HOUSE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO TPM EXCEPTIONS

SUBMISSION

by

AUSTRALIAN RECORD INDUSTRY ASSOCIATION

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The Australian Record Industry Association (ARIA) is a trade association representing the interests of the Australian recorded music sector. It presently has approximately 100 members ranging from the local affiliates of the major international recording companies, to significant Australian owned and operated companies through to small independent labels and artist owned labels.

ARIA does not consider that, at this early stage in the development of digital markets, any "other" non-specified exceptions to the technological protection measure (TPM) prohibitions under Article 17.4.7(e)(viii) of the AUSFTA are warranted. However, we would like to assist the Committee by providing some background information and our views regarding:

- The value of TPMs and their role in facilitating access to content (section I);
- The Committee's task and Terms of Reference (section II);
- A suggested approach for the Committee in undertaking the inquiry (section III); and
- The criteria to be applied by the Committee (section IV and V).

We would be pleased to provide such further information or clarification as the Committee may require.

I. The Value of TPMs and Their Role in Facilitating Access to Content

Technological protection measures are vital to the ongoing success of the record industry's business in Australia, and in particular its online business.

Australian consumers have had access to legal music download services since as early as 2003. Today there are several services offering digital music, including Telstra's BigPond Music and nineMSN's service at music.ninemsn.com.au. ARIA has little doubt that other services will be launched in the near future, including Apple's iTunes music store (which was most recently launched by Apple in Japan. These services offer a variety of products, including albums and singles priced per download and mobile phone ring tones. In addition, users can listen to music online before purchasing, using streamed audio. If overseas experience is any guide, Australia can also expect to see in the near future different online business models such as subscription services and a variety of interactive streaming services.

The very existence of these services has been made possible by the appropriate deployment of TPMs to protect the digital music products being offered. Without the protection provided by TPMs, content made available online is at risk from widespread unauthorised copying and distribution.

The use of TPMs has already enabled ARIA's members to offer digital music in forms permitting varied and unprecedented uses. For example, digital music files downloaded from BigPond Music may not only be copied to a computer, but also copied an unlimited number of times to a portable music player, and burned to CD up to three times. The service even allows a buyer to download up to two replacement files at no additional charge if the buyer has problems in installation or if the original is lost or destroyed.[1] This catalogue of authorised uses substantially exceeds those uses of recordings that are permitted by the law itself, in Australia as well as elsewhere.[2]

Contrary to the statement at page 3 of the Committee's Issues Paper, ARIA's members do not wish to "lock up" their works. Their business interest lies in the broadest possible dissemination of their works, and in offering consumers appealing opportunities to make flexible and varied uses of them. The TPMs used by ARIA's members serve as a mechanism for making works available on different terms for different prices.

The availability of online music services in Australia demonstrates the industry's commitment to making works available and increasing, rather than diminishing, consumer access and choice in relation to different uses and formats.[3]

II. The Committee's Task and Terms of Reference

Despite the positive experiences with TPMs to date, concerns have been expressed that TPMs could be used by copyright owners in a manner that may affect non-infringing uses. So far these concerns are based on speculation rather than reality or even probability. In ARIA's view, the Committee's inquiry should be viewed as an "insurance policy" to guard against these concerns coming to pass.

A similar purpose underlies the US rulemaking procedure under the DMCA, which is the genesis of Article 17.4.7(e)(viii) of the AUSFTA. The US House Commerce Committee called this rulemaking a "fail-safe mechanism" which would *"monitor developments in the marketplace for copyrighted materials, and allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to protect a diminution in the availability to individual users of a particular category of copyrighted materials"*.[4]

The Committee's task, as set out in the Terms of Reference, is to assist the government by reviewing whether Australia should include any exception other than the seven specific exceptions in the new anti-circumvention law. There is no

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1 See http://bigpondmusic.com/site_help.asp?cache=65070742#mymusic, visited on 10th October 2005.

2 While some jurisdictions have "private copy" exceptions to copyright, these are generally limited to one or a small number of copies.

3 The increase in consumer access and choice made possible by TPMs was a key finding in the similar US rulemaking procedure under the DMCA, which is the genesis of Article 17.4.7(e)(viii): Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 27th October 2003 ("2003 US report").

4 2003 US Report, page 8.

obligation to do so, however, and indeed the Committee may reach the conclusion that no other exception has been shown to be justified at this time.

It is evident from the Terms of Reference that the scope of the Committee's task is more focussed than the overall task of the government in implementing the TPM provisions of the AUSFTA. For example, as part of the overall implementation process the government will consider how to implement the AUSFTA definition of "effective technological measure" into Australian law. It will also consider whether to enact any or all of the seven specific permitted exceptions contained in Article 17.4.7(e). By contrast, this inquiry is focussed on determining the need for a particular type of additional exception, depending on an adverse impact of TPM protection on non-infringing uses.

As the Attorney-General's Department has indicated in its information paper, a key purpose of this inquiry is to gather information from persons who are actually making non-infringing uses of copyright material.[5] Some of these may be persons who are using a TPM under an existing "permitted purpose" exception, as provided for in section 116 of the Act. The key question is whether these actual non-infringing uses (and not hypothetical uses) are or are likely to be adversely impacted by the enactment of the TPM provisions of the AUSFTA.

While this inquiry is limited to this specific question, there are a number of subsidiary elements involved, and a number of complex issues to consider. In particular, the consideration of proposed exceptions is taking place in a rapidly changing factual context. These changes include the ways in which TPMs are being used by copyright owners, and the nature of fast-developing new markets, as well as the types of non-infringing uses being made of copyright material. Because it is not possible to predict all of the problems that may arise, the AUSFTA requires the inquiry procedure to be undertaken at least once every four years, to assess whether the adverse impact on non-infringing uses is ongoing.[6]

These factors mean that the Committee will need to approach the inquiry in a focussed and methodical manner, and to examine the basis for and scope of any proposed exceptions with specificity and care.

The Committee's Terms of Reference suggest the following stages or elements to the Committee's task:

1. Receiving data about actual non-infringing uses.
2. Receiving views regarding whether any "other" exceptions should be enacted to accommodate those uses.
3. Identifying and articulating any proposed exceptions that appear to be within the scope of the inquiry.
4. Receiving public views in relation to the identified proposed exceptions, including data as to actual or likely adverse impact.

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5 The AGD e-News on Copyright, Issue 37, August 2005 ("AGD Paper"), page 4: "[y]ou may wish to make a submission to the Committee if you: ... think that the changes ... may have a likely adverse impact on your non-infringing uses of copyright material".

6 AUSFTA, Article 17.4.7(e)(viii).

5. For each proposed exception, considering the evidence in light of the criteria set out in Article 17.4.7(e)(viii) and (f) of the AUSFTA.
6. Forming a view on the application of those criteria, and preparing a report to government.

In light of these factors, and the distinct tasks outlined above, it is clear that the process by which proposed exceptions are to be formulated and considered is equally as important as the determination of the exceptions themselves. Therefore ARIA would like to suggest an approach to conducting this inquiry that should assist the Committee in making the inquiry as efficient and focussed as possible. As described in more detail below, the approach would involve first weeding out proposed exceptions that are beyond the proper scope of the inquiry, and then engaging in further public consultation in order to ensure consideration of all sides' views of the need for and effect of those proposed exceptions that are properly before the Committee.

III. Suggested Approach to this Inquiry

The Committee has called for submissions from interested parties, addressing the Terms of Reference. The Committee has also indicated that it will hold public hearings over October and November. It is not possible at this stage to predict the outcomes of this process and whether any proposed exceptions will emerge which may require closer consideration.

Given the volume of material that may emerge from the initial public consultation, it will be important for the Committee to begin by identifying a "shortlist" of proposed exceptions that appear to be within the scope of the review and that appear to meet the criteria set out in the AUSFTA.

This task is not easy, as it involves applying a set of complex criteria from the AUSFTA, as the consultation process progresses. ARIA would like to suggest an approach may assist the Committee in reaching a shortlist of proposed exceptions. The criteria for "other" exceptions, as stated in the Issues Paper, may be broken down as follows:

a. Acts of circumvention
b. Access control measures
c. Credibly demonstrated likely or actual adverse impact
d. On non-infringing uses of copyright material
e. Relate only to a particular class of copyright material
f. Not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures.

Criteria a, b, d and e may be seen as "scope criteria", as they delineate the mandated scope of the Committee's inquiry. In most cases, criteria a, b, d and e could be applied to any proposed exceptions, to eliminate at an early stage those exceptions that are clearly outside the scope of the inquiry. Criteria c and f on the other hand entail the evaluation of facts and evidence, and are likely to involve more substantive, qualitative judgments.

We would therefore suggest that the most logical and efficient approach would be to apply the scope criteria first, then if there are any remaining proposed exceptions, apply the substantive criteria to them with the benefit of the further public consultation referred to below. Any proposals that appear to the Committee to meet both the scope and substantive criteria would be placed on the shortlist. ARIA's detailed comments on each of the "scope criteria" are outlined in section IV, and comments on the substantive criteria appear in section V.

Given the specialist subject matter of this inquiry, and the technical nature of some of the criteria, it will be important for the Committee to have the benefit of expert assistance in assessing these criteria and the extent to which proposed exceptions satisfy them. We presume that the Committee will have the support of the Attorney-General's Department during the process and before producing its final report.

The shortlist should then be published and the Committee should call for further public submissions regarding that list. It is only at that stage that copyright owners and other interested parties would be in a position to meaningfully respond and make submissions. Prior to that time, copyright owners would have no capacity to anticipate the nature or scope of particular exceptions that may be put forward by interested parties and/or considered by the Committee.

It would also be useful for the Committee to make recommendations to government regarding the manner of implementation of any exceptions. ARIA submits that the most appropriate method of implementing any recommended exceptions would be through some form of regulatory or administrative procedure (such as notification in the Government Gazette or the making of regulations under the *Copyright Act 1968*) rather than legislative amendment.

Such a procedure would be flexible and capable of amendment and improvement as required by technological and/or commercial developments without the need for the cumbersome legislative process. The need for flexibility is increased by the requirement that all exceptions be reviewed every four years.

The Committee may care to consider an alternative, or perhaps an additional, recommendation to government in relation to process. The substantive review process could be referred to an appropriately qualified administrative or other body such as, for example, the Copyright Tribunal. The Tribunal has established procedures for undertaking inquiries in relation to copyright matters. It also has demonstrated expertise in considering complex matters of copyright law, and factual evidence regarding economic impacts.

This would relieve the Committee of the burden of having to undertake the inquiry, or at least, the technical aspects of the inquiry, every four years. [In our view, it would be more efficient for the Committee to consider and make recommendations to government as to how such reviews ought to be undertaken rather than be required to undertake periodic administrative reviews of the type encompassed by Article 17.4.7(e)(viii) of the AUSFTA.

In the following sections we provide some more detailed comments on each of the scope criteria and substantive criteria.

IV. Scope criteria

The criteria that limit the scope of this inquiry are as follows:

- Particular class of works, performances or phonograms
- Acts of circumvention
- Access control measures
- Non-infringing uses
- "Other" exceptions

Particular class of works, performances or phonograms

Article 17.4.7(e)(viii) limits the other exceptions to "non-infringing uses of a work ... in a particular class of works". The Attorney-General's Department has clarified in its notice that:

> *Additional exceptions can only refer to a particular class of copyright material. Thus, the Committee could not recommend an exception that applied to all works. Suggested exceptions should not be based on the category of user.*

This means that exceptions based on uses for particular bodies such as libraries and universities are not within the scope of this review. It also means that a class that potentially covers all works is not permissible.

It is relevant here to note the experience of the United States in undertaking the DMCA rulemaking procedure, which serves a similar purpose to the current inquiry. The rulemaking procedure has been undertaken twice, in 2000 and 2003, with a third procedure due for 2006. In each case, the Librarian has reached its conclusions after careful analysis and consideration of each criterion, as well as review of the extensive evidential record and underlying legislative history. In both 2000 and 2003 the Librarian of Congress, in making the report, commented extensively on the meaning of "particular class" of works. A number of points were made by the Librarian that should be persuasive in interpreting the same phrase in the AUSFTA:

- The categories of works protected under the US Copyright Act (for example, literary works, phonograms) are at least the starting point for defining a "class",[7] but the words "particular class" were intended to mean a "narrow and focused subset" of those categories.[8]

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7 Recommendation of the Register of Copyrights, Rulemaking on Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 FR 64556 (27th October 2000) ("US 2000 report"), 64560.

8 US 2000 report, p 64560.

- A "class" of works cannot be defined in terms of the status of the user or the nature of the use.[9]
- The class should be identified based upon attributes of the works themselves, and not by reference to some external criteria.[10]
- Classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, is beyond the scope of "particular class".[11]
- The determination of scope of "particular class" will take into account the adverse effects an exemption may have on the market for or value of copyrighted works.[12]

ARIA submits that these comments should be applied by the Committee in determining any "particular class" of works to which an exception should apply.

Acts of circumvention

The Committee's Issues Paper recognises that Article 17.4.7(viii) of the AUSFTA only allows the government to enact other exceptions to the prohibition on the *act of circumventing* access control measures. As the Committee is aware, there is as yet no such prohibition in Australian law, so the Committee will need to proceed on the basis that the prohibition, when enacted, will be fully compliant with the AUSFTA. The AUSFTA does not permit any other exceptions in this category to the prohibitions on dealings in circumvention devices.

Access control measures

What the Issues Paper refers to in shorthand as an "access control measure" is one type of an "effective technological measure" defined in the AUSFTA as:

> *"Any technology, device or component that, in the normal course of its operation, controls access to a protected work ... or protects any copyright."*

The measures within the scope of this review are effective technological measures that "control access to a work, performance or phonogram".[13]

In ARIA's view, it would be advisable for the Committee to approach the question of what is a measure within the scope of this inquiry from first principles relying upon this definition.[14]

Non-infringing uses

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9 US 2000 report, 64559.

10 US 2000 report, 64559.

11 US 2000 report, 64560.

12 US 2003 report, 12.

13 AUSFTA Article 17.4.7(a)(i) and (f).

14 The Committee will be aware that the relationship between TPMs, access and preventing and inhibiting infringement, in the context of existing Australian law, has been recently considered by the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58. This decision does not have any relevance to the Committee's inquiry.

It is critical to keep in mind that this inquiry is limited to non-infringing uses. This is perhaps an obvious point, but ARIA would suggest that the Committee eliminate at an early stage of the inquiry proposals that do not concern non-infringing uses.

Whether there should be new exceptions to rights is a separate issue, and its consideration should remain separate from the consideration of exceptions to TPM prohibitions. If a policy decision is made to enact new exceptions to rights, then those exceptions could in the future be considered as one of the "non-infringing uses" relevant to this inquiry.[15]

We also note that some of the exceptions that were considered in the US in the 2003 rulemaking procedure are outside the scope of this inquiry, since they involve uses that are infringing uses under Australian law.

Relationship of "other" exceptions to specified permitted exceptions

As the Issues Paper states, the Committee is tasked with considering "other" exceptions, ie other than the seven specified in Article 17.4.7(e). ARIA submits that the Committee should proceed on the basis that the activities described in these seven provisions will be considered by the government and therefore exceptions relating to those activities are outside the scope of the Committee's review.

V. Substantive criteria

"Credibly demonstrated" likely or actual adverse impact on non-infringing uses of copyright material

The existence of seven specific permitted exceptions, together with the wording "credibly demonstrated", indicates that the starting point for this inquiry is neutral – as follows from the "insurance policy" purpose. The Committee need not recommend any exceptions in this category, unless one or more proposed exceptions meet the criteria and appear justified. ARIA notes that the Terms of Reference require the Committee to report on "whether" any other exceptions should be enacted, not to report on "what exceptions" should be enacted, as indicated in the Committee's Issues Paper.

"Credibly demonstrated" also indicates that the proponent of any proposed exception has the burden of proof to demonstrate the claimed likely or actual impact.

The word "credible" indicates that the evidence provided in support of the exception should be objective and based on factual information rather than speculation or opinion. This is in line with the comments made above about actual non-infringing uses, and confirms that a mere theoretical possibility will not be sufficient. It is also consistent with the approach taken in the United States, where, even without the "credibly demonstrated" wording, the Librarian found that "in order to make a prima facie case for an exemption, proponents must show by a preponderance of the

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15 Some issues relating to possible exceptions to rights are being considered in the Fair Use Enquiry currently being undertaken by the Attorney-General's Department.

evidence that there has been or is likely to be a substantial adverse effect on non-infringing uses by users of copyright works."[16]

The Committee will also have to assess the "actual or likely adverse impact" on such non-infringing uses. ARIA submits that in order to justify an exception, the adverse impact should have broad effect and should be more than an isolated problem. The assessment of adverse impact should also be made in light of the particular class for which the exception is claimed. So, if only a very small percentage of non-infringing uses within a particular class of works may be affected, there may be insufficient adverse impact.

In the US, the Librarian commented that "de minimis problems, isolated harm or mere inconveniences would not suffice".[17] For example, if a work is available only in some formats, but not the one that is the most convenient to a consumer, this would not qualify as a meaningful adverse impact.

A further factor is that this inquiry is taking place at a time when there is currently no prohibition in place on the act of circumvention. Therefore the Committee will necessarily be assessing the likely impact, in the future, of such a prohibition. This means that evidence should reach a higher level in order to justify an exception. Otherwise, there is a danger of attempting to accommodate a future outcome that is mere speculation and may never come to pass.

Not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures

This substantive criterion is broad and overarching. It acts as a "sanity check" in applying other criteria to ensure that the purpose of legal protection has not been threatened.

In considering this criterion, the Committee may find helpful the factors contained in section 1201(a)(1)(C) of the DMCA. While these factors are not explicitly set out in the AUSFTA, they provide useful guidance as to the balancing process that is necessary, in order not to impair the adequacy of legal protection, in those limited cases where there may be an adverse impact on non-infringing use. The factors are as follows:

(i) availability for use of copyright works
(ii) availability for use of works for non-profit archival, preservation and educational purposes
(iii) impact of the prohibition on the circumvention of TPMs on criticism, comment, news reporting, teaching, scholarship or research
(iv) effect of circumvention of TPMs on the market for or value of copyright works.

The Committee may find it useful to apply this criterion last, when a proposed exception has been judged according to all the other criteria and the detailed evidence

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16 US 2003 report, 10.
17 US 2003 report, 11.

considered. It should assist the Committee to consider the "big picture", and ensure that, following the application of detailed criteria, the proposed exception would not undermine the fundamental purpose of legal protection for TPMs.

VI. Conclusion

Currently, the specifics of any "other" exceptions under Article 17.4.7(e)(viii) have yet to be proposed let alone a need for any such exception credibly demonstrated, as required by the AUSFTA. If our suggested approach to this inquiry is followed, and there is a further phase of public consultation, we look forward to providing more detailed input to assist the Committee.