

# Review of exceptions for circumventing technological protection measures

**Issue:** *Exceptions to liability in the new liability scheme for circumvention of technological protection measures?*

## What is a technological protection measure?

Technological protection measures<sup>1</sup> are components, software and other devices that are used to protect copyright material from being copied or accessed. These measures are increasingly common as a means of self-protection for copyright owners in response to increasing copyright infringement in the digital age.

Examples of technological protection measures include encryption of software, passwords, and access codes such as regional coding on DVDs.

## What is circumvention of technological protection measures?

Technological protection measures can be disabled or circumvented, for example, by using computer programs, or devices such as microchips. Circumvention could also occur by using passwords provided without authorisation by other users of the material.

## What is the liability scheme envisaged by the AUSFTA?

Under the Australia-United States Free Trade Agreement (AUSFTA), Australia is required to implement a new liability scheme for circumventing technological protection measures by 1 January 2007. The AUSFTA requires Australia to introduce civil and criminal remedies in relation to the following three categories of activity:

- Acts of circumvention of technological protection measures that prevent access to copyrighted material
- Dealings with (manufacturing, selling etc) devices and services that may be used to circumvent a technological protection measure that controls access to copyrighted material, and
- Dealings with devices and services that may be used to circumvent a technological protection measure that protects copyright other than by restricting access to copyrighted material.

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<sup>1</sup> Technological protection measures are referred to as “effective technological measures” in the AUSFTA. For the purposes of this document the terms are interchangeable.

## What are the exceptions to liability allowed by the AUSFTA?

The AUSFTA allows specific, limited exceptions to liability in relation to each of these three categories of liability.

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

As indicated above, in certain circumstances the AUSFTA allows Australia to introduce other exceptions to liability in relation to the circumvention of access control measures.

## What are the criteria for these 'other' exceptions?

Australia can only implement exceptions if they comply with Article 17.4.7(e)(viii) and (f) of the AUSFTA. In summary, exceptions must:

- be confined to acts of circumvention of access control measures
- be limited to activities where the prohibition on circumvention has a credibly demonstrated likely or actual adverse impact on non-infringing uses of copyright material
- relate only to a particular class of copyright material; and
- not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures.

## What is the task of the Committee?

The task of the Committee is to report on what 'other' exceptions, within the terms of Article 17.4.7(e)(viii) and (f) of the AUSFTA, should be included in the new liability scheme for the circumvention of technological protection measures.

### **Why does the review matter?**

There is considerable interest in the scope of Australia's copyright law in relation to circumvention of technological protection measures. On the one hand, copyright owners want to be able to "lock up" their material (eg. music, films, computer software) as a means of controlling unauthorised use and for protection against infringement.

On the other side, copyright users do not want to be locked out of accessing copyright material. Copyright users argue that technological protection measures prevent them from being able to access material which they have legally acquired, or material which they can legally copy and communicate under the Copyright Act. In addition, copyright users are concerned that technological protection measures can be used for illegitimate purposes such as anti-competitive behaviour.