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Department of Communications, Information Technology and the Arts

**Submission to Legal and Constitutional Affairs Committee regarding
Technological Protection Measures Exceptions**

Introduction

1. Technological protection measures (TPMs) are of interest to a number of areas within the Communications, Information Technology and the Arts portfolio. The portfolio oversees policy in the area of the information economy, the content and carriage industries, the arts and particularly national cultural institutions, information and communications technology (ICT) and the broadcast sector. A number of these areas deal with TPMs on a regular basis. We have consulted our agencies on TPM issues and this submission reflects the consultation.
2. The Government's policy is to maintain a balanced approach to copyright, which both supports the rights of copyright owners and ensures that users can enjoy non-infringing uses of copyright material unimpeded. It is also important that copyright law is not used to stifle legitimate competition or innovation, particularly in the developing sectors of ICT.
3. The TPM provisions of the Australia-United States Free Trade Agreement (AUSFTA) have specific scope (Article 17.4.7) for exceptions to be determined in certain circumstances. In particular, Article 17.4.7(e)(viii) provides for exceptions where an actual or likely adverse impact on non-infringing uses is demonstrated through a review. The Committee is reviewing whether Australia should include any such exceptions under that Article.
4. In this submission, the Department has, on the basis of its consultations, identified a number of areas in which further exceptions may be necessary to enable agencies to continue to carry out their activities and statutory responsibilities.

General principles

5. This submission is based on the following general principles:
 - (a) Any exception should be consistent with purpose of the TPM provisions in the AUSFTA while enabling individuals and organisations to continue to carry out non-infringing activities;
 - (b) the anti-circumvention framework should be directed at preventing copyright infringement, rather than controlling access to copyright material;
 - (c) any exceptions should be flexible enough to be accommodated in the final form of the TPM provisions, the legislation for which has yet to be drafted;
 - (d) to the extent possible, any exceptions should also be drafted in a way which avoids constraining the way in which services are delivered in the evolving online environment; and
 - (e) where exceptions are proposed, a means of implementing the exceptions should also be established

Areas where exceptions are considered appropriate

6. Appropriate exceptions as permitted under Article 17.4.7 of the AUSFTA for cultural institutions and broadcasters would facilitate their usual business activities and assist them in undertaking some of their legislatively mandated activities.

7. The development of the information economy and the capacity for government to deliver services in an online environment should not be inadvertently constrained and some specific exceptions under Article 17.4.7 to this end are therefore likely to be desirable.

Enabling exceptions to be implemented

8. In relation to (e) above, the exceptions within the AUSFTA relating to privacy, 17.4.7(e)(v), libraries, 17.4.7(e)(vii), and other possible exceptions, 17.4.7(e)(viii), appear to be allowed only in relation to the circumvention of an access control measure. There does not appear to be, as is the case with other exceptions, for example with software interoperability, a corresponding specific exception applying to the manufacture of and dealing in circumvention devices.

9. In addition, for the exceptions relating to security testing of encryption and computers, 17.4.7(e)(ii) and 17.4.7(e)(iv), and parental control locks 17.4.7(e)(iii), there does not appear to be a corresponding exception which allows for dealings in devices which circumvent copyright protection measures.

10. Depending on how the exceptions are implemented, there may be a workability issue for the practical application of exceptions if the above issues are not addressed. Many organisations such as libraries may need to be able to obtain circumvention devices or services in order to be able to undertake allowed exceptions. It is not clear how they could do this where, because of prohibitions on dealings in devices, users would not have the means to undertake such circumvention. It would therefore seem appropriate and consistent with the intention of the AUSFTA, that, where exceptions are applied consistent with the AUSFTA, there should also be appropriate means to allow those exceptions to be implemented.

11. Also, there may be some ambiguity regarding the position of some devices which could be classed as either copy control measures or as access control measures. An example of this is passwords which are used to initiate software on installation. The primary purpose of this password approach is to ensure that the software is not used multiple times. A similar example is passwords/codes which are required during the playing of a computer game to allow the game to continue and which are sourced from a document which accompanies the purchase of the product. If these access control measures are to be considered TPMs, then corresponding exceptions should be considered.

Information Economy and ICT

12. A key issue is the impact of intellectual property arrangements on innovation. In this regard, it is important to balance the consideration of specific rights and exceptions with wider implications for innovation. The interests of established

stakeholder groups need to be complemented with consideration of emerging or future communities of knowledge, research and innovation.

13. In order to support this principle, any process to develop exceptions to sanctions on circumvention devices in respect of TPMs should provide as far as possible for circumvention activity that:

- facilitates non-infringing access to intellectual property;
- supports access for reasonable and legitimate research and commercial exploitation; and
- maintains the whole-of-government capacity to deliver services in an online environment.

14. The function of an anti-circumvention framework should be to prevent or inhibit infringement, rather than simply to control access to copyright material.

15. In examining the implementation of TPM obligations under the AUSFTA, consideration of exceptions for reasonable access, such as tinkering, decompilation, and exploitation of abandonware, would therefore appear to be warranted. Tinkering involves the practices of accessing 'hidden' intellectual property in order to identify opportunities for modifications which may lead to new services or products. In many cases this would require circumvention of TPMs. Abandonware is a term for software over which no-one is any longer asserting or enforcing copyright. A possible example is a number of computer games written in the 1980s, some of which appear to be re-emerging today on mobile phones and internet games. There is likely to be a requirement to circumvent TPMs in order to revive some of this content.

Libraries and archives

16. The *Copyright Act 1968* (Copyright Act) currently has a wide range of permitted purpose exceptions which allow the manufacture and dealing in circumvention devices and services for libraries and archives, including the reproduction and communication of works for users and other libraries and archives and also the reproduction or communication of works for preservation and other purposes.

17. The AUSFTA exceptions include a specific exception for libraries and archives, that is the circumvention of access measures in order to facilitate purchasing decisions (Article 17.4.7(e)(vii)).

18. It would also seem appropriate for libraries and archives (including museums and galleries) to be provided under Article 17.4.7(e)(viii) with additional exceptions to reproduce many of the permitted purpose exceptions currently included in the Copyright Act. The areas of proposed circumvention of protection measures relate to enabling the organisations to carry out their mandated activities, particularly in the area of preservation.

19. Exceptions could be considered, for example, circumventing encryption or password protections to allow preservation and communication for the public (as allowable under the Copyright Act) for items such as literary works, personal papers,

manuscripts, documents and media-based digital publications stored on a media storage device.

20. Many original papers and manuscripts are now provided to libraries, archives and other cultural institutions on digital media such as USB drives, firewire drives, iPods, CD, DVDs or external hard drives. The form in which these papers might be stored on these drives can often involve proprietary file formats which are not sustainable for preservation. If cultural institutions cannot circumvent the encryption/password protection they may not be able to copy the materials for long term preservation and storage in sustainable software formats. This may mean that the materials are lost in the long term because of obsolescence, damage and the breakdown of data on the physical media.

21. At present libraries and archives use professional broadcast equipment in their preservation activities which bypass many copy and access controls before works are copied to hard disk.

22. Some computer games and some high end software require dongles or specific devices to function. It is considered to be an appropriate, non-infringing, use that this content be able to be re-engineered by libraries and archives to be stored in more accessible formats. This is likely to involve the circumvention of dongles and encryption designed to protect format types.

23. Issues also arise relating to avoidance of inadvertent constraints on preservation and the delivery of mandated activities with:

- government websites, such as portals aggregating content and delivered under core business activities;
- digital publications, including documents, interactive multimedia, computer programs, databases and mapping applications;
- sound recordings, including downloadable audio files, podcasts, audiostreaming, DAT tapes and CDs;
- film, including VHS, DVD, electronic/digital cinema and web streaming; computer games on various electronic media; and
- websites and new media art forms.

24. In all these cases, exceptions could be put in place to allow the breaking of encryption or password protection to allow transfer to preservation grade digital storage for the purposes of preservation and communication with the public as allowed under the current copyright exceptions, as well as to allow the delivery of public services by government as currently undertaken. The lack of such exceptions would mean that libraries, archives and museums, in particular, may be significantly limited in their ability to undertake their government mandated and funded role in preserving Australian culture. Such exceptions would appear to fall within the scope allowed under Article 17.4.7(e)(viii) in that there would be an adverse effect if the exceptions were not in place and the activities proposed under the exceptions would not appear to infringe the stated purposes of the AUSFTA.

25. We understand that the National Library of Australia has provided further detailed examples in its submission.

26. While it is possible that areas not covered by specific exceptions could be dealt with by contract, it would be preferable if this were not considered the prime approach to dealing with TPMs. The burden of managing rights attained through contract could become onerous for institutions which handle hundreds or thousands of pieces of copyright material. For institutions with limited budgets this is not an ideal situation. Copyright owners may also seek to impose additional costs where the right to circumvent is being sought, even when the procuring institution is only seeking to exercise unremunerated exceptions recognised under the Copyright Act. It would therefore seem preferable to deal with this matter through allowing exceptions, rather than by using contracts. The result (ie. circumvention) would be similar, but the means would be much less expensive and onerous.

Broadcasters

27. We note that in many instances broadcasters rely heavily on blanket or statutory licences to allow them to use copyright material for broadcast. These licences usually do not contain any provisions regarding the circumvention of TPMs.

28. With respect to these materials, broadcasters may encounter TPMs or technology characterised as TPMs such as regional encoding, copy protection and encryption. Regional encoding is a particular issue for a broadcaster such as SBS which has a legislative mandate to broadcast multicultural content.

29. The inability to bypass regional encoding causes problems for broadcasters in broadcasting some material and in previewing international material in order to facilitate purchases.

30. Broadcasters with a diverse regional network may be required to copy material from one format to another in order to ensure that stations without access to digital broadcast facilities are able to receive materials in a form which they can use.

31. It is suggested that it would be appropriate that exceptions be put in place which allow the circumvention of regional coding, copy controls and encryption on CDs and DVDs for the purpose of broadcast. Without these kinds of exceptions broadcasters may face difficulties in carrying out their core, non-infringing activities associated with broadcasting. At the same time this would not infringe the copyright owner's use of effective TPMs used in connection with the exercise of their rights if the exception is linked to a non-infringing use such as an agreement with a rights holder to broadcast.

Conclusion

32. It is considered that a range of exceptions as detailed above are important for cultural institutions and broadcasters which facilitate usual business activities. Without appropriate exceptions, national cultural institutions and the public broadcasters may not be able to undertake some of their legislatively mandated activities.

33. Also, as discussed in paragraphs 12 – 15 above, it would also appear appropriate to provide for exceptions to ensure that the development of the information economy and including the capacity for government to deliver services in an online environment is not inadvertently constrained.