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BY: _____

Submission No. 9
Date Received

The Secretary
House Standing Committee on Legal and
Constitutional Affairs,
House of Representatives
Parliament House
CANBERRA ACT 2600

7 October 2005

Dear Sir / Madam

Submissions to the Inquiry into the Technological Protection Measures (TPM) exceptions under the *Copyright Act 1968*

1. I refer to the House of Representatives Standing Committee on Legal and Constitutional Affairs Terms of Reference in the above inquiry. I have been asked to make a submission to the Committee on behalf of the Tax Office.
2. I understand that The Australia-United States Free Trade Agreement requires changes to the *Copyright Act 1968* (the Copyright Act) to prohibit use of devices which circumvent Technological Protection Measures (TPMs). These changes will prohibit use of TPMs by Government Agencies even when they are being used for the purposes of s183 of the Copyright Act.
3. I note that lawfully authorised activities carried out by government employees, agents or contractors for law enforcement, intelligence, essential security, or similar governmental purposes will be specifically excluded from the operation of the required amendments to the Act in accordance with article 17.4.7(e)(vi) of the Australia United States Free Trade Agreement. My submission addresses this exception as well as other possible exceptions that should be considered for Government Agencies.

Exception for law enforcement etc

4. I am concerned by the potential impact of the proposed changes on the Tax Office's operations, to the extent that the changes may have an adverse effect on our ability to exercise statutory access and information-gathering powers to collect information necessary to ensure compliance with tax laws.
5. Under the self-assessment tax system that we have, it is the taxpayer who holds information relevant to his or her liability to tax. If we do not have the ability to access this information, it will significantly and adversely affect our ability to ensure that people are meeting their responsibilities and to collect public revenue on behalf of the Commonwealth. If, for example, the Tax Office exercised its statutory powers to obtain documents, information or data for the purposes of an enquiry into a particular taxpayer's compliance with a tax law, and the documents, information or

data was password protected, we would wish to ensure that the use of a device to circumvent the protection was not unlawful.

6. In this context, it is critical that the concept of "law enforcement" be sufficiently wide so as to cover civil (including tax-related) as well as criminal law administration and enforcement.

7. Even outside of the investigation of particular matters, the Tax Office relies heavily on access and use of a wide range of copyright material to support its operations. Generally such access and use is made on agreed commercial terms, however, there are some instances where (consistent with section 183 of the Copyright Act) this is not possible. In some of these cases, it is necessary to use circumvention devices.

8. Whilst the circumstances in which the Tax Office would wish to use circumvention devices is very narrow, the loss of this as an option even in very few cases could have an adverse effect on our operations. Ideally, the scope of exception for law enforcement activities (including in relation to intelligence gathering) should be drafted widely enough to cover a broad range of information-gathering activities carried out by the Tax Office, even if they do not directly relate to the investigation of a particular matter.

Other possible exceptions

9. Whilst the need for further, specific exceptions will depend to a large extent on the eventual scope of the exception discussed above, the specific circumstances in which the Tax Office (and presumably other Government Agencies) would wish to continue to be able to utilise a circumvention device are when:

- the copyright owner can not be identified, or can not be contacted (such as in the case of orphaned works);
- the copyright permission cannot be obtained within a suitable time frame for the agency to be able to make operational use of the copyright material. For example, where a copyright owner has been identified, and for reasons such as language or location, or because there are multiple copyright owners, a timely permission cannot be obtained;
- a work is out-of-copyright, but where a TPM prevents access; and
- agreement cannot be reached with the copyright owner, but where access to the material is necessary due to the operational requirements of the agency. For example, a promoter of an aggressive tax-avoidance scheme who publishes a commercially available product describing the tax-avoidance scheme may refuse to sell material to the Tax Office because it may not be in their interests to do so.

10. The Tax Office operates in an environment of finite (and increasingly short) periods in which to undertake enquiries to ensure that people are meeting their tax

responsibilities and to take any necessary remedial action (such as to amend tax assessments). Given the lengthy time periods sometimes required to obtain copyright permissions, these exemptions are considered necessary to accommodate our operational needs.

11. Should the Committee require any further information in regard to these submissions, please contact Will Day, ATO General Counsel, on 02-62162270.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Bruce Quigley', with a long horizontal flourish extending to the right.

Bruce Quigley
First Assistant Commissioner
Office of the Chief Tax Counsel
Australian Taxation Office