Justice Gleeson and Justices Gummow, Hayne and Haydon, note that in construing s 116A of the Act it is appropriate to seek to avoid "an overbroad construction which would extend the copyright monopoly rather than match it." The judges were critical of the Full Federal Court judges (whose judgment the High Court unanimously overturned) for preferring a construction of s 116A which had the effect of extending the copyright monopoly by including within the definition of a technological protection measure not only measures which stop the infringement of copyright, but also "devices which prevent the carrying out of conduct which does not infringe copyright and which is not otherwise unlawful".

Justice Kirby also signaled a possible constitutional challenge should parliament introduce a TPM provision which had the effect of permitting the effective enforcement, through a technological measure, of the division of global markets. Such a law, according to Justice Kirby, would interfere with the fundamental right of an individual to enjoy lawfully acquired private property.

Two things flow from the comments referred to above. Firstly, the High Court has signaled that it is prepared to give a narrow reading to statutory provisions which would otherwise have the effect of extending the copyright monopoly beyond the interests traditionally protected by copyright. Secondly, Justice Kirby's comments can be expected to encourage a constitutional challenge in the event that the drafters of the AUSFTA TPM provisions are not sensitive to the issues at play in *Stevens v Sony*.

10. Proposed exceptions

In what follows, we set out the exceptions which FLAG submits are necessary to allow existing non-infringing uses.

In referring to "works", FLAG intends to refer to "works" and "subject matter other than works" as those terms are understood in the Act. FLAG notes that US consideration of the exception provisions has interpreted "works" as including "audio-visual works".

10.1 Accessing a work which is intended to be copied/communicated in reliance on Part VB of the Act

As noted in section 7 above, absent a special exception, the AUSFTA TPM provisions will have the effect that educational institutions will be prevented from relying on the Part VB statutory licence in order to copy or communicate a reasonable portion of a work which is subject to an access control measure. This, in FLAG's submission, would be counter to the legislature's intention in enacting Part VB: ie to facilitate the use of copyright works for educational purposes. It would also amount to a response which was out of proportion to the mischief sought to be addressed by the AUSFTA TPM provisions: as noted above, there is little if any risk of the educational statutory licences being used as a vehicle for copyright pirates.

FLAG submits that it is appropriate to create an exception which would permit an educational institution to circumvent an access control measure for the purpose of copying or communicating a work or works pursuant to the Part VB licence.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes it is – as stated above, a prohibition on circumvention would have the effect of preventing educational institutions from engaging in non-infringing uses in reliance on Part VB of the Act where the relevant work was subject to an access control measure. Copyright owners can be expected to rely increasingly on such measures to control access to works and "contract out of" the exceptions to copyright, thereby effectively thwarting the legislative intention behind the Part VB statutory licence.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes – the particular class of copyright material would be any work used by an educational institution pursuant to and in accordance with the statutory licence in Part VB of the Act and in respect of which the relevant copyright owner(s) are entitled to payment of equitable remuneration for such use under the Act.

In the event that the Committee considers that a further narrowing of the relevant class of copyright material is warranted, FLAG submits that it would be appropriate to recommend that the exception only apply where:

- (i) the circumvention of the technological protection measure is conducted by or under the supervision of an authorised officer of that institution;
- (ii) any device or process used for the purpose of the circumvention remains in the possession or control of the educational institution and is kept in safe custody so that it can only be accessed with the written permission of an authorised officer of the institution; and
- (iii) the authorised officer makes a declaration promptly after any exercise of this exception, signed by him, providing details of the work which was circumvented.

(c) Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?

Yes it can – as noted above, educational institutions have a long history of compliance with the educational statutory licences. Further, Part VB is subject to copying/communication limits as well as notice and reporting requirements. These checks and balances are more than adequate protection against piracy. Copyright pirates do not need to use educational institutions or their staff or libraries in order to access and copy and communicate copyright material. FLAG is not aware of any evidence that education exceptions have been used in this way before or after the introduction of the Digital Agenda Amendments to the Act. The Committee should not be distracted by renewed voicing of the paranoid claims that broader exceptions will create loopholes for commercial pirates. It should require evidence to support any such claims, not assertion.

10.2 Accessing a work which is intended to be copied/communicated in reliance on Part VA of the Act

FLAG notes that the existing permitted purposes set out in s 116A(7) of the Act do not include the audio-visual educational statutory licence contained in Part VA of Act, pursuant to which educational institutions are permitted to copy and communicate off-air broadcasts in return for a promise to pay equitable remuneration. At the time of the Digital Agenda amendments, there was no real need for educational institutions to be able to circumvent TPM controls on broadcasts: the technology did not exist to "lock-up" broadcasts in this way. This is no longer the case. TPM controls can be applied to digital broadcasts.

An example of such a control is a broadcast flag. The role of broadcast flags in relation to digital broadcasts has been the subject of recent controversies in the United States. On 6 May 2005, the US Court of Appeal ruled the Federal Communication Commission lacked the statutory authority to prohibit the manufacture of computer and video hardware that did not recognise and give effect to "broadcast flags" (the "Flag Order"). The Flag Order would have required devices capable of

receiving broadcast digital television signals to implement broadcast flags by 1 July 2005³. Librarians and public interest groups argued that such flags would curtail the ability of librarians and consumers to make fair use of the copyrighted works, and curb interoperability between devices. The North Carolina State University ("NCSU") led evidence of the NCSU libraries assisting staff members to make broadcast materials available to students in distance learning courses via the internet on a password protected basis. The US Court of Appeal held that there was a "substantial probability" that if the Flag Order was enforced then it would "immediately harm the concrete and particularized interests of the NCSU Libraries".

These flags are primarily intended to control unauthorised re-transmission or distribution of the broadcast which would amount to copyright infringement in Australia. Accordingly, the flag will be a technological protection measure for the purposes of the Act. An example of the flags 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. This will lock educational institutions out of the ability to exercise their Part VA statutory licence rights with respect to those broadcasts - rights for which they pay a fixed price under agreements with the relevant collecting society (Screenrights). In effect, 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 (which is currently available) available to educational institutions in return for a further payment which would be a windfall.

FLAG submits that it is appropriate to create an exception allowing educational institutions to circumvent a broadcast flags and other access control measure for the purpose of exercising its rights pursuant to Part VA of the Act.

FLAG also notes that in its submission to the Digital Agenda Review, it urged the Government to amend the Act to make clear that broadcasts which are made publicly available on the internet by the broadcaster can be copied in reliance on Part VA. This submission was supported by the Australian Broadcasting corporation in its submission to the Digital Agenda Review.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes it is – as stated above, a prohibition on circumvention would have the effect of preventing educational institutions from engaging in non-infringing uses in reliance on Part VA of the Act where the relevant work was subject to an access control measure.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes – the particular class of copyright material would be any broadcast used by an educational institution pursuant to and in accordance with the statutory licence in Part VA of the Act and in respect

³ Federal Communication Commission Ruling 47 Code of Federal Regulations 73.9002(b) "No party shall sell or distribute in interstate commerce a Covered Demodulator Product that does not comply with the Demodulator Compliance Requirements and Demodulator Robustness Requirements." The Demodulator Compliance Requirements state that devices must recognise the flag and flagged content must be output only to "protected outputs" or in degraded form through analogue outputs or reduced visual resolution and recorded only by "authorized methods" which may include tethering of recordings to a single device. The Demodulator Robustness Requirements state that the Demodulator Compliance Requirements must be implemented in such a way as to devices must be robust against user access or modifications so that an "ordinary user" could not easily circumvent the broadcast flag using "generally available tools".

of which the relevant copyright owner(s) are entitled to payment of equitable remuneration for such use under the Act.

In the event that the Committee considers that a further narrowing of the relevant class of copyright material is warranted, FLAG submits that it would be appropriate to recommend that the exception only apply in the circumstances outlined above with respect to Part VB.

- (c) **Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?**

Yes it can – as noted above, educational institutions have a long history of compliance with the educational statutory licences.

10.3 Format shifting in the case of obsolete or out-of-date media

Educational institutions have large amounts of resources contained on VHS cassettes and other media which have become, either literally or in a practical sense, obsolete.⁴ While currently there is no fair dealing exception which would allow educational institutions to make a copy of such resource onto a more convenient format (such as DVD), in its submission to the Fair Use Review, FLAG urged the Government to introduce such an exception. If, as a result of the Fair Use Review, the Act is amended to include a format shifting exception, it would be appropriate, in FLAG's submission, to create an exception which allowed educational institutions to circumvent a TPM for the purpose of engaging in permissible format shifting of works and other subject matter legitimately acquired by that institution.

- (a) **Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?**

Yes it is – in the event that the Government amends the Act to introduce a format shifting exception to copyright, educational institutions (and others) would be prevented from taking advantage of such exception in respect of material which was subject to an access control measure. This would have the effect of preventing educational institutions from employing the most efficient or convenient medium on which to store and access copyright works. It is also likely to have the effect of preventing educational institutions from accessing works when those works are stored on a medium which has become technologically or commercially obsolete.

- (b) **Does the proposed exception relate to a particular class of copyright material?**

Yes it does – the exception relates to works and other subject matter which have been acquired legitimately by an educational institution in a format which has since become obsolete or practically obsolete.

- (c) **Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?**

Yes it can – as outlined above, educational institutions have a long track record of compliance with the existing educational copying exceptions contained in the Act. This history suggests that they can be trusted to ensure that exceptions are not abused and that the legitimate interests of copyright owners are adequately protected.

⁴ Regarding the definition of "obsolete", FLAG has had an opportunity to consider the Copyright Advisory Group to the Schools Resourcing Taskforce ("CAG") submission, and supports the CAG proposal with respect to an appropriate definition of obsolete in the context of educational institutions.

10.4 Accessing a work where the *access control* has become obsolete

FLAG notes that the US Library of Congress has accepted that an exception for this purpose is appropriate and urges the Committee to recommend that such an exception be incorporated into the Act.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes it is – in the event that a technological lock preventing access to a work becomes obsolete, a legitimate owner of that work would be prevented, absent an exception, from circumventing the lock in order to access the work.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes it does – the exception relates to works and other subject matter which have been acquired legitimately by an educational institution and which are subject to an access control which has become obsolete.

(c) Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?

Yes it can – as outlined above, educational institutions have a long track record of compliance with the existing educational copying exceptions contained in the Act. This history suggests that they can be trusted to ensure that exceptions are not abused and that the legitimate interests of copyright owners are adequately protected.

10.5 Accessing material which is *not* protected by copyright

It would appear that the AUSFTA TPM provisions will have the effect of prohibiting circumvention of an access control measure notwithstanding that this is necessary to obtain access to material which is *not* protected by copyright. FLAG submits that it is appropriate to enact an exception which allows for circumvention of an access control measure in order to access material which is not protected by copyright. FLAG submits that it is not appropriate to allow the TPM provisions to be used in order to lock-up material which is not the subject of copyright protection, either because it is material in which copyright is not capable of subsisting or because the copyright has expired. In FLAG's submission, this exception should also apply to access to a work for the purpose of reproducing or communicating less than a substantial part of the work.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes it is - increasingly, multi-media works of relevance to the education sector contain a mixture of material; some protected by copyright and some in which copyright has expired. Absent a special exception, educational institutions will be prevented from circumventing an access control measure in order to access material which is *not* protected by copyright. Neither the Part VA licence nor the Part VB licence apply to non-broadcast sound recordings and cinematographic films.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes it does – it applies to material which in respect of which the Act provides no protection.

- (c) **Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?**

Yes it can – as outlined above, educational institutions have a long track record of compliance with the existing educational copying exceptions contained in the Act. This history suggests that they can be trusted to ensure that exceptions are not abused and that the legitimate interests of copyright owners are adequately protected.

10.6 Accessibility for students with disabilities

Under the *Disability Discrimination Act 1992*, and the *Disability Standards for Education 2005*, educational institutions have obligations to provide students with disabilities with the same educational opportunities as non-disabled students. In order to do this, it will often be necessary to re-format digital teaching resources in order to facilitate access to that material by disabled students. Such reformatting could include enlarging the typeface or converting the work to a Braille format. FLAG submits that it is appropriate to provide an exception to circumvention of an access control measure by an educational institution for the purpose of facilitating access to works, for educational purposes, by students with a disability.

- (a) **Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?**

Yes it is – while some of the activities described above would be permitted pursuant to Part VB of the Act, in the event that no exception is enacted to enable circumvention for the purpose of copying and communicating pursuant to Part VB, then educational institutions will, absent a disability exception, be prevented from accessing works which are the subject of an access control measure for the purpose outlined above. FLAG acknowledges that it is possible that some of the reformatting activities which educational institutions would wish to engage in order to make digital works more accessible to disabled students might not be permitted under Part VB of the Act. However, FLAG has submitted, in its submission to the Government's Fair Use Review, that the Act should be amended to allow educational institutions to engage in such reformatting for the purpose of facilitating access to works, for educational purposes, by disabled students. In the event that the Act is amended to provide for such a fair dealing exception, then absent a circumvention exception, educational institutions would be prevented from circumventing an access control measure in order to exercise such fair dealing exception.

- (b) **Does the proposed exception relate to a particular class of copyright material?**

Yes it does – the exception applies to works or other subject matter which are protected by an access control measure and which an educational institution wishes to access for the purpose of reformatting in order to facilitate access to the work/subject matter, for educational purposes, to a disabled student.

- (c) **Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?**

Yes it can – as outlined above, educational institutions have a long track record of compliance with the existing educational copying exceptions contained in the Act. This history suggests that they can be trusted to ensure that exceptions are not abused and that the legitimate interests of copyright owners are adequately protected.

10.7 Access to data held by application service provider

An application service provider ("ASP") is an entity which manages and distributes software-based services to customers from a central data server. The ASP owns the software applications and makes the applications available to customers on the Internet. Typically, the customer saves data onto the central server of the ASP.

Increasingly, educational institutions are using ASPs to access software applications such as Word, Excel etc. Benefits include lower costs (compared with buying software licences for each computer on campus) and the ease of upgrades via an central server (rather than to each individual computer).

In the event that an ASP becomes insolvent, goes out of business or otherwise will not or cannot comply with its contractual obligations, the educational institution client would be faced with a need to circumvent access control measures in order to access *its own data* stored on the ASP server. FLAG submits that it would be appropriate to create an exception to allow users to circumvent any access control on the central server of an ASP which prevents the user from accessing its own data.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes – such a prohibition would prevent educational institutions from being in a position to access their own copyright material. It would not be an infringing use since the staff and students are the copyright owners of their material. The exception could be drafted to make it an offence to circumvent an access control of an ASP without the permission of the copyright owner or licensee.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes it does – the exception applies to works in which the copyright is owned by the person who seeks to circumvent, or authorise another person to circumvent, an access control measure for the purpose of accessing such works.

(c) Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?

The exception would allow users to access material in which they own copyright and would not encourage piracy.

10.8 Cultural determination

Sensitivity to the cultural requirements of indigenous students requires educational institutions to be able to reformat legitimately acquired electronic resources which may contain material which is culturally unacceptable to such students. FLAG submits that an exception allowing for circumvention of an access control measure for this purpose is appropriate.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes it is – absent an exception allowing educational institutions to circumvent an access control measure for the purpose of reformatting such works (in order to remove culturally unacceptable material) indigenous students will be deprived of the opportunity to have access to such educational resources.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes it does – the exception applies to works which have been legitimately acquired by an educational institution and which contain material which is culturally unacceptable to indigenous students.

- (c) **Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?**

Yes it can – as outlined above, educational institutions have a long track record of compliance with the existing educational copying exceptions contained in the Act. This history suggests that they can be trusted to ensure that exceptions are not abused and that the legitimate interests of copyright owners are adequately protected.

10.9 Anti-competition exception

FLAG notes that one of the apparently unintended consequences of the DMCA TPM provisions has been their use for non-copyright purposes, such as preventing competition in the field of non-copyright goods or services. The US courts have been quick to hold that if the use that an access control prevents is not related to the exclusive rights of copyright, but rather is designed to block a competitor from marketing interoperable products, then the DMCA TPM provisions do not apply. An example of this approach is the *Lexmark v Static Controls Corp*⁵ case, in which the second largest maker of printers in the US sought, unsuccessfully, to rely on the DMCA to prevent a competitor from selling a device which allowed cheaper, non-Lexmark printer cartridges to be used in Lexmark printers.

FLAG is concerned that, subject to how they are eventually drafted, the AUSFTA TPM provisions may not provide Australian courts with sufficient flexibility to determine that an access control measure of the kind employed by Lexmark falls outside of the protection of the proposed TPM provisions. We note that in the *Stevens v Sony* case⁶ handed down on 6 October 2005, the Court expressed disquiet regarding the way in which Sony had sought to rely on the existing TPM provisions for non-copyright purposes (in this case, the division of global markets designated by Sony).

FLAG submits that it is appropriate to provide an exception which permits circumvention of an access control measure where a court has ruled that the access control measure has been used to prevent competition in the field of non-copyright related goods and services.

- (a) **Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?**

Yes it is – absent such an exception it will be open to the manufacturers of non-copyright goods and services to rely on the TPM provisions to seek to prevent competition by blocking uses which do not involve an exercise of one of the exclusive rights of copyright.

- (b) **Does the proposed exception relate to a particular class of copyright material?**

Yes it does – the exception relates to non-copyright goods and services which have been subject to an access control measure.

- (c) **Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?**

⁵ 387 F3d 522 (6th Cir 2004)

⁶ *Stevens v Kabushiki Kaisha Sony Computer Entertainment & Ors*

Yes it can – FLAG submits that the exception proposed in no way impairs the adequacy of legal protection, or the effectiveness of legal remedies against the circumvention of effective technological protection measures, which relate to access controls which are intended to prevent users from exercising rights comprised in copyright.

10.10 Region coding

FLAG submits that an exception which allows for circumvention of regional coding access control protection is appropriate. FLAG notes that in *Stevens v Sony*, Kirby J appeared to consider that such regional access control protection was subject to constitutional challenge on the basis that it amounted to an interference with the rights of an individual to enjoy lawfully acquired private property.

10.11 Orphaned works exception

In its submission to the Fair Use Review, FLAG urged the Government to amend the Act to provide a fair dealing-style exception to copyright with respect to orphaned works. In the event that such exception is incorporated into the Act, FLAG submits that it would be appropriate to create an exception which would permit an access control measure to be circumvented for the purpose of accessing, copying or communicating an orphaned work.

(a) Is it the case that a prohibition on circumvention would have a likely or actual adverse impact on non-infringing uses of copyright material?

Yes it is - in the event that the Act is amended to include a fair dealing exception in relation to copying and communication of orphaned works, then absent an exception allowing for circumvention of an access control measure, educational institutions (and others) would be prevented from taking advantage of such fair dealing exception where the work was the subject of an access control measure.

(b) Does the proposed exception relate to a particular class of copyright material?

Yes it does – the exception relates to orphaned works.

(c) Can it be shown that the proposed exception will not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures?

Yes it can – by definition an orphaned work is a work which has been abandoned by the copyright owner or where the copyright owner cannot be located.

10.12 The need for *ad hoc* consideration of further specific exceptions

FLAG is concerned that the rate of technological development will be such that adverse impacts which are presently unforeseen will emerge after the completion of this review. While we note that the AUSFTA provides for a review of proposed exceptions at least every four years, FLAG submits that it would be appropriate to provide for the creation of further exceptions from time to time provided those exceptions comply with Article 17.4.7(e)(viii) of the AUSFTA and the necessary administrative review process has taken place. This would, in our submission, be consistent with the AUSFTA requirement for a review of exceptions "at least" every 4 years, and is a critical additional step to ensuring appropriate flexibility, for a number of reasons:

- (a) the range, nature, function and impact of TPMs will expand quickly in the future. In requiring educational and other user interests to demonstrate the likely effect of TPMs that are not currently being used puts them in a very difficult position. The potential for new TPMs to prevent educational interests having access to information and the potential impact of that foreclosure have been outlined above. To allow copyright owners to use

access controls against the interests of educational interests in the period pending the next review could result, in cases where a new exception is subsequently granted, in access being denied to works and information to many thousands of Australian students without any compensating benefits to the copyright owner. In Australia's position this makes no economic sense and can only harm the competitiveness of our educational sector in an increasingly global market. Further, if a new exception is allowed in an overseas market there needs to be the flexibility (where appropriate) to implement a similar exception in Australia rather than waiting years for the next review; and

- (b) If (contrary to FLAG's submissions) the AUSFTA provisions are taken to require exceptions to be drafted in very precise terms then there is no flexibility in the drafting of the exceptions which would allow for future developments in TPMs. New specific exceptions would be required. It makes it imperative that some flexible and responsive means for adding to the list of exceptions is created. FLAG respectfully submits that it would be in negligent disregard of the interests of the educational sector to do otherwise. It would certainly contravene the assurances given to JSCOT at the time that the AUSFTA was being debated within parliament.

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FLAG would, of course, be pleased to provide any further assistance with the LACA Committee may require during the course of its consideration of the matters canvassed in this submission.

[name of signatory here
[] October 2005