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Department of Education, Science and Training

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SUPPLEMENTARY SUBMISSION BY
DEPARTMENT OF EDUCATION, SCIENCE AND TRAINING

HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES (TPM) EXCEPTIONS

DECEMBER 2005

Introduction

1. The Department of Education, Science and Training (DEST) provides this further submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs (**the LACA Committee**) in connection with their '*Inquiry into Technological Protection Measures (TPM) Exceptions*' (**the Inquiry**).

2. This submission:

   — discusses some aspects that were not covered in DEST's original submission, dated October 2005 (DEST's main submission is available on the LACA Committee's website at: http://www.aph.gov.au/house/committee/laca/protection/subs/sub048.pdf);

   — responds to arguments raised in some other submissions to the Inquiry;

   — confirms and amplifies DEST's responses to certain questions put by the Committee during the hearing on Monday 5 December 2005; and

   — provides responses to additional questions that were not addressed by DEST at the hearing.

Copyright owner concerns and legitimate scope of TPMs

3. DEST affirms that there is a great deal of difference between institutional users and the main areas of legitimate copyright owner concern which we assess to be:

   — commercial piracy of music, videos, software and computer games;

   — peer-to-peer file-sharing networks, especially in relation to music.

4. TPMs have a legitimate place in meeting the threat posed by commercial piracy and uncontrolled peer to peer networks. Further the AUSFTA requires that Australia implement a system of protection to underpin TPMs. What is at stake is the scope of the protection given to TPMs and the extent of exceptions (in many cases remunerated).

Concept of 'technological protection measure' and circumvention

5. To the extent that they warrant legal underpinning, TPMs should be about protection of copyright, and not about meeting extraneous commercial objectives.

6. For that reason, DEST considers that TPMs should be defined in a manner that would exclude their application to protect out-of-copyright works.

7. In addition, a regional playback control (RPC) should not be protected as a TPM. If despite this recommendation a TPM is defined in such a way as to embrace a TPM, then exceptions should be provided to permit circumvention applied to imported media where the importation did not infringe copyright.

8. Finally DEST would be concerned if TPMs were to be applied in a specious manner; i.e. ostensibly in order to protect subsisting copyright, but in reality for

some other purpose. For example, a copyright owner may apply a TPM to a CD or DVD containing largely public domain material, combined with a small amount of proprietary material. DEST would be concerned if the effect of this was to prevent circumvention for the purpose of accessing the public domain material. DEST would therefore urge that in drafting any legislation consideration be given to avoiding such an unintended outcome:

- by defining a TPM in such a way as to exclude a specious application of the technology (i.e. not genuinely for the purpose of protecting copyright); and
- by defining 'circumvention' as the *relevant* circumvention, i.e., circumvention of a TPM in order to access public domain material[1] should be permissible, even though the same media contains copyright material that is not sought to be accessed.

Maintaining the balance provided by TPM exceptions

9. DEST agrees with the position stated by the Attorney-General's Department during the Committee hearings. That is, as a starting point policy-makers should seek to retain the circumvention exceptions provided under existing law. DEST notes that if all the exceptions were retained in all the existing areas, the existing balance will have nevertheless shifted adversely to users, because:

- the regimes required under AUSFTA would prohibit use, as well as dealings;
- any exceptions that are available under Article 17.4.7(e)(viii) can only apply to use, not dealings.

Particular class criterion

10. DEST reiterates the position stated in its main submission with respect to the particular class criterion, but would amplify it in one respect.

11. DEST agrees that an exception applicable to *all* copyright subject matter would not meet the particular class criterion. However, within that, a valid class may be defined by reference to *any* attribute or combination of attributes of the subject matter, including:

- the category of subject matter in terms of the categories used in the *Copyright Act 1968*, including:
  - works:
    - literary works
    - dramatic works
    - musical works
    - artistic works
  - subject matter other than works

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[1] Or for that matter, material in which the copyright is owned by the user themself.

- films
- sound recordings
- television broadcasts
- sound broadcasts
- published editions of works

- performances

— the format or medium in which the copyright subject matter is stored, presented, distributed or communicated, for example:

- DVD;
- CDROM;
- streaming audio; *etc*

— the fact that the copyright subject matter is configured, presented, packaged or marketed in a certain way, e.g. a 'student edition' would be a category of subject matter

— whether the subject matter is published

— whether the subject matter is provided under a licence.

12. To the above list of possibilities, DEST would add:

— the category of TPM applied to the copyright subject matter.

That is, an exception that is drafted so as to apply to any or all copyright materials protected by TPM type XYZ would, in DEST's view, meet the 'particular class' criterion.

13. In summary, any formulation of the particular 'class' that is logically entailed by the essential rationale of the exception is permissible under the test.

14. DEST notes that, as illustrated by the Issues Matrix attached to its main submission, many of the possible *TPM* exemptions are based on *primary* copyright exemptions. That is:

— a primary exemption might permit, say, copying by Parliamentary libraries for members of Parliament (see, currently, s.48A);

— the secondary, TPM exception may permit circumvention of a TPM for the 'permitted purpose' (see, currently, s. 116A(3) which allows dealings in a circumvention device / service for purposes of copying under s.48A).

15. Where TPM exceptions are of this type, DEST submits that the particular class criterion is likely to be met by virtue of the fact that the primary exemption is framed so as to apply to certain limited categories of subject matter.[2] For

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[2] Section 183, relating to Crown use, is an exception because that statutory licence is applicable to all works and other copyright subject matter. For this reason DEST suggests in its main submission (at

example s. 48A applies to 'works' (whether literary, dramatic, musical or artistic). The policy rationale presumably is that works are the ordinary copyright subject matter which would form part of the holdings of a Parliamentary Library. DEST submits that if there is a good policy foundation for an exemption along the lines of s.48A applicable to 'works', then there is similarly a good policy basis to construe 'works' as a permissible class of subject matter for the (secondary) TPM exception. In short, TPM exceptions for permitted use (i.e. one covered under a primary exemption) should generally meet the 'particular class' criterion as a matter of course.

Classes of user

16. One question that occupied the Committee's attention during hearings on 5 December 2005 was whether it was legitimate to frame a TPM exception for the benefit of a particular class of user. Unquestionably, the answer is yes. In fact many of the primary exemptions identified in the Issues Matrix annexed to DEST's main submission are provided for the benefit of particular classes of user, so it would naturally follow that a TPM (secondary) exception so as to enable the primary 'permitted purpose' would also benefit that class of user.

17. However this aspect (i.e. the class of user) of an exception does not qualify the exception as meeting the 'particular class' criterion. The 'particular class' criterion would still need to be met by reference to attributes of the subject matter as elucidated above. The fact that a work is used in a classroom by a teacher is not an attribute of the subject matter (unless as noted above the intended use is reflected in some differentiation of the product - as in a student edition). Similarly, the fact that an e-Book is used by a print-handicapped reader is not relevant one way or another, to the question of whether the particular class criterion was met; however the fact that the e-Book provides a large print mode may be an attribute by which the 'class' can be framed.

Reverse engineering and interoperability

18. The Committee also asked whether DEST had a view on the need to circumvent TPMs for the purpose of interoperability between databases and computer programs. We undertook to respond in writing as this question was not addressed directly in our original submission.

19. DEST considers that an exception to the anti-circumvention provisions to enable interoperability between databases and computer programs, and to allow access to databases, particularly those holding data from publicly-funded research, is most desirable.

20. In support of this, we refer to the Australian Law Reform Commission Report *Genes and Ingenuity: Gene Patenting and Human Health.* (ALRC 99, 2004), which was a review of IP rights over genes and genetic and related technologies

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para.148) that a TPM exception might need to be the subject of further consideration to identify the sorts of article embodying particular copyright subject matter that may require circumvention.

with a particular focus on human health issues. The report remarks that access to such databases can be subject to both TPMs and contract protection, and that limiting access to, and the use of, the information contained in such databases can stifle potentially useful research[3] and that where a database owner refuses to grant a licence to use its genetic database...this could constitute a breach of competition law.[4]

21. We refer to Article 17.4.7(e)(ii) of AUSFTA, which provides for a TPM exception for:

> non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;

22. As illustrated by the Issues Matrix (column 3) attached to our original submission, this falls under the 'built in' exceptions that are being examined by the Attorney-General's Department. However, it is limited. DEST requests the LACA Committee to recommend a much broader exception - although it could only relate to a TPM that is in fact an 'access control measure' (ACM).

23. A broad exception should take account of the fact that there are a number of permutations to consider.

- First, an ACM may be used to prevent access to either:
  - computer programs;
  - data sets or databases (or just 'data').
- Second, interoperability may be needed between:
  - programs;
  - data;
  - hardware.

24. As the Issues Matrix (column 2) shows, the exception currently provided in the Australian Copyright Act allows circumvention *dealings*[5] with a computer program for non-infringing activities directed towards making interoperable products - more specifically, a program or article that is to be interoperable with the original (circumvented) program or another program. However, Article 17.4.7(e)(ii), (referred to in the Issues Matrix in column 3) is limited to circumvention of a program for the purpose of achieving interoperable programs. This provision

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[3] Australian Law Reform Commission Report *Genes and Ingenuity: Gene Patenting and Human Health.* (ALRC 99, 2004), para.28.48

[4] ibid., para. 28.50

[5] Circumvention itself is not currently prohibited.

would not allow retention of an exception for the purpose of interoperable *hardware*. Nor does it extend to the case of interoperability with *data* - raised by the LACA Committee. These latter cases would need to be brought under Article 17.4.7(e)(viii).

25. DEST therefore proposes a broadly framed exception, or exceptions, to allow circumvention of a TPM (being an ACM) applied to:

— a computer program; or

— data,

for the purpose of any non-infringing reverse engineering activities undertaken in order to produce interoperable:

— programs;

— data;

— hardware.

26. The exceptions could be subject to conditions to preserve the ordinary operation of the TPMs, where appropriate, such as:

— that the copy circumvented was lawfully obtained;

— that the circumvention is undertaken by an appropriately qualified researcher;

— that the researcher has made good faith efforts to obtain authority for the circumvention [or that a non-ACM protected copy is not reasonably available].

27. It should be noted that the proposal framed above provides that the reverse engineering activities be 'non-infringing'. It therefore would not operate to allow circumvention followed by copying of the circumvented material, unless such copying was permissible under a separate provision.

Exercising an exception via an agent

28. The Law Council of Australia[6] and a number of other submitters[7] have argued that any TPM exception for the benefit of a particular person should be exercisable by another person acting on their behalf. That is, the task of circumvention should be capable of being performed by an 'agent', or 'outsourced'[8], subject to a signed declaration system similar to that already provided by section 116A(3) of the Copyright Act.

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[6] The Law Council's submission (#15) is available on the Committee's website at: http://www.aph.gov.au/house/committee/laca/protection/subs/sub015.pdf

[7] For example, submission by Ms Kimberlee Weatherall (#38) available on the Committee's website at: http://www.aph.gov.au/house/committee/laca/protection/subs/sub038.pdf

[8] The term used in the Law Council's submission is 'vicarious immunity'.

29. The case in support of this principle is clear. A person who does not have the technical competence to undertake circumvention themselves should not be deprived of an exception that is intended to apply to them. As the Law Council states:

> Sound policy demands that a person's freedom to take advantage of an exception from liability should not be determined by whether that person actually has (or can employ) the technical human capital to circumvent.

30. None of the submissions which have raised this proposal explain how far 'outsourcing' may go, and at what point the work performed by the outsourcer / agent fall foul of the prohibition on 'dealings' in circumvention devices and services. However DEST suggests that a meaningful differentiation can be achieved. To take a hypothetical example:

> An educational institution may approach an IT 'body shop' from time to time in order to engage personnel with various IT and technical skills. On a particular occasion it may ask for a technician skilled in computer audio and video equipment. The body shop recommends a particular person and advises their charge-out rate. The institution engages that person on a contract for three months, to work on its premises in converting existing audio resources to more stable, modern formats. In the course of that work, the technician encounters some media with proprietary TPMs and devises a means of circumventing the protection in order to convert the media.

31. In these circumstances it would be difficult to argue that the IT body shop was dealing in circumvention devices or services.

Nature of the current Inquiry, and outcomes

32. In regard to the 'particular class' criterion and other matters, copyright owner interests have sought to have the Committee adopt the approaches of the United States Copyright Office (USCO) in its rulemaking under the US Digital Millennium Copyright Act (DMCA).

33. A number of submission have drawn the Committee's attention to fundamental differences between US and Australian law, which affect the context in which circumvention exceptions should be approached. It is unnecessary to go over that ground again.

34. However there is a separate point that deserves additional emphasis at this time: that is, that the LACA Committee Inquiry is fundamentally different to the USCO 'rulemaking'.

35. Article 17.4.7(e)(viii) of AUSFTA requires that exceptions must be considered in 'a legislative or administrative review or proceeding'. In fact, the LACA Inquiry is a *legislative* review. It forms part of a policy making process, leading to legislation.

36. The submission by the Commonwealth Attorney-General's Department[9] states that:

> . . . the determination . . . of possible additional exceptions under Articles 17.4.7(e)(viii) . . . will be made by the Government and reflected in proposed amendments to the Copyright Act, taking into consideration the recommendations made by the Committee as a result of the current inquiry.[10]

37. By comparison, the USCO 'rulemaking' took place in a context in which legislation was already in place. The USCO proceedings were merely an administrative or regulatory process. The USCO considered that it was not able to reshape the policy balance expressed in the DMCA, but only to deal with 'exceptional circumstances'. As evidence of this, DEST notes that the USCO shied away from recommending certain exceptions, stating that:

> . . . while many commentators and witnesses made eloquent *policy* arguments in support of exemptions for certain types of works or certain uses of works, such arguments are in most cases are more appropriately directed to the *legislator* than to the *regulator* . . .[11]
>
> [*emphasis added*]

38. For further support of the contentions under this heading DEST would refer the Committee to the submission by Ms Kimberlee Weatherall, submission #38, available on the LACA Committee's website at: http://www.aph.gov.au/house/committee/laca/protection/subs/sub038.pdf.

Form of future 'legislative or administrative' reviews

39. DEST reiterates its view that the Copyright Tribunal is not an appropriate forum to conduct future Inquiries. Tribunal procedures are adapted to deal with matters in dispute in an adversary process, not the formation of policy.

40. As noted above, a review of exceptions under Article 17.4.7(e)(viii) of AUSFTA is essentially a policy-making process.

41. Accordingly, DEST considers that future reviews ought to be conducted by a Committee of the Parliament, as is occurring now, or by the Attorney-General's Department.

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[9] Submission #52, available on the Committee's website at: http://www.aph.gov.au/house/committee/laca/protection/subs/sub052.pdf

[10] In evidence before the Committee on 5 December 2005, the Attorney-General's Department indicated that amendments might be in the Copyright Regulations, rather than in the Act. Nevertheless it is clear that the proposed exceptions will be reflected in *legislation* at some level. (DEST also agrees with the Department's view that any exception under Article 17.4.7(e)(viii) of AUSFTA should *not* be subject to a 'sunset' clause.)

[11] Copyright Office, *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Final Rule 65 FR 64556-01, 27 October 2000 at 64562.