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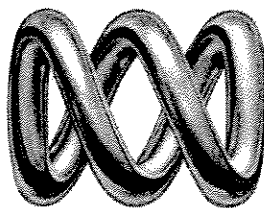
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**The House of Representatives Standing Committee on
Legal and Constitutional Affairs**

Inquiry into Exceptions to Technological Protection Measures

**Submission of the
Australian Broadcasting Corporation
October 2005**



ABC
Australian
Broadcasting
Corporation

EXECUTIVE SUMMARY

ABC Perspective

The ABC is concerned to ensure copyright policy strikes a balance between the interests of copyright owners and copyright users. In the ABC's case, that balance is necessarily affected by the ABC's legislated mandate under the *Australian Broadcasting Act 1983* (Cth).

The ABC's submissions proceed from the perspective of the ABC as a net copyright user.

ABC Submissions

- Providing appropriate exceptions to technological protection measures ("TPMs") creates a balance between a copyright owner's monopoly interests on the one hand with free speech on the other.
- Exceptions to TPMs should be reviewed more than the proposed "at least every 4 years".
- Exceptions to TPMs must recognise that TPMs have the ability to stifle creativity and culture.
- TPMs have the potential to encourage anti-competitive behaviour in industries that deal in copyright.
- Exceptions to TPMs must provide for the implied constitutional freedom of political and governmental discussion.
- Exceptions to TPMs should include corresponding exceptions relating to manufacture and dealing in circumvention devices.
- It is noted that film and broadcasts are not dealt with by the Australian and United States Free Trade Agreement.
- Exceptions to TPMs must provide for fair dealing, other exceptions to copyright infringement, statutory licences in the *Copyright Act 1968* (Cth) and blanket licences.
- Examples of TPMs preventing fair dealing include:
 - (a) TPMs which prevent format change; and
 - (b) TPMs which prevent use of regionally coded DVDs.
- Exceptions to TPMs must preserve the effectiveness of statutory licences granted to the ABC under the *Copyright Act*.
- Examples of TPMs preventing legitimate use of copyright material licensed to the ABC under a blanket licence include:
 - (a) TPMs which prevent format change; and
 - (b) TPMs which interfere with the ABC's production, editing and transmission equipment.
- Examples of TPMs preventing other legitimate licensed uses by the ABC include:
 - (a) TPMs which prevent format change; and

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- (b) TPMs which interfere with the ABC's production, editing and transmission equipment.
- o The current exceptions to TPMs for libraries and archives including libraries and archives within cultural institutions should be maintained.
- o The ABC seeks exceptions to TPMs which allow the ABC to retain and maintain its archive.
- o The current exceptions to TPMs for educational and research institutions should be maintained.
- o On review of the United States of America copyright legislation, the ABC proposes a model for specific exceptions to TPMs which:
 - (a) preserves rights of fair dealing and the Australian implied constitutional freedoms;
 - (b) avoids the specificity in the drafting of the exceptions in the USA; and
 - (c) includes specific provisions relating to statutory licences.
- o On review of the United Kingdom legislation, the ABC proposes a model for specific exceptions to TPMs which includes specific provisions for public broadcasters to carry out their legislated mandate.

ABC Proposed Specific Exceptions

Please see page 17 for the specific exceptions proposed by the ABC.

INTRODUCTION

Thank you for providing the Australian Broadcasting Corporation (the 'ABC') with the opportunity to make submissions with respect to the *Inquiry into Exceptions to Technological Protection Measures* ("TPMs").

ABC Charter

The ABC is a publicly funded broadcaster, governed by Federal legislation, the *Australian Broadcasting Corporation Act 1983* (Cth) ("ABC Act"). The ABC's charter is, in summary:

- (a) to provide Australia with innovative and comprehensive broadcasting services of a high standard as part of the Australian broadcasting system, including broadcasting programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of the Australian community; and broadcasting programs of an educational nature;
- (b) to transmit to countries outside Australia broadcast programs of news, current affairs, entertainment and cultural enrichment; and
- (c) to encourage and promote the musical, dramatic and other performing arts in Australia.

Through its distinctive radio, television and new media services, the ABC is one of Australia's largest copyright creators, copyright owners, copyright users and copyright dealers. The ABC is a net user of copyright and this submission proceeds from this basis.

The overriding concern of the ABC, as a national public broadcaster, is that it continues to fulfil its legislative mandate under the *ABC Act* and satisfy the changing expectations of the Australian community in the digital age.

The application of TPMs to copyright material, that is the subject of this legitimate use by the ABC, has the effect of preventing the ABC from being able to use copyright material to achieve its mandate.

Providing appropriate exceptions to TPMs creates a balance between a copyright owner's monopoly interests on the one hand with free speech on the other.

General Comments on the Submission

It must be stated at the outset that in preparation for this submission, feedback from the various stakeholders within the ABC's divisions of Television, Radio, New Media and Digital Services, Enterprises, Technology and Distribution, Business Services (including Library and Archives, Content Services, Legal Services) and Strategy and Communications, suggests that the impact of TPMs on the ABC achieving its charter obligations is not yet fully known. There are some specific examples of TPMs impeding the ABC's activities but not as many as might have been expected. Consequently, it is difficult to say with great conviction what specific exceptions are in fact required to ensure that TPMs do not undermine the ABC's ability to achieve its mandate.

In this way, some of the ABC's submissions may appear theoretical rather than based on experience. Nevertheless this must be taken into account as TPMs have the potential to threaten many of the ABC's fundamental activities, such as reporting news and the critique and review of material.

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[1] Review at Least Every 4 Years

Given the above, the ABC submits that a review every four years, at least in the early stages of the design and implementation of the legislative reform relating to TPMs, may not be often enough as the implications of TPMs are still relatively unknown.

[2] Creativity and Culture

The pace of technological change has exceeded the ability of copyright law to maintain a "balance" between the interests of both users and creators of copyright. The focus of copyright law, particularly recent law reform, is now more prominently directed towards copyright piracy than creativity. The ABC is concerned that laws relating to TPMs, without appropriate exceptions, could stifle creativity and culture.

[3] Anti-Competitive Behaviour

The ABC is also concerned about the potential increase of anti-competitive behaviour by copyright owners and controllers, if laws relating to TPMs create greater monopoly control over access to copyright material, without the usual exceptions, such as fair dealing, which are designed to temper the effect of such monopolies. Monopoly control over access to copyright material could prevent the ABC from being unable to carry out its mandated functions, including accessing material for the purpose of news reporting and undertaking criticism or review of material.

[4] Implied Constitutional Freedom

Australian law must comply with the implied right to governmental and political discussion.¹ Any law which protects TPMs but which does not permit an exception to allow free governmental and political discussion will not be appropriate and adapted to its purpose and will be unconstitutional.

This implied constitutional right plays a critical role in the media and is fundamental to the ABC meeting its charter.

[5] Corresponding Exceptions – Manufacture and Dealing

It is noted that the exceptions to TPMs permitted under the Australian US Free Trade Agreement ("AUSFTA") are to be drafted only in respect of *use*.

To be effective law, any proposed specific exception to TPMs also needs to exempt the manufacture, the supply and acquisition, of circumvention devices where the circumvention device is to be used for the purpose of a legitimate specific exception to TPMs. The limitations on the drafting of the specific exceptions proposed by the AUSFTA to *use* alone will undermine the integrity of the law. That is, a party attempting to access a circumvention device in order to exercise a legitimate exception to TPMs will be in breach of a law that is confined to *use* only by having attempted to acquire the circumvention device. Furthermore, this party's action will also incite the supplier of the circumvention device to breach the law.

¹ See: *Nationwide News Pty Ltd v Wills* and *Australian Capital Television Pty Ltd v the Commonwealth* (1992) 177 CLR 1; *Stephens v. West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579; *Coleman v Power* [2004] HCA 39 (1 September 2004).

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Unless the law deals with manufacture, supply and acquisition of circumvention devices done for a legitimate purpose, then the specific exceptions to TPMs will be of no use in practice.

This incongruity created by the AUSFTA should be amended to ensure the exceptions are effective in law, and do not encourage law breaking behaviour, which is not in the public interest.

[6] Film and Broadcasts Not Dealt with by the AUSFTA

The ABC notes that the relevant articles of the AUSFTA do not appear to relate to film or broadcasts but works (literary, dramatic, musical and artistic works), sound recordings (phonograms) and performances only. The ABC therefore submits that any legislation implementing TPMs should be limited to those particular classes of copyright material.

[7] Fair Dealing, Other Exceptions to Copyright Infringement, Statutory Licences and Blanket Licences

Certain exceptions to copyright infringement play a key role in the ABC meeting its charter obligations. Particularly, these are fair dealing for the purpose of reporting news and for the purpose of criticism or review; statutory licences within the *Copyright Act 1968 (Cth)*; other exceptions to copyright infringement such as the use of an insubstantial part of a piece of copyright material; and so-called "blanket" licences, which are licences between the ABC and an organisation acting collectively on behalf of copyright owners that permit the ABC to use a certain type of copyright matter in its activities.

These exceptions to copyright infringement are integral to developing innovative approaches to the ABC's charter activities, such as the provision of high quality content on different platforms. Lack of proper exceptions to TPMs may stifle the development of such new approaches, and threaten innovation, and the ability to conduct research in the digital environment.

The ABC's ability to rely on exceptions to copyright infringement is predicated on the fact that the ABC has access to the copyright material. Circumvention devices to TPMs are therefore most relevant to the ABC where the ABC does not have a commercial, contractual relationship with the copyright owner or controller for the supply of the physical, accessible copyright material.

The ABC does not have guaranteed TPM free access to copyright material when the ABC is relying on the fair dealing provisions and statutory licences of the *Copyright Act* or on a blanket licence (where the supply of the physical copyright material is not guaranteed, although the right to use it is). TPMs can therefore impede the ABC's ability to carry out its functions when legitimately entitled to do so under copyright law, by limiting content available to be used under fair dealing exceptions, statutory licences and blanket licences.

The ABC has previously submitted that amendments should be made to the *Copyright Act 1968 (Cth)* to allow the use of decryption devices on technological protection measures (TPMs) for the purpose of fair dealing.² This should also extend to other exceptions to copyright infringement.

² ABC Submission on Fair Use, July 2005.

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[8] Fair Dealing

The ABC is entitled to fair deal in copyright material under the *Copyright Act* in accordance with sections 41 or 103A – “*Fair Dealing for the Purpose of Criticism or Review*”; and sections 42 and 103B – “*Fair Dealing for the Purpose of Reporting News*” (amongst others).

The use of TPMs has the potential to impede the ABC’s ability to fair deal as they restrict use of copyright material on different broadcasting and communication platforms.

Fair dealing ensures that there is the appropriate balance between the granting of protection by monopoly to copyright owners and freedom of speech. The ABC argues that the public interest principles in free speech underlying fair dealing outweigh the principles underlying TPMs.

The ABC submits therefore that there must be corresponding exceptions to TPMs which continue to permit the ABC to rely on the fair dealing provisions – for example, sections 41, 42, 103A and 103B, which relate to reporting news and criticism or review, and sections 43 and 104 which relate to judicial proceedings (in the event the ABC was involved in litigation). The ABC advocates that *all* fair dealing provisions in the *Copyright Act* (howsoever broadened as a consequence of the review by the Attorney General, “*Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*”, in relation to fair use) be granted an associated specific exception to TPMs as a matter of balancing the monopoly rights of copyright owners with free speech.

(i) Examples of TPMs Preventing Fair Dealing

(a) TPMs which Prevent Format Change

Not everyone in the ABC’s offices around Australia can access the most up to date digital equipment. This is a question of resources, particularly in regional areas.

It is therefore sometimes necessary for the ABC to make a copy of a DVD in a VHS format so that it can be considered by an ABC producer for a legitimate use, whether that be a fair dealing for the purpose of reporting news, or criticism or review. TPMs on the DVD which impede copying can prevent the ABC from making this format change even though the ABC is changing the format for a legitimate purpose.

While the ABC does not use circumvention devices currently as a matter of practice, this is a circumstance in which the ABC may require the right to use a circumvention device.

(b) TPMs which Prevent Use of Regionally Coded DVDs

The ABC sometimes uses regionally coded DVDs in the presentation of news and in other radio, television and new media programming, where the ABC is relying on fair dealing exceptions for the purposes of reporting news or criticism or review.

The ABC currently uses technologies in its equipment which allow it to use DVDs from anywhere in the world. However, if regional coding is considered a TPM, the ABC will need a legitimate exception in order to circumvent the regional coding for fair dealing purposes.

[9] Statutory Licences Granted to the ABC under the *Copyright Act*

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The ABC's legitimate entitlements to use copyright material under the statutory licences granted to it under the *Copyright Act* will be undermined if no corresponding exceptions to TPMs are granted in the legislation. Such sections include:

- section 45 - Reading or Recitation in public or for a Broadcast;
- section 47 - Reproduction for Purpose of Broadcasting;
- section 67 – Incidental Filming or Televising of Artistic Works;
- section 70 – Reproduction for Purpose of Including Work in Television Broadcast; and
- section 107 – Making a Copy of the Sound Recording for Purpose of Broadcasting.

These statutory licences create a balance between the monopoly interests of copyright owners on the one hand and the interests in free speech on the other. These statutory licences take into account the use of copyright material in the broadcasting industry and the exigencies of broadcasting.

The ABC submits that there must be corresponding exceptions to TPMs which continue to permit the ABC to rely on sections 45, 47, 67, 70, and 107 of the *Copyright Act*.

[10] Blanket Licensing

The ABC enters into blanket licences with the representatives of copyright holders to obtain the rights to use certain copyright material to achieve its charter obligations in an efficient and cost effective fashion.

A number of these licences do not require the physical supply of the copyright material free of TPMs to the ABC. It is current practice that the copyright material is variously accessed either in the marketplace or through libraries and archives or provided by third parties who do not control the relevant copyright. And so, it is difficult and would result in greater cost to the ABC to demand the physical supply of copyright material free of TPMs.

(i) Examples of TPMs Preventing Use Under a Blanket Licence

(a) TPMs which Prevent Format Change

As a national organisation with extensive archives, it is often necessary for, say, the ABC's Archives and Libraries in Sydney to upload a copy of a CD into a different format and transmit it to a regional ABC office or other metropolitan office for consideration for broadcast. For example, a producer in Alice Springs may require a digital copy of a sound recording emailed to them for inclusion in a regional production. Such use may be legitimately justified under a blanket licence or statutory licence. TPMs therefore have the potential to prevent the ABC from being able to perform its functions in regional areas.

The ABC would therefore seek to be able to use a circumvention device to permit the ABC to continue to use legitimately licensed copyright material under its blanket licences.

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(b) TPMs which Interfere with the ABC's Production, Editing and Transmission Equipment

Another example of TPMs preventing a legitimate use of CDs under its blanket licence is where TPM technologies interfere with the ABC's production, editing and transmission equipment.

Some CDs contain certain types of copy protection which are not able to be used in the ABC's production, editing and transmission systems, even though the ABC is licensed to use the CDs in this way. Some of the ABC's radio play list equipment and editing equipment cannot read certain copies of CDs. This has had the effect of increasing the time and resources necessary for the production, and limiting the editorial content able to be used in ABC programs. In some circumstances CDs with TPMs have crashed the ABC's systems.

Seeking copies of sound recordings without TPMs add to the cost of the blanket licences. In order to make good the blanket licences, it is possible that the ABC may need to circumvent the TPMs.

The ABC seeks permission to be able to use devices, if necessary, to disable the TPMs on sound recordings so that the TPMs do not prevent the ABC from using the sound recordings when it is licensed to do so.

[11] Other Legitimate Licensed Uses

(i) Examples of TPMs Preventing Other Legitimate Licensed Uses

The same two situations relating to format change and interfering with the ABC's production, editing and transmission systems as noted above affect other legitimate licensed uses of copyright material by the ABC.

(a) TPMs which Prevent Editing

On occasion the ABC receives radio program material pooled from overseas radio broadcasters. This content often requires editing (for example, editing out messages from sponsors as required by the ABC's editorial policies). The ABC is not often able to specify the format in which pooled programming is delivered. The ABC would need to be able to override the TPMs on these recordings in order to load the recordings into the digital editor and undertake the editing.

As described above, the ABC would need a specific exception to use devices to disable the TPMs to allow the editing of the licensed material to occur.

[12] Current Exception for Libraries and Archives and including Libraries and Archives within Cultural Institutions Should be Maintained

Presently, the *Copyright Act* permits the manufacture and dealing in circumvention devices for libraries and archives for the purpose of reproducing and communicating works by libraries and archives for users, for other libraries and archives, and for preservation and other purposes.³ It is not clear what policy justifies the removal of these particular exceptions to

³ Section 132 of the *Copyright Act* in conjunction with sections 49, 50, 51A.

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TPMs. These exceptions are well justified within the mandates of libraries and archives, which provide access to Australians to cultural material.

Access to material within a library or archive can lead to a licence of the copyright material. It is established practice in the television, film, radio and new media industries to view different copyright material through various media libraries and archives before selecting and licensing the material. Use of digital technologies is particularly important where libraries and archives are serving producers in regional areas. TPMs on copyright material have the potential of limiting the selection available to the producer and thus could consequently limit innovative cultural productions.

The ABC would therefore support the re-instatement of the current permitted purposes for libraries and archives, reframed if necessary, as specific exceptions to TPMs which meet the criteria for the exceptions as required by the AUSFTA.

The specific exception granted under US Copyright Law that libraries and archives may circumvent access in order to facilitate purchasing decisions, with respect, does not reference the broader needs of cultural institutions. That purpose relating to purchasing decisions is too limited.

[13] Exceptions to TPMs should allow ABC Archival Retention and Maintenance

Like other significant public cultural institutions such as the Australian Film Commission, the National Gallery and Library of Australia, the Australian Museum, Screensound, and the Special Broadcasting Service, the ABC performs public and cultural functions for the benefit of Australians. The ABC's archives and library hold one of the largest collections of non-literary works, comprising sound recordings and cinematograph films. The ABC's collection includes works of great cultural significance.

The ABC performs an important role in preserving and providing access to culturally and historically significant material. The ABC fulfils the public expectation that important broadcast content is preserved for access by the public and industry.

Both the public and the media/entertainment industry have significant access expectations of the ABC, whether prescribed or not, in meeting their diverse needs. This is because the ABC's library and archive contains important educational, historical, culturally significant and newsworthy material. Access is sought both in the public interest and for personal interest (for example, pertaining to family members). It is sought for research and study purposes (for example, allowing copying, format and/or time shifting and viewing of material) and production related purposes (for example, creating new material across a range of formats for communication to the public).

The ABC continues to invest public funds in the acquisition of appropriate equipment and skilled personnel to ensure that the ABC's archive is maintained appropriately, including the digitisation of the ABC's archive. The costs of maintaining, managing and preserving the ABC's archive are significant.

The ABC has previously submitted that its ability to preserve and maintain its material should be recognised and facilitated by the *Copyright Act* through an explicit exception to allow the

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ABC to exercise copyright for the purpose of preserving and archiving material.⁴ By extension, the ABC should be granted special exemption from TPM rules for the purpose of preserving and archiving material should TPMs attached to archived material prevent access to this material by the ABC, by the public and by the industry.

The ABC proposes that archiving by all public cultural institutions should fall within a specific exception to copyright infringement and also to TPMs. The ABC therefore supports the introduction of an exception to TPMs which allows public cultural institutions like the ABC to retain and maintain archives.

[14] Exceptions for Educational and Research Institutions Should be Maintained

The ABC notes that under the AUSFTA it is proposed that the current permitted purposes relating to educational and research institutions are removed.⁵

The ABC endorses the reinstatement of provisions that promote education and research by the creation of specific exceptions, which are drafted to meet the criteria required by the AUSFTA.

⁴ ABC Submission on Fair Use, July 2005.

⁵ Section 132 of the *Copyright Act* in conjunction with Part VB.

SUBMISSIONS – COMPARATIVE ANALYSIS

[15] United States of America Scenario

The Copyright Law of the United States of America sets out the law relating to TPMs in Chapter 12 (attached at Attachment 1).

Unlike the United Kingdom, there is not a mechanism for public broadcasters to apply to have an exemption to the law relating to TPMs. Instead, the exceptions are limited to reverse engineering for the purpose of achieving interoperability, security testing of encryption technology, parental control locks, security testing of computers/networks; privacy issues; law enforcement and national security and libraries for making acquisition decisions. The ABC submits these exceptions do not appropriately recognise the effect of TPMs on broadcasters.

The Librarian of Congress in consultation with the Registrar of Copyrights has declared these additional exceptions under its rule making power:

- *compilations consisting of lists of websites blocked by filtering software applications;*
- *literary works, including software and databases, protected by access control mechanisms that fail to permit access because of malfunction, damage or obsolescence;*
- *computer programs protected by dongles 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;*
- *literary works distributed in e-book format when all existing e-book editions of the work (including digital text editions made available by authorized entities) contain access controls that prevent the enabling of the e-books' read-aloud function and that prevent the enabling of screen readers to render the text into a 'specialized format'.*

Again, these exceptions do not appropriately recognise the effect of TPMs on broadcasters.

However, the ABC does note that in relation to TPMs, it is significant that the US legislation preserves fair use and the constitutional freedoms in the USA in sub-sections 1201(c)(1) and (4):

(c) OTHER RIGHTS, ETC., NOT AFFECTED. -

(1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

SUBMISSIONS – COMPARATIVE ANALYSIS

[16] ABC Proposal

The US legislation recognises in policy the adverse impact of TPMs on non-infringing uses of copyright material. However, it does not take into account the effect of TPMs on a public broadcaster's activities.

(i) Preserve Rights of Fair Dealing and Australian Implied Constitutional Freedoms

As a first position, the ABC submits that the policy underlying sub-sections 1201(c)(1) and (4) in the US Copyright Law should be used as the basis for a model to preserve the rights of fair dealing (howsoever amended under the review by the Attorney General, "*Fair Use and Other Copyright Exceptions: An Examination of Fair Use, Fair Dealing and Other Exceptions in the Digital Age*", in relation to fair use) and the Australian implied constitutional freedoms.

Presumably, the AUSFTA does not require Australia to carry more restrictive provisions relating to exceptions to TPMs than the USA. It follows therefore that the inclusion of provisions which preserve fair dealing and Australian implied constitutional freedoms in the Australian *Copyright Act* would not have to meet the criteria for specific exceptions to TPMs set out in article 17.4.7(e)(viii) and (f) of the AUSFTA.

In this regard please see Proposed Specific Exceptions.

(ii) Avoid the Specificity in the Drafting of the Exceptions in the USA

With respect, the rules made by the Librarian of Congress, in the ABC's view, are not drafted sufficiently in line with the language used in copyright law to be able to operate in law to provide any proper blanket protection. It is submitted, such exceptions as drafted in the US legislation and by the Librarian of Congress, should not merely be picked up and placed into the Australian copyright framework.

Furthermore, it is submitted that the policy behind the specific rules are too narrow and specific to cover the difficulties that public broadcasters face with TPMs.

It is submitted that the House of Representatives Standing Committee on Legal and Constitutional Affairs can, however, meet the criteria for specific exceptions to TPMs required by AUSFTA without taking the narrow, specific approach demonstrated by the Librarian of Congress. In this regard, please see Proposed Specific Exceptions which it is submitted, meet the criteria.

Furthermore, it is submitted that the Committee should take a broader approach (albeit one which meets the criteria) to ensure that legitimate licensed uses of copyright material in Australia are not made redundant by TPMs. The drafting of specific exceptions to TPMs should reflect the language used in the *Copyright Act* if the exceptions are to be effective.

(iii) Include Specific Provisions Relating to Statutory Licences in the *Copyright Act*

The US legislation also contains specific provisions governing the act of circumventing TPMs in relation to certain statutory licences. For example, there are specific provisions which allow the act of circumvention of TPMs by broadcasters on sound recordings which are used by broadcasters under a statutory licence after certain conditions have been met. An extract from section 112 of the US Copyright Law is set out in Attachment 2.

SUBMISSIONS – COMPARATIVE ANALYSIS

The ABC submits that while the conditions required to be met by the broadcaster are burdensome, the policy underlying section 112 in the US Copyright Law should be used as the basis for a model to ensure that the effectiveness of statutory licences are preserved, when TPMs are applied to copyright material which are governed by statutory licences.

In this regard please see the Proposed Specific Exceptions.

[17] United Kingdom Scenario

The UK has sought to address the issue of exceptions to TPMs further to the European Copyright Directive 2001/29/EC under the *Copyright and Related Rights Regulations 2003* (UK) which introduced section 296ZE "Remedy where effective technological measures prevent permitted acts".

Section 296ZE provides for Schedule 5A of the *Copyright Designs and Patents Act 1988* (UK) ("CDPA"). Schedule 5A lists the permitted acts where TPMs can be circumvented. These permitted purposes reflect the statutory licences granted in the CDPA.

The legislation provides that where a complainant has lawful access to the protected copyright work and is prevented from carrying out a permitted act by TPMs, the complainant may apply to the Secretary of State for directions to enable that complainant to be able to circumvent the TPMs and use the copyright material. Sections 296ZE(2) and (3) are the key sections. Section 296ZE and Appendix 5A are set out in the Attachment 3.

[18] ABC Proposal

The UK legislation clearly recognises the adverse impact of TPMs on non-infringing uses of copyright material on public broadcasters. It also reflects a policy of ensuring that TPM provisions do not impede the statutory licences granted in the *Copyright Act*.

However, as a first position, the ABC submits that the UK legislative solution from a practical sense does not accommodate the exigencies of day-to-day broadcasting and communication. That is, the process of complaint is time-consuming, and requires a case-by-case approach, which would not fit within the 'on-air' deadlines of the ABC.

(i) Provide Specific Provisions for Public Broadcasters to Carry Out their Legislated Mandate

The ABC advocates an express sanction for public broadcasters to be able to procure and use circumvention devices on TPMs on copyright material (most likely to be digital "works", sound recordings and films) in order for the ABC to carry out its functions, provided the ABC is at all times licensed to use the copyright material.

Specific exceptions to TPMs based on this proposal can be drafted to meet the criteria required under the AUSFTA for an exception to be recognised. Please see the Proposed Specific Exceptions.

SUBMISSIONS – PROPOSED SPECIFIC EXCEPTIONS

The ABC notes that specific exceptions to TPMs are required to meet the following criteria under the AUSFTA:

Criteria for Exceptions:

The exception must be:

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

Based on the ABC's submissions above, the ABC proposes a number of specific exceptions to TPMs to enable the ABC to meet its key objectives.

[19] Proposals for Specific Exceptions to TPMs

(i) ABC's First Position

As a first position, the ABC proposes the following provisions and specific exceptions to TPMs be permitted under *Copyright Act 1968* as they meet the criteria for exceptions under the AUSFTA:

- [1] The sections relating to access control measures (effective technological measures that control access to copyright material) do not apply to the [*manufacture, supply or*] use of a circumvention device for the following permitted purposes:
- [a] use of a literary work where the use of the literary work is:
- [i] a use of an insubstantial part of the literary work; and/or
 - [ii] a use under section 41 (fair dealing for purpose of criticism or review) and/or section 42 (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 45 (reading or recitation in public or for a broadcast); and/or
 - [iv] a use under section 47 (reproduction for purpose of broadcasting); and/or
 - [v] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [vi] a use under section 43 (reproduction for purpose of judicial proceedings or professional advice); and/or
 - [vii] a use for the purposes of governmental or political discussion.

SUBMISSIONS – PROPOSED SPECIFIC EXCEPTIONS

- [b] use of a dramatic work where the use of the dramatic work is:
 - [i] a use of an insubstantial part of the dramatic work; and/or
 - [ii] a use under section 41 (fair dealing for purpose of criticism or review) and/or section 42 (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 45 (reading or recitation in public or for a broadcast); and/or
 - [iii] a use under section 47 (reproduction for purpose of broadcasting); and/or
 - [iv] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [v] a use under section 43 (reproduction for purpose of judicial proceedings or professional advice); and/or
 - [vi] a use for the purposes of governmental or political discussion.
- [c] use of a musical work where the use of the musical work is:
 - [i] a use of an insubstantial part of the musical work; and/or
 - [ii] a use under section 41 (fair dealing for purpose of criticism or review) and/or section 42 (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 47 (reproduction for purpose of broadcasting); and/or
 - [iv] a use under sections 103A and/or 103B; and/or
 - [v] a use under section 43 (reproduction for purpose of judicial proceedings or professional advice); and/or
 - [vi] a use for the purposes of governmental or political discussion.
- [d] use of an artistic work where the use of the artistic work is:
 - [i] a use of an insubstantial part of the artistic work; and/or
 - [ii] a use under section 41 (fair dealing for purpose of criticism or review) and/or section 42 (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 70 (reproduction for purpose of including work in television broadcast); and/or
 - [iv] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [v] a use under section 43 (reproduction for purpose of judicial proceedings or professional advice); and/or

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- [vi] a use for the purposes of governmental or political discussion.
- [e] use of a sound recording where the use of the sound recording is:
 - [i] a use of an insubstantial part of the sound recording; and/or
 - [ii] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 104 (acts done for purpose of judicial proceedings); and/or
 - [iv] a use under section 107 (making a copy of the sound recording for purpose of broadcasting); and/or
 - [v] a use for the purposes of governmental or political discussion.
- [f] use of a cinematograph film where the use of the cinematograph film is:
 - [i] a use of an insubstantial part of the cinematograph film; and/or
 - [ii] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 104 (acts done for purpose of judicial proceedings); and/or
 - [iv] a use for the purposes of governmental or political discussion.
- [g] use of a sound broadcast where the use of the sound broadcast is:
 - [i] a use of an insubstantial part of the sound broadcast; and/or
 - [ii] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 104 (acts done for purpose of judicial proceedings); and/or
 - [iv] a use for the purposes of governmental or political discussion.
- [h] use of a television broadcast where the use of the television broadcast is:
 - [i] a use of an insubstantial part of the television broadcast; and/or
 - [ii] a use under section 103A (fair dealing for purpose of criticism or review) and/or section 103B (fair dealing for purpose of reporting news); and/or
 - [iii] a use under section 104 (acts done for purpose of judicial proceedings); and/or
 - [iv] a use for the purposes of governmental or political discussion.

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- [i] use of an exempt recording in accordance with Part XIA (performers' protection).

The ABC submits that its proposals meet all of these criteria but for the limitation to 'acts of circumvention' for reasons given above (see "Corresponding Exceptions"), in which case the words "*manufacture, supply or*" could be deleted in order to meet the criteria. That these words remain would be the ABC's first position.

Each provision relates to specific exceptions to copyright infringement where a prohibition on circumvention has a real, credible and demonstrated adverse impact on the current permitted use of this copyright material by the ABC. The exceptions set out above are all exceptions to copyright infringement set out in the *Copyright Act*.

Each provision is carefully drafted so they are limited to a particular type of copyright material, and are in line with the language used in the *Copyright Act*.

As the exceptions relate only to legitimate use of the copyright material, the exceptions would not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs as those TPMs relate to other illegitimate uses by third parties.

The ABC submits the following should also be included in the legislation:

- [2] Nothing in the sections relating to circumvention of access control measures (effective technological measures that control access to copyright material) shall affect rights, remedies, limitations, or defences to copyright infringement, including fair dealing.
- [3] Nothing in the sections relating to access control measures (effective technological measures that control access to copyright material) shall enlarge or diminish any rights under the Australian Constitution.

(ii) ABC's Last Position

As a last position, which is not the ABC's favoured position, the specific exceptions could be limited to acts of circumvention as follows:

- [1] The sections relating to access control measures (effective technological measures that control access to copyright material) do not apply to acts of circumvention of access control measures (effective technological measures that control access to copyright material) for the following permitted purposes:
 - (a) format change of sound recordings by the Australian Broadcasting Corporation;
 - (b) format change of cinematograph films by the Australian Broadcasting Corporation;
 - (c) use of regional decoding devices on cinematograph films by the Australian Broadcasting Corporation;

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- (d) use of sound recordings in the production, editing and/or transmission systems of the Australian Broadcasting Corporation;
- (e) use of cinematograph films in the production, editing and/or transmission systems of the Australian Broadcasting Corporation;
- (f) archival retention, maintenance and preservation of sound recordings by the Australian Broadcasting Corporation;
- (g) archival retention, maintenance and preservation on cinematograph films by the Australian Broadcasting Corporation.

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Copyright Law of the United States of America and Related Laws Contained in Title 17 of the *United States Code*

Circular 92

Chapter 121 Copyright Protection and Management Systems

1201. Circumvention of copyright protection systems

1202. Integrity of copyright management information

1203. Civil remedies

1204. Criminal offenses and penalties

1205. Savings clause

§ 1201. Circumvention of copyright protection systems²

(a) VIOLATIONS REGARDING CIRCUMVENTION OF TECHNOLOGICAL MEASURES. - (1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (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 succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine -

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

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(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected, and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability

of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

(2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that -

(A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

(B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

(3) As used in this subsection -

(A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and

(B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

(b) ADDITIONAL VIOLATIONS. - (1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that -

(A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;

(B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or

(C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

(2) As used in this subsection -

(A) to "circumvent protection afforded by a technological measure" means avoiding, bypassing, removing, deactivating, or otherwise impairing a technological measure; and

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(B) a technological measure "effectively protects a right of a copyright owner under this title" if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.

(c) OTHER RIGHTS, ETC., NOT AFFECTED. - (1) Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.

(2) Nothing in this section shall enlarge or diminish vicarious or contributory liability for copyright infringement in connection with any technology, product, service, device, component, or part thereof.

(3) Nothing in this section shall require that the design of, or design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as such part or component, or the product in which such part or component is integrated, does not otherwise fall within the prohibitions of subsection (a)(2) or (b)(1).

(4) Nothing in this section shall enlarge or diminish any rights of free speech or the press for activities using consumer electronics, telecommunications, or computing products.

(d) EXEMPTION FOR NONPROFIT LIBRARIES, ARCHIVES, AND EDUCATIONAL INSTITUTIONS. - (1) A nonprofit library, archives, or educational institution which gains access to a commercially exploited copyrighted work solely in order to make a good faith determination of whether to acquire a copy of that work for the sole purpose of engaging in conduct permitted under this title shall not be in violation of subsection (a)(1)(A). A copy of a work to which access has been gained under this paragraph -

(A) may not be retained longer than necessary to make such good faith determination; and

(B) may not be used for any other purpose.

(2) The exemption made available under paragraph (1) shall only apply with respect to a work when an identical copy of that work is not reasonably available in another form.

(3) A nonprofit library, archives, or educational institution that willfully for the purpose of commercial advantage or financial gain violates paragraph (1) -

(A) shall, for the first offense, be subject to the civil remedies under section 1203; and

(B) shall, for repeated or subsequent offenses, in addition to the civil remedies under section 1203, forfeit the exemption provided under paragraph (1).

(4) This subsection may not be used as a defense to a claim under subsection (a)(2) or (b), nor may this subsection permit a nonprofit library, archives, or educational institution to manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, component, or part thereof, which circumvents a technological measure.

(5) In order for a library or archives to qualify for the exemption under this subsection, the collections of that library or archives shall be -

(A) open to the public; or

(B) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.

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(e) LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES. - This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term "information security" means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

(f) REVERSE ENGINEERING. - (1) Notwithstanding the provisions of subsection (a)(1)(A), a person who has lawfully obtained the right to use a copy of a computer program may circumvent a technological measure that effectively controls access to a particular portion of that program for the sole purpose of identifying and analyzing those elements of the program that are necessary to achieve interoperability of an independently created computer program with other programs, and that have not previously been readily available to the person engaging in the circumvention, to the extent any such acts of identification and analysis do not constitute infringement under this title.

(2) Notwithstanding the provisions of subsections (a)(2) and (b), a person may develop and employ technological means to circumvent a technological measure, or to circumvent protection afforded by a technological measure, in order to enable the identification and analysis under paragraph (1), or for the purpose of enabling interoperability of an independently created computer program with other programs, if such means are necessary to achieve such interoperability, to the extent that doing so does not constitute infringement under this title.

(3) The information acquired through the acts permitted under paragraph (1), and the means permitted under paragraph (2), may be made available to others if the person referred to in paragraph (1) or (2), as the case may be, provides such information or means solely for the purpose of enabling interoperability of an independently created computer program with other programs, and to the extent that doing so does not constitute infringement under this title or violate applicable law other than this section.

(4) For purposes of this subsection, the term "interoperability" means the ability of computer programs to exchange information, and of such programs mutually to use the information which has been exchanged.

(g) ENCRYPTION RESEARCH. -

(1) DEFINITIONS. - For purposes of this subsection -

(A) the term "encryption research" means activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products; and

(B) the term "encryption technology" means the scrambling and descrambling of information using mathematical formulas or algorithms.

(2) PERMISSIBLE ACTS OF ENCRYPTION RESEARCH. - Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure as applied to a copy, phonorecord, performance, or display of a published work in the course of an act of good faith encryption research if -

(A) the person lawfully obtained the encrypted copy, phonorecord, performance, or display of the published work;

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(B) such act is necessary to conduct such encryption research;

(C) the person made a good faith effort to obtain authorization before the circumvention; and

(D) such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

(3) FACTORS IN DETERMINING EXEMPTION. - In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include -

(A) whether the information derived from the encryption research was disseminated, and if so, whether it was disseminated in a manner reasonably calculated to advance the state of knowledge or development of encryption technology, versus whether it was disseminated in a manner that facilitates infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security;

(B) whether the person is engaged in a legitimate course of study, is employed, or is appropriately trained or experienced, in the field of encryption technology; and

(C) whether the person provides the copyright owner of the work to which the technological measure is applied with notice of the findings and documentation of the research, and the time when such notice is provided.

(4) USE OF TECHNOLOGICAL MEANS FOR RESEARCH ACTIVITIES. - Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to -

(A) develop and employ technological means to circumvent a technological measure for the sole purpose of that person performing the acts of good faith encryption research described in paragraph (2); and

(B) provide the technological means to another person with whom he or she is working collaboratively for the purpose of conducting the acts of good faith encryption research described in paragraph (2) or for the purpose of having that other person verify his or her acts of good faith encryption research described in paragraph (2).

(5) REPORT TO CONGRESS. - Not later than 1 year after the date of the enactment of this chapter, the Register of Copyrights and the Assistant Secretary for Communications and Information of the Department of Commerce shall jointly report to the Congress on the effect this subsection has had on -

(A) encryption research and the development of encryption technology;

(B) the adequacy and effectiveness of technological measures designed to protect copyrighted works; and

(C) protection of copyright owners against the unauthorized access to their encrypted copyrighted works.

The report shall include legislative recommendations, if any.

(h) EXCEPTIONS REGARDING MINORS. - In applying subsection (a) to a component or part, the court may consider the necessity for its intended and actual incorporation in a technology, product, service, or device, which -

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(1) does not itself violate the provisions of this title; and

(2) has the sole purpose to prevent the access of minors to material on the Internet.

(i) PROTECTION OF PERSONALLY IDENTIFYING INFORMATION. -

(1) CIRCUMVENTION PERMITTED. - Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to circumvent a technological measure that effectively controls access to a work protected under this title, if -

(A) the technological measure, or the work it protects, contains the capability of collecting or disseminating personally identifying information reflecting the online activities of a natural person who seeks to gain access to the work protected;

(B) in the normal course of its operation, the technological measure, or the work it protects, collects or disseminates personally identifying information about the person who seeks to gain access to the work protected, without providing conspicuous notice of such collection or dissemination to such person, and without providing such person with the capability to prevent or restrict such collection or dissemination;

(C) the act of circumvention has the sole effect of identifying and disabling the capability described in subparagraph (A), and has no other effect on the ability of any person to gain access to any work; and

(D) the act of circumvention is carried out solely for the purpose of preventing the collection or dissemination of personally identifying information about a natural person who seeks to gain access to the work protected, and is not in violation of any other law.

(2) INAPPLICABILITY TO CERTAIN TECHNOLOGICAL MEASURES. -

This subsection does not apply to a technological measure, or a work it protects, that does not collect or disseminate personally identifying information and that is disclosed to a user as not having or using such capability.

(j) SECURITY TESTING. -

(1) DEFINITION. - For purposes of this subsection, the term "security testing" means accessing a computer, computer system, or computer network, solely for the purpose of good faith testing, investigating, or correcting, a security flaw or vulnerability, with the authorization of the owner or operator of such computer, computer system, or computer network.

(2) PERMISSIBLE ACTS OF SECURITY TESTING. - Notwithstanding the provisions of subsection (a)(1)(A), it is not a violation of that subsection for a person to engage in an act of security testing, if such act does not constitute infringement under this title or a violation of applicable law other than this section, including section 1030 of title 18 and those provisions of title 18 amended by the Computer Fraud and Abuse Act of 1986.

(3) FACTORS IN DETERMINING EXEMPTION. - In determining whether a person qualifies for the exemption under paragraph (2), the factors to be considered shall include -

(A) whether the information derived from the security testing was used solely to promote the security of the owner or operator of such computer, computer system or computer network, or shared directly with the developer of such computer, computer system, or computer network; and

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(B) whether the information derived from the security testing was used or maintained in a manner that does not facilitate infringement under this title or a violation of applicable law other than this section, including a violation of privacy or breach of security.

(4) USE OF TECHNOLOGICAL MEANS FOR SECURITY TESTING. - Notwithstanding the provisions of subsection (a)(2), it is not a violation of that subsection for a person to develop, produce, distribute or employ technological means for the sole purpose of performing the acts of security testing described in subsection (2), provided such technological means does not otherwise violate section (a)(2).

(k) CERTAIN ANALOG DEVICES AND CERTAIN TECHNOLOGICAL MEASURES. -

(1) CERTAIN ANALOG DEVICES. -

(A) Effective 18 months after the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in any -

(i) VHS format analog video cassette recorder unless such recorder conforms to the automatic gain control copy control technology;

(ii) 8mm format analog video cassette camcorder unless such camcorder conforms to the automatic gain control technology;

(iii) Beta format analog video cassette recorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 1,000 Beta format analog video cassette recorders sold in the United States in any one calendar year after the date of the enactment of this chapter;

(iv) 8mm format analog video cassette recorder that is not an analog video cassette camcorder, unless such recorder conforms to the automatic gain control copy control technology, except that this requirement shall not apply until there are 20,000 such recorders sold in the United States in any one calendar year after the date of the enactment of this chapter; or

(v) analog video cassette recorder that records using an NTSC format video input and that is not otherwise covered under clauses (i) through (iv), unless such device conforms to the automatic gain control copy control technology.

(B) Effective on the date of the enactment of this chapter, no person shall manufacture, import, offer to the public, provide or otherwise traffic in -

(i) any VHS format analog video cassette recorder or any 8mm format analog video cassette recorder if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the automatic gain control copy control technology no longer conforms to such technology; or

(ii) any VHS format analog video cassette recorder, or any 8mm format analog video cassette recorder that is not an 8mm analog video cassette camcorder, if the design of the model of such recorder has been modified after such date of enactment so that a model of recorder that previously conformed to the four-line colorstripe copy control technology no longer conforms to such technology.

Manufacturers that have not previously manufactured or sold a VHS format analog video cassette recorder, or an 8mm format analog cassette recorder, shall be required to conform to the four-line colorstripe copy control technology in the initial model of any such recorder manufactured after the date of the enactment of this chapter, and thereafter to continue

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conforming to the four-line colorstripe copy control technology. For purposes of this subparagraph, an analog video cassette recorder "conforms to" the four-line colorstripe copy control technology if it records a signal that, when played back by the playback function of that recorder in the normal viewing mode, exhibits, on a reference display device, a display containing distracting visible lines through portions of the viewable picture.

(2) CERTAIN ENCODING RESTRICTIONS. - No person shall apply the automatic gain control copy control technology or colorstripe copy control technology to prevent or limit consumer copying except such copying -

(A) of a single transmission, or specified group of transmissions, of live events or of audiovisual works for which a member of the public has exercised choice in selecting the transmissions, including the content of the transmissions or the time of receipt of such transmissions, or both, and as to which such member is charged a separate fee for each such transmission or specified group of transmissions;

(B) from a copy of a transmission of a live event or an audiovisual work if such transmission is provided by a channel or service where payment is made by a member of the public for such channel or service in the form of a subscription fee that entitles the member of the public to receive all of the programming contained in such channel or service;

(C) from a physical medium containing one or more prerecorded audiovisual works; or

(D) from a copy of a transmission described in subparagraph (A) or from a copy made from a physical medium described in subparagraph (C).

In the event that a transmission meets both the conditions set forth in subparagraph (A) and those set forth in subparagraph (B), the transmission shall be treated as a transmission described in subparagraph (A).

(3) INAPPLICABILITY. - This subsection shall not -

(A) require any analog video cassette camcorder to conform to the automatic gain control copy control technology with respect to any video signal received through a camera lens;

(B) apply to the manufacture, importation, offer for sale, provision of, or other trafficking in, any professional analog video cassette recorder; or

(C) apply to the offer for sale or provision of, or other trafficking in, any previously owned analog video cassette recorder, if such recorder was legally manufactured and sold when new and not subsequently modified in violation of paragraph (1)(B).

(4) DEFINITIONS. - For purposes of this subsection:

(A) An "analog video cassette recorder" means a device that records, or a device that includes a function that records, on electromagnetic tape in an analog format the electronic impulses produced by the video and audio portions of a television program, motion picture, or other form of audiovisual work.

(B) An "analog video cassette camcorder" means an analog video cassette recorder that contains a recording function that operates through a camera lens and through a video input that may be connected with a television or other video playback device.

(C) An analog video cassette recorder "conforms" to the automatic gain control copy control technology if it -

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(i) detects one or more of the elements of such technology and does not record the motion picture or transmission protected by such technology; or

(ii) records a signal that, when played back, exhibits a meaningfully distorted or degraded display.

(D) The term "professional analog video cassette recorder" means an analog video cassette recorder that is designed, manufactured, marketed, and intended for use by a person who regularly employs such a device for a lawful business or industrial use, including making, performing, displaying, distributing, or transmitting copies of motion pictures on a commercial scale.

(E) The terms "VHS format," "8mm format," "Beta format," "automatic gain control copy control technology," "colorstripe copy control technology," "four-line version of the colorstripe copy control technology," and "NTSC" have the meanings that are commonly understood in the consumer electronics and motion picture industries as of the date of the enactment of this chapter.

(5) VIOLATIONS. - Any violation of paragraph (1) of this subsection shall be treated as a violation of subsection (b)(1) of this section. Any violation of paragraph (2) of this subsection shall be deemed an "act of circumvention" for the purposes of section 1203(c)(3)(A) of this chapter.

§ 1202. Integrity of copyright management information³

(a) FALSE COPYRIGHT MANAGEMENT INFORMATION. - No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement -

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) REMOVAL OR ALTERATION OF COPYRIGHT MANAGEMENT INFORMATION. - No person shall, without the authority of the copyright owner or the law -

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section 1203, having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

(c) DEFINITION. - As used in this section, the term "copyright management information" means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

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- (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
- (2) The name of, and other identifying information about, the author of a work.
- (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
- (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
- (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
- (6) Terms and conditions for use of the work.
- (7) Identifying numbers or symbols referring to such information or links to such information.
- (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

(d) LAW ENFORCEMENT, INTELLIGENCE, AND OTHER GOVERNMENT ACTIVITIES. - This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term "information security" means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

(e) LIMITATIONS ON LIABILITY. -

(1) ANALOG TRANSMISSIONS. - In the case of an analog transmission, a person who is making transmissions in its capacity as a broadcast station, or as a cable system, or someone who provides programming to such station or system, shall not be liable for a violation of subsection (b) if -

(A) avoiding the activity that constitutes such violation is not technically feasible or would create an undue financial hardship on such person; and

(B) such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement of a right under this title.

(2) DIGITAL TRANSMISSIONS. -

(A) If a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to the particular copyright management information addressed by such standard if -

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(i) the placement of such information by someone other than such person is not in accordance with such standard; and

(ii) the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title.

(B) Until a digital transmission standard has been set pursuant to subparagraph (A) with respect to the placement of copyright management information for a category of works, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to such copyright management information, if the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title, and if -

(i) the transmission of such information by such person would result in a perceptible visual or aural degradation of the digital signal; or

(ii) the transmission of such information by such person would conflict with -

(I) an applicable government regulation relating to transmission of information in a digital signal;

(II) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this chapter; or

(III) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted in a voluntary, consensus standards-setting process open to participation by a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems.

(3) DEFINITIONS. - As used in this subsection -

(A) the term "broadcast station" has the meaning given that term in section 3 of the Communications Act of 1934 (47 U.S.C. 153); and

(B) the term "cable system" has the meaning given that term in section 602 of the Communications Act of 1934 (47 U.S.C. 522).

§ 1203. Civil remedies⁴

(a) CIVIL ACTIONS. - Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court for such violation.

(b) POWERS OF THE COURT. - In an action brought under subsection (a), the court -

(1) may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;

(2) at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

(3) may award damages under subsection (c);

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(4) in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

(5) in its discretion may award reasonable attorney's fees to the prevailing party; and

(6) may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

(c) AWARD OF DAMAGES. -

(1) IN GENERAL. - Except as otherwise provided in this title, a person committing a violation of section 1201 or 1202 is liable for either -

(A) the actual damages and any additional profits of the violator, as provided in paragraph (2), or

(B) statutory damages, as provided in paragraph (3).

(2) ACTUAL DAMAGES. - The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

(3) STATUTORY DAMAGES. - (A) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1201 in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

(B) At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.

(4) REPEATED VIOLATIONS. - In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 within three years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

(5) INNOCENT VIOLATIONS. -

(A) IN GENERAL. - The court in its discretion may reduce or remit the total award of damages in any case in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

(B) NONPROFIT LIBRARY, ARCHIVES, EDUCATIONAL INSTITUTIONS, OR PUBLIC BROADCASTING ENTITIES. -

(i) DEFINITION. - In this subparagraph, the term "public broadcasting entity" has the meaning given such term under section 118(g).

(ii) IN GENERAL. - In the case of a nonprofit library, archives, educational institution, or public broadcasting entity, the court shall remit damages in any case in which the library, archives, educational institution, or public broadcasting entity sustains the burden of proving, and the

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court finds, that the library, archives, educational institution, or public broadcasting entity was not aware and had no reason to believe that its acts constituted a violation.

§ 1204. Criminal offenses and penalties⁵

(a) IN GENERAL. - Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain -

(1) shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

(2) shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

(b) LIMITATION FOR NONPROFIT LIBRARY, ARCHIVES, EDUCATIONAL INSTITUTION, OR PUBLIC BROADCASTING ENTITY. - Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(g)).

(c) STATUTE OF LIMITATIONS. - No criminal proceeding shall be brought under this section unless such proceeding is commenced within five years after the cause of action arose.

§ 1205. Savings clause

Nothing in this chapter abrogates, diminishes, or weakens the provisions of, nor provides any defense or element of mitigation in a criminal prosecution or civil action under, any Federal or State law that prevents the violation of the privacy of an individual in connection with the individual's use of the Internet.

Chapter 12 Endnotes

¹The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 added chapter 12, entitled "Copyright Protection and Management Systems," to title 17. Pub. L. No. 105-304, 112 Stat. 2860, 2863. The WIPO Copyright and Performances and Phonograms Treaties Implementation Act of 1998 is title I of the Digital Millennium Copyright Act. Pub. L. No. 105-304, 112 Stat. 2860.

²The Satellite Home Viewer Improvement Act of 1999 amended section 1201(a)(1)(C) by deleting "on the record." Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-594.

³In 1999, section 1202 was amended by inserting "category of works" for "category or works," in subsection (e)(2)(B). Pub. L. No. 106-44, 113 Stat. 221, 222.

⁴The Satellite Home Viewer Improvement Act of 1999 amended section 1203(c)(5)(B) in its entirety. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-593.

⁵The Satellite Home Viewer Improvement Act of 1999 amended section 1204(b) in its entirety. Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-593

Source:
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
(202) 707-3000

ATTACHMENT 2

§ 112. Limitations on exclusive rights: Ephemeral recordings

(8) If a transmitting organization entitled to make a phonorecord under this subsection is prevented from making such phonorecord by reason of the application by the copyright owner of technical measures that prevent the reproduction of the sound recording, the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such phonorecord as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization's reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such phonorecords as permitted under this subsection.

Source:
U.S. Copyright Office
101 Independence Ave. S.E.
Washington, D.C. 20559-6000
(202) 707-3000

QUESTIONS FOR INTERNAL ABC STAKEHOLDERS

Copyright Designs and Patents Act 1988 (UK) as amended

296ZE Remedy where effective technological measures prevent permitted acts

(1) In this section -

"permitted act" means an act which may be done in relation to copyright works, notwithstanding the subsistence of copyright, by virtue of a provision of this Act listed in Part 1 of Schedule 5A;

"voluntary measure or agreement" means -

(a) any measure taken voluntarily by a copyright owner, his exclusive licensee or a person issuing copies of, or communicating to the public, a work other than a computer program, or

(b) any agreement between a copyright owner, his exclusive licensee or a person issuing copies of, or communicating to the public, a work other than a computer program and another party,

the effect of which is to enable a person to carry out a permitted act.

(2) Where the application of any effective technological measure to a copyright work other than a computer program prevents a person from carrying out a permitted act in relation to that work then that person or a person being a representative of a class of persons prevented from carrying out a permitted act may issue a notice of complaint to the Secretary of State.

(3) Following receipt of a notice of complaint, the Secretary of State may give to the owner of that copyright work or an exclusive licensee such directions as appear to the Secretary of State to be requisite or expedient for the purpose of -

(a) establishing whether any voluntary measure or agreement relevant to the copyright work the subject of the complaint subsists; or

(b) (where it is established there is no subsisting voluntary measure or agreement) ensuring that the owner or exclusive licensee of that copyright work makes available to the complainant the means of carrying out the permitted act the subject of the complaint to the extent necessary to so benefit from that permitted act.

(4) The Secretary of State may also give directions -

(a) as to the form and manner in which a notice of complaint in subsection (2) may be delivered to him;

(b) as to the form and manner in which evidence of any voluntary measure or agreement may be delivered to him; and

(c) generally as to the procedure to be followed in relation to a complaint made under this section;

QUESTIONS FOR INTERNAL ABC STAKEHOLDERS

and shall publish directions given under this subsection in such manner as in his opinion will secure adequate publicity for them.

(5) It shall be the duty of any person to whom a direction is given under subsection (3)(a) or (b) to give effect to that direction.

(6) The obligation to comply with a direction given under subsection (3)(b) is a duty owed to the complainant or, where the complaint is made by a representative of a class of persons, to that representative and to each person in the class represented; and a breach of the duty is actionable accordingly (subject to the defences and other incidents applying to actions for breach of statutory duty).

(7) Any direction under this section may be varied or revoked by a subsequent direction under this section.

(8) Any direction given under this section shall be in writing.

(9) This section does not apply to copyright works made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

(10) This section applies only where a complainant has lawful access to the protected copyright work, or where the complainant is a representative of a class of persons, where the class of persons have lawful access to the work.

(11) Subsections (1) to (10) apply with any necessary adaptations to -

(a) rights in performances, and in this context the expression "permitted act" refers to an act that may be done by virtue of a provision of this Act listed in Part 2 of Schedule 5A;

(b) database right, and in this context the expression "permitted act" refers to an act that may be done by virtue of a provision of this Act listed in Part 3 of Schedule 5A; and

(c) publication right.

SCHEDULE 5A

Section 296ZE

PERMITTED ACTS TO WHICH SECTION 296ZE APPLIES

PART 1

Copyright exceptions

section 29 (research and private study)

section 32(1), (2) and (3) (things done for purposes of instruction or examination)

QUESTIONS FOR INTERNAL ABC STAKEHOLDERS

section 35 (recording by educational establishments of broadcasts)

section 36 (reprographic copying by educational establishments of passages from published works)

section 38 (copying by librarians: articles in periodicals)

section 39 (copying by librarians: parts of published works)

section 41 (copying by librarians: supply of copies to other libraries)

section 42 (copying by librarians or archivists: replacement copies of works)

section 43 (copying by librarians or archivists: certain unpublished works)

section 44 (copy of work required to be made as condition of export)

section 45 (Parliamentary and judicial proceedings)

section 46 (Royal Commissions and statutory inquiries)

section 47 (material open to public inspection or on official register)

section 48 (material communicated to the Crown in the course of public business)

section 49 (public records)

section 50 (acts done under statutory authority)

section 61 (recordings of folksongs)

section 68 (incidental recording for purposes of broadcast)

section 69 (recording for purposes of supervision and control of broadcasts)

section 70 (recording for purposes of time-shifting)

section 71 (photographs of broadcasts)

section 74 (provision of sub-titled copies of broadcast)

section 75 (recording for archival purposes)

PART 2

Rights in performances exceptions

paragraph 4 of Schedule 2 (things done for purposes of instruction or examination)

paragraph 6 of Schedule 2 (recording of broadcasts by educational establishments)

paragraph 7 of Schedule 2 (copy of work required to be made as condition of export)

paragraph 8 of Schedule 2 (Parliamentary and judicial proceedings)

QUESTIONS FOR INTERNAL ABC STAKEHOLDERS

paragraph 9 of Schedule 2 (Royal Commissions and statutory inquiries) paragraph 10 of Schedule 2 (public records) paragraph 11 of Schedule 2 (acts done under statutory authority) paragraph 14 of Schedule 2 (recordings of folksongs) paragraph 16 of Schedule 2 (incidental recording for purposes of broadcast) paragraph 17 of Schedule 2 (recordings for purposes of supervision and control of broadcasts) paragraph 17A of Schedule 2 (recording for the purposes of time-shifting) paragraph 17B of Schedule 2 (photographs of broadcasts) paragraph 20 of Schedule 2 (provision of sub-titled copies of broadcast) paragraph 21 of Schedule 2 (recording of broadcast for archival purposes)

PART 3

Database right exceptions

regulation 20 of and Schedule 1 to the Copyright and Rights in Databases Regulations 1997 (S.I. 1997/3032)