

RECEIVED  
10 OCT 2000

Submission No. 23

Date Received

BY:

**SUBMISSION TO THE INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS BY THE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS**

**Introduction**

Why do television and movie studios and distributors (**Content Providers**) not go from street to street prosecuting home occupiers for the breach of copyright that nearly all of them would engage in by video taping (or more recently recording to DVD) material that has been broadcast over the free to air networks or over any of the pay TV services? The answer is that the Content Providers are not confident that any such actions would succeed and much harm could come to their economic interests if they were to try to enforce copyright in this way and fail. The point is that copyright has always been a balancing act between the rights of creators of material and the users of that material and this remains true no matter the plain meaning of any statute. It seems highly unlikely that judges will punish users for what is in all reality a quite reasonable and unobjectionable use of material.

Legal measures to prevent the circumvention of technological protection measures (**TPMs**) must be considered in the same light - balancing the rights of creators of material with the reasonable use of copyright material by those who have come into possession of that material without breach of copyright (**Non-Infringing Possessors**). It is recognised that clause 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement (**USFTA**) only allows exceptions for non-infringing uses of copyright material. To the extent that the submissions below refer to reasonable use that is not condoned by a strict reading of the *Copyright Act*, it is submitted that corresponding express reasonable use rights should be inserted into the *Copyright Act* to ensure that the reasonable use is a non-infringing use.

**TPMs should not be able to be used for non-competitive purposes**

Content Providers may argue that region coding of DVDs is needed to prevent parallel importing of pirated material. This does not explain why the TPMs in DVDs prevents the use of DVDs sold in countries with strong copyrights laws (including the USA) in Australian DVD players. It is also unclear why seizure at point of entry into Australia would not be a sufficient mechanism to address piracy of DVDs from countries with weaker copyright laws or laxer enforcement of those laws.

The primary effect of region coding in respect of Zone 1 DVDs (USA) is that price competition between Australian and US retailers and wholesalers is prevented. This either is, or should be, a serious breach of the *Trade Practices Act*.

It is submitted that TPMs should be limited to the minimum mechanisms that Content Providers can reasonably be expected to adopt in order to protect their primary copyright rights (the making of copies, adaptations, broadcasts, etc but not prevention of parallel importing). It is further submitted that the onus should be Content Providers to prove that they have done so.

To the extent that the TPMs actually adopted are not the minimum mechanisms that Content Providers can reasonably be expected to adopt in order to protect their

primary copyright rights, there should be an exception under clause 17.4.7(e)(viii) of the USFTA to the legal measures to prevent the circumvention of TPMs.

In the case of region coding of DVDs, the effect of these submissions would be that it would be legal to manufacture, own, sell and use a device that defeated the TPMs on DVDs so that DVDs region coded for USA, UK, Europe or Japan could be used in Australia. To the extent that the Content Providers make it reasonable to do so (considering both cost and technical difficulty), the device would be required to restore, or leave unaffected, the TPMs of DVD material sufficient to protect the Content Providers primary rights.

Although the comments above are directed in the first instance to region coding of DVDs, it is likely that the same considerations apply to region coded games and other software.

### **TPMs should not prevent reasonable interoperability**

Given the rapid product cycles of electronic equipment compared to the technology used in the production of traditional copyright works (eg books), it is reasonable that Non-Infringing Possessors should have the right to use that material in a way which will reasonably allow the use of the copyrighted material on other technological platforms without any requirement to pay the copyright owner for another copy. Obviously, Content Providers would have a legitimate concern that this right not allow more than one copy of the material to be used at any one time.

As an example, if a person downloads an online movie to his or her PC (and pays the copyright owner for this copy), the person should be able, as of right, to view the movie on a portable DVD player or Playstation Portable.

It is submitted that, to the extent that the TPMs actually adopted do not make reasonable provision for this interoperability right, there should be an exception under clause 17.4.7(e)(viii) of the USFTA to the legal measures to prevent the circumvention of TPMs. It is recognised that it may be difficult, if not impossible, for Content Providers to make reasonable provision for the interoperability right in respect of existing technological platforms in a way which gives reasonable protection to their primary copyright rights. In these circumstances, the balancing of rights may require, for example, a period of, say, six months after first publication of copyright material before TPMs can be defeated to allow use of the copyright material on those existing platforms.

### **TPMs should not prevent the use of a specific hardware platform**

In a number of cases (such as Sony Playstations, X-boxes and others), Content Providers use TPMs to prevent third parties supplying software to run on those platforms. Although the TPMs may have a peripheral role in preventing piracy of software marketed by the Content Providers, the primary concern addressed by the TPMs seems to be to protect the investment of the Content Providers in the hardware platform (which hardware may be marketed at a loss).

At first glance, this behaviour seems reasonable - why should Content Providers not be allowed to sell hardware at a loss on the prospect of recovering their costs on software that may be subsequently sold? However, that simplistic analysis ignores a number of factors: competition in the supply of software is prevented; that fact that the physical space and cost (even if subsidised) of the hardware are limited resources; and the fact that this behaviour has nothing to do with protection of copyright. It is submitted that this behaviour either is, or should be, prohibited by bright-line rule as a species of third line forcing under the *Trade Practices Act* and that the *Copyright Act* should not be a legal blank cheque to avoid competition policy. In accordance with other types of third line forcing, however, it should be capable of notification under the *Trade Practices Act*.

It is also submitted that, to the extent that the TPMs have the effect of preventing the use of hardware platforms by third parties (rather than merely preventing copying of Content Providers' software), there should be an exception under clause 17.4.7(e)(viii) of the USFTA to the legal measures to prevent the circumvention of TPMs.

It is noted that this category of exception is actually an example of the first identified (TPMs should not be able to be used for non-competitive purposes).

#### **TPMs should allow back-up copies to be made**

Copyright material used in electronic equipment (including, CDs, DVDs, video tapes, floppy disks, CD-ROMs, DVD-ROMs and data tapes) is inherently fragile. It is obvious that a Non-Infringing Possessor should have the right to protect the investment that he or she has made in purchasing such material by making a reasonable number of backup copies. (Noting that a single backup copy is just as fragile as the original.)

It is submitted that, to the extent that the TPMs have the effect of preventing a Non-Infringing Possessor making a reasonable number of backup copies of copyright material for use with electronic equipment, there should be an exception under clause 17.4.7(e)(viii) of the USFTA to the legal measures to prevent the circumvention of TPMs. However, it is recognised that this exception could significantly affect a Content Providers ability to protect their content on existing hardware platforms. Accordingly, it is proposed that the exception not apply if the Content Providers concerned undertake to provide additional copies of the copyright material on reasonable evidence of a person being a Non-Infringing Possessor and the previous copies of the content being unavailable or unusual. This qualification should not apply if onerous conditions are imposed by the Content Providers or if more than a nominal, cost based fee is charged.

#### **Limitation of clause 17.4.7(e)(viii) to specific classes of copyright material**

Clause 17.4.7(e)(viii) of the USFTA only allows exceptions to the legal measures to prevent the circumvention of TPMs in relation to particular classes of copyright material. In order to address this requirement, it is suggested that the exceptions suggested in this document apply, in the first instance, only to copyright materials containing video or audio material or computer programs. In addition, the relevant provisions of the *Copyright Act* should contain a regulation making power in relation

to all remaining classes of copyright material exercisable on the recommendation of the Minister after the Minister has held an appropriate inquiry into the making of such regulations.

Alex Andrews  
10 October 2005