

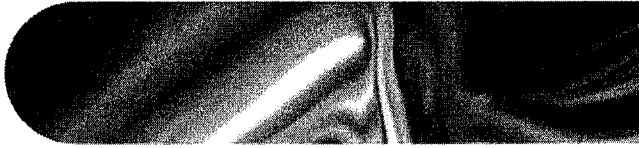
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AUSTRALIAN
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***Submission to Review of Technological
Protection Measures Exceptions by House of
Representatives Legal and Constitutional
Affairs Committee***

October 2005

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to copyright policy issues.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions to the House of Representatives Standing Committee on Legal and Constitutional Affairs (LACA Committee) on exceptions to circumvention of technological protection measures (TPMs).

Context in which this review is occurring

3. This review forms part of the process of implementing Australian's obligations under Chapter 17 (Intellectual Property Rights) of the Australia-US Free Trade Agreement (AUSFTA). Other aspects of Australia's obligations regarding TPMs, including new sanctions against circumventing TPMs and specific exemptions from circumvention liability allowed by the AUSFTA, are being considered by the Attorney-General's Department.
4. There are already sanctions in the Copyright Act against the manufacture, importation and distribution of technological protection measures designed to prevent or inhibit infringement of copyright (copy-control TPMs). The amendments required by the AUSFTA relate to measures intended to control access to a copyright work (access-control TPMs).
5. The provisions relating to TPMs in the AUSFTA are intended to more closely align the application of Australian law to circumvention of TPMs with that of US law. The position in the US is therefore relevant when considering the interpretation and intent of the AUSFTA provisions. For the purposes of this review, the US procedure for determining exemptions to circumvention liability – which we discuss below – is particularly relevant.

Opportunity for further comment

6. As part of this review, the LACA Committee has sought submissions from people who are seeking exemption from liability for circumventing an access control measure. We do not know what exemptions will be sought, and what justifications will be advanced for those exemptions. Those who would be affected by the exemptions will therefore need an opportunity to respond to any exemptions sought and the justifications for them.
7. An exemption to enable non-infringing uses of a class of works under AUSFTA Article 17.4(7)(e)(viii) must be based on an actual or likely adverse impact on those non-infringing uses of access-control TPMs. That impact must be "credibly demonstrated". Such an impact is not credibly demonstrated unless those who would

be affected by the exemption have an opportunity to respond to evidence submitted by those seeking the exemption.

8. We note that the inquiries by the US Copyright Office into exemptions from circumvention liability included an opportunity to comment on the submissions of others. We comment further on that process below.
9. Submissions to the Committee may raise issues about access which copyright owners were not previously aware of, and they should have an opportunity to consider whether access can be provided other than by allowing circumvention of TPMs.

Review process in the United States

10. The US Copyright Act includes a procedure for determining whether there should be exemptions from circumvention liability. Under that procedure, the Copyright Office conducts an inquiry, every three years, into whether there should be exemptions. The inquiry involves a call for submissions, an opportunity to comment on other submissions, public hearings, and an opportunity to comment on issues arising from public hearings.
11. Following the inquiry, the Register of Copyrights makes recommendations to the Librarian of Congress. The Librarian of Congress can announce the recommended exemptions, which means they take effect. The exemptions can last for up to three years, after which time a new application for exemption must be made.
12. There have been two inquiries by the Copyright Office to date: in 2000 and in 2003. In each case, the Librarian of Congress has announced the exemptions recommended by the Register of Copyrights.
13. We have set out below the exemptions allowed and rejected by the Copyright Office.

Criteria for exemptions to circumvention liability under Article 17.4(7)(e)(viii)

14. AUSFTA Article 17.4(7)(e)(viii) allows exemptions to circumvention liability, other than those listed in paragraphs (i) to (vii), which meet all of the following criteria:
 - the circumvention is of an access control (not a copy control);
 - the use of the work is non-infringing;
 - there is an actual or likely adverse impact on that non-infringing use; and
 - that impact is credibly demonstrated.
15. In addition, any exemption must apply:
 - to a class of works, performances or phonograms, and
 - only to the extent that it does not impair
 - the adequacy of legal protection, or
 - the effectiveness of legal remedies

against the circumvention of effective technological protection measures.¹

16. These criteria are similar to those applying under US law, and some of the terms used are the same as in US law.² The consideration of the meaning of these terms by the US Copyright Office is therefore relevant to the consideration of them in the Australian context.

“Adverse impact”

17. The US Register of Copyrights took the view that an adverse impact must be “substantial”, meaning that it must be “distinct, verifiable and measurable”. It must not be hypothetical or theoretical, and must be something more than “mere inconveniences” or isolated cases.

“Actual or likely” impact

18. The Register of Copyrights took the view that “likely” means “more likely than not”. A mere possibility is not sufficient. A claim of actual adverse impact must be supported by evidence.

Credibly demonstrated

19. The Register of Copyright’s Notice of Inquiry for the 2003 rulemaking sought evidence of “first-hand knowledge” of the impact of the circumvention prohibition on non-infringing uses on the basis that “the most compelling cases [for exemption] will be those with the most thorough knowledge of the facts”.
20. It is clear that there must be evidence of actual or likely harm; mere assertion or unsubstantiated claims will not suffice.
21. As noted above, the procedure used by the US Copyright Office included an opportunity to comment on the applications of others.

Class of works, performances or phonograms

22. It is clear from the consideration of exemptions by the US Copyright Office in 2000 and 2003 that an exempted class of works must be defined according to “attributes of the works themselves, and not by some external criteria such as the intended use

¹ Articles 7.4(7)(e)(viii) and 17.4(7)(f).

² Subsection 1201(a)(1)(B) provides that the prohibition on circumvention of a TPM that controls access (in paragraph (A)):

shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the net succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works...

or users of the works”.³ The Register of Copyrights took the view that a class of exempted works will generally be a subset of a category of copyright subject matter – for example, a subset of literary works or artistic works – “refined by reference to other factors that assist in ensuring that the scope of the class addresses the scope of the harm to noninfringing uses”.

23. In addition, the Register took the view that the determination of the exempted class of works “will also take into account the adverse effects an exemption may have on the market for or value of copyrighted works”.

Exemptions for fair dealing or fair use

24. The circumvention of copy-control measures is not prohibited in the US, and its prohibition in Australia is not required by the AUSTFA.⁴ In the US, the decision to not introduce such a prohibition was intended to address concerns about fair use. In the US, a person who has access to a digital file may circumvent a copy-control mechanism to make a fair use copy without incurring circumvention liability. This is also the case in Australia, and will continue to be the case after implementation of the AUSFTA TPM obligations.
25. Applications to the US Register of Copyrights for an exemption from liability for circumventing an access-control measure to make a fair use were rejected in 2000 and in 2003. This was largely because an exemption must relate to a “class of works”, and the class must be defined by subject matter rather than by the type of use or the type of user. Applications for exemptions for classes of works likely to be subject to fair use in educational institutions and libraries were also rejected.
26. Similar considerations will apply to any applications for “fair dealing” exemptions from circumvention liability in Australia. Any such exemptions must relate to a class of works identified by subject matter, and must comply with the other exemption criteria (including actual or likely adverse impact on non-infringing uses).

Expectations about convenience of access

27. One outcome of technological change is that people can now get access from their computer at home or at work to much material that was previously accessible only from a library, or, in some cases, not at all. The availability of so much material online has raised expectations that all material should be available and easily accessible.
28. Exceptions to copyright infringement, including the fair dealing provisions, allow copying and other uses of material which is accessible. They do not, however, provide a right of access. In the non-digital environment, they do not, for example, oblige the owner of a private library to provide access to that library to a person entitled to make a fair dealing of works in the collection.

³ Recommendation of the Register of Copyrights in RM 2002_4; *Rulemaking on Exemptions from Prohibition on Circumvention on Copyright Protection Systems for Access Control Technologies* at page 11.

⁴ The manufacture, importation and distribution of devices and services to circumvent copy-control measures is, however, already prohibited by the Australian Copyright Act.

29. Much material online is available for free, but some is available only upon payment. A work in non-digital form – such as a book – which is usually only available to those who purchase it may be available for free if it is held in the collection of a library. The same is the case in the digital environment. Libraries have an important role in providing access to digital material, as they do in providing access to non-digital material. As a result of amendments which came into effect in March 2001, libraries are able to acquire material in digital form from other libraries for their collections, and to email digital material to people for their research or study.
30. In our view, to demonstrate that circumvention liability has an adverse impact on on-infringing uses, a person must show that:
- access to the work is not available by other means, including by purchasing a copy at a reasonable price or getting access to a copy of the work held in a library;⁵ and
 - the public interest in the person getting access to the information in the work by circumventing a TPM is greater than the public interest in the protection of the work against unauthorised access.

Exemptions allowed and rejected by the US Copyright Office

October 2000 rulemaking

31. In October 2000, the Librarian of Congress announced that the following two classes of works were exempt from circumvention liability until 28 October 2003:
- compilations consisting of lists of websites blocked by filtering software applications; and
 - literary works, including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage, or obsolescence.⁶
32. The Copyright Office rejected applications for exemption in 10 areas:
1. “thin” copyright works (works consisting primarily but not entirely of material in the public domain);
 2. sole source works (works only available from a single source);
 3. audiovisual works on digital versatile discs (DVDs), including those with region coding;
 4. video games in formats playable only on dedicated platforms;
 5. computer programs and other digital works for purposes of reverse engineering;
 6. encryption research purposes;

⁵ An exemption should not apply if, for example, the person can get access to the information by reading a printed version of the work.

⁶ <http://www.copyright.gov/1201/anticirc.html>

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7. "fair use" works (classes of works most likely to be used in libraries and educational institutions for fair use: scientific and social databases, textbooks, scholarly journals, academic monographs and treatises, law reports and educational audio/visual works);
8. material that cannot be archived or preserved;
9. works embodied in copies which have been lawfully acquired by users who subsequently seek to make non-infringing uses thereof; and
10. works covered by copyright exceptions for public broadcasting entities.

October 2003 rulemaking

33. In October 2003, the Librarian of Congress announced that the following four classes of works were exempt from circumvention liability until 27 October 2006:⁷

- certain compilations of lists of websites blocked by filtering software;⁸
- computer programs protected by "dongles" (hardware locks) that prevent access due to malfunction or damage and which are obsolete.
- computer programs and video games distributed in formats that have become obsolete and which require the original media or hardware as a condition of access.⁹
- literary works distributed in an ebook format whose access control prevents the operation of ebook features which provide access to people with a print disability.¹⁰

34. The first two exemptions were variations of the exemptions granted in October 2000, which expired in October 2003.

35. The Copyright Office rejected applications for 25 other exemptions:

1. Proposed class: All works should be exempt for noninfringing uses, e.g., fair use and private uses, and other use-based proposals.
2. Proposed classes: Several, including "Per se Educational Fair Use Works" and "Fair Use Works."
3. Proposed classes: (1) Musical recordings and audiovisual works protected by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project where the granted exemption applies only to acts of circumvention whose primary purpose is to further a legitimate research project; and (2) Musical recordings and audiovisual works protected

⁷ <http://www.copyright.gov/1201/index.html>

⁸ "Compilations consisting of lists of Internet locations blocked by commercially marketed filtering software applications that are intended to prevent access to domains, websites or portions of websites, but not including lists of Internet locations blocked by software applications that operate exclusively to protect against damage to a computer or computer network or lists of Internet locations blocked by software applications that operate exclusively to prevent receipt of email."

⁹ "A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."

¹⁰ "Literary works distributed in ebook format when all existing ebook editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format."

by access control mechanisms whose circumvention is reasonably necessary to carry out a legitimate research project.

4. Proposed class: Any work to which the user had lawful initial access (and variations).
5. Proposed class: Copies of audiovisual works, including motion pictures, and phonorecords of musical sound recordings that have been previously licensed for reproduction but can no longer be reproduced for private performance after the lawful conditions for prior reproduction have been met.
6. Proposed class: "Thin copyright" works.
7. Proposed class: Public domain works or works distributed without restriction.
8. Proposed class: Musical works, sound recordings, and audiovisual works embodied in media that are or may become inaccessible by possessors of lawfully-made copies due to malfunction, damage, or obsolescence.
9. Proposed class: Audiovisual works released on DVD that contain access control measures that interfere with the ability to defeat technology that prevents users from skipping promotional materials.
10. Proposed class: Ancillary audiovisual works distributed on DVDs encrypted by CSS.
11. Proposed class: Audiovisual works stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.
12. Proposed class: Video games stored on DVDs that are not available in Region 1 DVD format and access to which is prevented by technological measures.
13. Proposed class: Audiovisual works embodied in DVDs encrypted by CSS.
14. Proposed class: Software designed for use on dedicated video game players.
15. Proposed class: Literary works (including ebooks), sound recordings, and audiovisual works protected by access controls that prevent post-sale uses of works; "tethered" works.
16. Proposed class: Audiovisual works, including motion pictures, the DVD copies of which are tethered to operating systems that prevent rendering on alternative operating systems
17. Proposed class: Sound recordings, audiovisual works and literary works (including computer programs) protected by access control mechanisms that require assent to End-User License Agreements as a condition of gaining access.
18. Proposed class: Published sound recordings of musical works on compact discs that use technological measures that prevent access on certain playback devices.
19. Proposed class: Sound recordings on copy-protected Red Book Audio format compact discs.
20. Proposed exemption: Broadcast news monitoring.
21. Proposed exemption: Reverse engineering for interoperability and the Static Control proposals.
22. Proposed exemption: Computer issues: encryption research, data file formats, recovery of passwords, personally identifying material.
23. Proposed exemption: Conversion of data file formats and source code
24. Proposed exemption: Privacy and personally identifying information

Implementation of any recommended exemptions

36. The AUSFTA requires the Australian government to establish a legislative or administrative review or proceeding whereby people can seek an exemption from liability for circumventing a TPM (Article 17.4(7)(e)(viii)). That review or proceeding must take place at least every four years.
37. In our view, under the AUSFTA, any exemption to circumvention liability may apply for a maximum period of four years. The requirement that the review or proceeding take place every four years indicates that any exemption must be reviewed at least every four years. In the US, the exemptions which have been granted have been for three years. The two exemptions granted in 2000 were reconsidered in 2003.
38. Partly for this reason, it is inappropriate that any exemptions covered by Article 17.4(7)(e)(viii) be given effect by amendments to the Copyright Act. Apart from the requirements of the AUSFTA, legislative exemptions are inappropriate given the rapid changes in technology, and changes in the way technology is used in the protection and distribution of copyright material. If the justifications for an exemption disappear, the exemption should be removed, but this can be difficult if it is provided by legislation.
39. In our view, the amendments to the Copyright Act implementing the AUSFTA TPM obligations should empower the Attorney-General to determine whether there should be additional exemptions which meet the criteria set out in AUSFTA 17.4(7)(e)(viii), and provide that a person does not have circumvention liability for acts covered by the exemption. Any such determination should apply for a maximum of four years, and be announced in the Government Gazette.
40. The implementing amendments should also grant power to the Copyright Tribunal to consider, and make recommendations to the Attorney-General about, applications for exemption to circumvention liability. The Act should provide that for any determinations made more than one month after the implementing legislation comes into force, the Attorney-General is required to take into account the Tribunal's recommendations.
41. In the past, the Copyright Tribunal had jurisdiction of this kind in relation to the statutory royalty payable by record companies for recordings of musical works.¹¹ Under the Copyright Act as it then was, the Tribunal was empowered to conduct an inquiry into the royalty rate, and make recommendations to the Attorney-General.¹² A new royalty rate could be set by the Governor-General (rather than the Attorney-General), who was required to take into account the Tribunal's recommendation. The rate was fixed by regulation.
42. The Copyright Tribunal has experience and expertise in dealing with technical evidence as well as copyright law. In addition to its experience in dealing with large, complex matters, it has experience in dealing with unrepresented applicants in relatively small matters.
43. The AUSFTA requires a review or proceeding to be conducted at least every four years. In our view, this does not necessarily require a periodic review; a process which allows an application to be made at any time is also consistent with the AUSFTA. However, if there is a determination to allow an exemption, any interested

¹¹ The mechanism for determining the royalty rate has since changed; the Tribunal now has power to make a determination about the rate rather than just a recommendation.

¹² Such an inquiry took place in 1979: *Report of the Inquiry by the Copyright Tribunal into the Royalty Payable in Respect of Records Generally*, AGPS, 1980.

party should be able to apply to the Tribunal for a review of the determination after a period of time (up to a maximum of four years) if the circumstances which gave rise to the determination change.

Libby Baulch
Executive Officer
October 2005