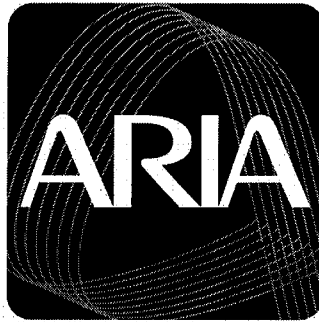


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Submission No. 3201.....
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**HOUSE STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS**

INQUIRY INTO TPM EXCEPTIONS

SECOND SUBMISSION

by

AUSTRALIAN RECORDING INDUSTRY ASSOCIATION

7 DECEMBER 2005

HOUSE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO TPM EXCEPTIONS

ARIA appreciates this opportunity to make a further submission to assist the Committee in undertaking this inquiry.

Process for public consultation

During the public hearings process, the Committee invited ARIA to submit its views in relation to those proposals for additional exceptions that have been suggested to the Committee by way of written submission. This was an alternative to ARIA's suggestion that the Committee consider the written submissions and oral evidence, then:

- Publish a shortlist of proposed exceptions that appear to be within the scope of the review and appear to meet the criteria set out in the AUSFTA; and
- Invite further submission in respect of that shortlist.

ARIA notes that some of the proposals put forward are clearly outside the scope of the inquiry and for this reason ought not be acted upon by the Committee. Others will require closer attention by the Committee in order to determine whether they are within the scope of the inquiry, and if so, which elements of them are properly the subject of further consideration.

At the time of making this submission, ARIA has seen all submissions posted on the inquiry website as at 6 December 2005, most of which propose a number of exceptions to the prohibition on circumventing access controls. We have had a very short time in which to review all of these proposals and respond to the numerous issues raised by them. Therefore this submission is limited to a selected number of broad issues which have been raised by submissions to the inquiry, as follows:

- Proposals outside the scope of the inquiry
- Circumvention and contractual terms
- Actual or reasonably foreseeable adverse impact – sound recordings in Australia
- Format choice and sound recordings
- Proposals relating to statutory licences
- Proposals relating to broadcasting uses

It has not been possible within the timeframe to meaningfully respond to every proposal, but any omission to mention a proposal should not be taken as ARIA's acceptance of it.

Proposals outside the scope of the inquiry

The Terms of Reference reflect the nature of the inquiry, which is focussed on a narrow issue: whether there are any exceptions, other than those set out in Article 17.4.7(e)(i) to (vii) of the AUSFTA, that should be enacted in respect of the prohibition on circumvention of TPMs.

The Attorney-General's Department is separately undertaking other tasks that relate to this inquiry. One of these is the implementation of the TPM provisions of the AUSFTA in general, including the implementation of a prohibition on the act of circumvention and possibly the enactment of exceptions to that prohibition to cover the activities set out in Article 17.4.7(e)(i) to (vii).

Some submissions to this inquiry appear to be mistaken as to the nature of the Committee's task, and cover issues that relate to this broader task being undertaken separately by the Department. Submissions in this category include proposals to extend exceptions to cover the prohibition on manufacturing and dealing in circumvention devices,¹ a proposal to retain the current system of circumventing for permitted purposes pursuant to a notice,² and proposals related to the definition of technological protection measure in the legislation to be enacted.³ Since the submissions are outside the scope of this inquiry, ARIA suggests that the Committee refer these submissions to the Attorney-General's Department as part of its separate process.

The Attorney-General's Department is also separately undertaking a review of fair use and other exceptions, which may result in changes to the system of exceptions to copyright under the Copyright Act. Such changes are not within the scope of the Committee's inquiry, which is limited to uses that are non-infringing under current Australian law.

ARIA therefore suggests that the Committee refer those submissions that propose changes to the current copyright law, including additional exceptions to copyright protection,⁴ to the Department's fair use inquiry.

As we noted in our earlier submission, the scope of this inquiry is defined by the "scope criteria" in Article 17.4.7(e)(viii), being:

- a. Acts of circumvention
- b. Access control measures
- c. On non-infringing uses of copyright material
- d. Particular class of copyright material

¹ ABC, Open Source Industry Australia. See the submission of the Commonwealth Attorney-General's Department, paragraph 40.

² Law Council of Australia IP Committee

³ See SBS, DCITA, Linux Australia, Law Council of Australia Intellectual Property Committee, Department of Parliamentary Services.

⁴ For example, the proposal to insert "reasonable use rights", see Alex Andrews submission; the proposal for an exception to permit the making of back-up copies: Alex Andrews; a proposal to insert a general "reasonable use" right into the Act (Andrews) or to enact an exception for "personal use" in general.

The Committee's task will require a methodical approach, that works through the scope and other criteria in a focussed and balanced manner. Some submitters have suggested the Committee "take a broader approach" to the inquiry or "avoid specificity" in drafting proposed exceptions –in our view this would be inconsistent with the Committee's terms of reference and the AUSFTA.⁵

Below we identify some matters that are clearly outside the scope criteria. As we noted in our first submission, identifying these matters at an early stage should assist the Committee in undertaking a focussed assessment of the more substantive criteria, such as adverse impact and effect on the purpose of protection for TPMs.

Format shifting

Some submissions do not explicitly propose enacting a new exception to copyright, but propose an exception to the prohibition on circumventing TPMs to enable a use that under current Australian law, is infringing. In particular, several submissions address "format shifting", the act of copying content from one format (eg a CD) to a different format (for example, a hard drive).⁶

Unless permitted by a licence, or other specific exception in the Act, format shifting in relation to sound recordings is currently an infringement of copyright. It is therefore outside the scope of the current inquiry. As noted above, if the Government resolves to enact further exceptions to copyright as part of the separate fair use inquiry, then the impact of TPMs on uses permitted by those exceptions is an issue to be considered at that future time, not as part of this inquiry.

Further, the scope of this inquiry is limited to exceptions on the prohibition on circumventing *access* control measures. It is important to understand the nature of TPMs used in relation to CDs. Such TPMs are primarily copy control mechanisms, designed to prevent unauthorised copying of a CD, and in most cases to permit specified copying. They are not directed to access as such and in most ordinary uses on a CD player do not act as access controls. Prima facie, this places such TPMs outside the scope of the inquiry.

The proponent of any exception relating to TPMs applied to CDs would need to provide credible evidence that a practical difficulty in gaining *access* to a CD is causing or likely to cause an adverse impact on non-infringing *uses*.⁷

Proposals based on the category of user

Proposals are within the scope of this inquiry only if they relate to a "particular class" of copyright work. As the Attorney-General's Department clarified in its notice:

Additional exceptions can only refer to a particular class of copyright material. Thus, the Committee could not recommend an exception that

⁵ See ABC submission, page 16.

⁶ For example Australian Digital Alliance/Australian Libraries Copyright Committee, Australian Vice-Chancellor's Committee, Professor Brian Fitzgerald/Nicolas Suzor.

⁷ For example see the SBS submission which seeks an exception for "copy controls on phonograms in digital formats" – copy controls being outside the scope of this inquiry.

applied to all works. Suggested exceptions should not be based on the category of user.

Despite this guidance, several submissions propose exceptions that are based on a category of user. Examples are the ABC submission that proposes a series of exceptions to apply to the ABC only, the submission from the Department of Parliamentary Services for an exception to apply to it, and submissions that propose exceptions for use by libraries or educational institutions in general,⁸ or particular libraries or educational institutions.⁹

While it is outside the scope of Article 17.4.7(e)(viii) to enact an exception whose scope is defined solely by use or user, it is conceivable that there are works in a “particular class”, within the scope of the inquiry, which are of interest to libraries and educational institutions. If that is the case, the proponent of such an exception has the burden of specifically identifying that particular class, and then providing evidence of adverse impact reaching the requisite level.

Several other submissions propose exceptions that would apply to all copyright works. Again, these are not within the scope of the Committee’s Terms of Reference. These proposals include those that propose to define an exception for a broad general purpose, such as “allowing interoperability”,¹⁰ “allowing access to works which the creator did not intend to be protected by TPMs”,¹¹ “meeting the cultural needs of indigenous students”¹² and “preventing anti-competitive behaviour”.¹³

Proposals based on fair dealing

Some submissions have proposed an exception to the prohibition that would permit circumvention for all uses that constitute fair dealing under the Act.¹⁴

These submissions are outside the scope of the inquiry, as they do not identify a “particular class” of works for which an adverse impact is claimed. To the extent that there is a particular class of works, in respect of which uses under the fair dealing exceptions are or are likely to suffer an adverse impact, the proponents of such an exception must identify that particular class and provide credible evidence of an actual or reasonably foreseeable adverse impact. (Otherwise, if these proponents

⁸ For example Australian Digital Alliance/Australian Libraries Copyright Committee, Australian Vice Chancellors’ Committee, Commonwealth Department of Education, Science and Training, Australian Flexible Learning Framework, Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education, Training and Youth Affairs, Australian ICT in Education Committee.

⁹ For example TAFE Libraries Australia, Queensland Parliamentary Library, National Library of Australia, Hon Peter Beattie, Premier and Treasurer of Queensland.

¹⁰ For example Cybersource submission, Alex Andrews.

¹¹ Australian Digital Alliance

¹² Australian Vice-Chancellors Committee.

¹³ Australian Vice-Chancellors Committee. Further examples include Brian Fitzgerald: “consumers can circumvent a TPM where they can show that the TPM has been set for unjustified reasons”.

¹⁴ For example Australian Flexible Learning Framework, Commonwealth Department of Education, Science and Training, Australian Digital Alliance/Australian Libraries Copyright Committee.

wish to make general submissions relating to fair dealing, the proper forum for those submissions is the Attorney-General's Department's fair use inquiry.)

The Register of Copyrights in the US rulemaking inquiry in both 2000 and 2003 rejected proposed exceptions based on fair use, including categories such as "fair use works", "per se educational fair use works", on the basis that these did not constitute a particular class.¹⁵

We would like to respond in particular to the ABC's submission in this area, which proposes a series of "classes" of works, which are merely the categories of works from the Copyright Act, and proposes that an exception to the prohibition on circumvention should be permitted for all acts that constitute fair dealing with respect to those classes. This is clearly not what was intended by the term "particular class". We refer the Committee to Section IV of our earlier submission.

We also disagree with the ABC's submission that under US law, circumvention of access control TPMs is permitted in order to undertake uses covered by the defence of fair use.¹⁶ This is simply a misunderstanding of the effect of section 1201(c)(1) and (4). Other provisions and case law have clarified that in the US, there is no general exception to the prohibition on circumventing access control TPMs to enable "fair uses" of copyright works. The only exceptions to the prohibition on circumventing access controls are those that are specified in the statute, or enacted as a result of a rulemaking inquiry, following similar criteria to those set out in Article 17.4.7(e)(viii).

It is therefore incorrect that "the inclusion of provisions which preserve fair dealing and Australian implied constitutional freedoms ... 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". To the contrary, any exceptions sought to be justified on the basis of fair dealing must be dealt with methodically, according to the criteria, in the usual manner.

Actual or reasonable foreseeable adverse impact – sound recordings in Australia

As the Attorney-General's Department has indicated, it is up to the proponent of a proposed exception to provide reasonable evidence in support of an exception.¹⁷ That must be evidence of an actual adverse impact, or one that is reasonably foreseeable.¹⁸

Many proposals do not outline, or even refer to, any evidence of adverse impact, let alone credibly demonstrate such impact. Many include mere speculation about the possible future effects of TPMs, or theoretically possible situations where a user may wish to make a non-infringing use. Such statements are not sufficient to justify any exemption.

ARIA submits that in order to justify an exception, the adverse impact should have broad effect and should be more than an isolated problem. The assessment of adverse

¹⁵ 2003 Report of the Register, page 85-86.

¹⁶ ABC subm page 16

¹⁷ Submission para 50

¹⁸ subm para 52

impact should also be made in light of the particular class for which the exception is claimed. So, if only a very small percentage of non-infringing uses within a particular class of works may be affected, there may be insufficient adverse impact.

The practical situation with respect to sound recordings in particular, is such that it is unlikely that the proponent of any exception could provide evidence of adverse impact reaching a level sufficient to justify an exception.

(a) Sound recordings on compact disc

As noted above, TPMs applied to compact discs are directed at copying rather than access and are prima facie outside the scope of the inquiry.

(b) Sound recordings provided in online format

Article 17.4.7(e)(viii) should not have any application to the other TPMs used in relation to sound recordings in Australia: those that are used on sound recordings provided in digital format, from online music stores such as BigPondMusic and iTunes. These TPMs are used in conjunction with contractual terms outlining the uses that may be made of the recording. For example, a digital download of a song from BigPond Music may be copied to a computer, and also copied an unlimited number of times to a portable music player, and burned to CD up to three times,¹⁹ and TPMs are applied to support these contractual terms.

Article 17.4.7(e)(viii) should not apply to TPMs used in this manner. Access to the content is granted on contractual terms, in return for payment. Any use of the recording outside the terms of the licence (for example to make a fourth copy when only three are permitted) is an *infringing* use.

Proposals regarding statutory licences

Several proposals suggest that there should be an exception to the prohibition on circumvention for uses of content that are permitted under statutory licence schemes in the Act. These include the licences for educational institutions under Part VA and VB of the Act.²⁰

We note at the outset that it is not clear that uses permitted under statutory licence schemes were intended to be within the scope of Article 17.4.7(e)(viii). In the US rulemaking procedure, on which Article 17.4.7(e)(viii) is based, it appears that uses under statutory licence were not within the scope of the general rulemaking procedure, because they were regarded as licensed uses, for which payment was made, rather than free uses under an exception.²¹ However we note the Department

¹⁹ See http://bigpondmusic.com/site_help.asp?cache=65070742#mymusic, visited on 10th October 2005.

²⁰ See submission of Australian Digital Alliance, Australian Vice-Chancellor's Committee, Australian Flexible Learning Framework, Hon Jon Stanhope, Chief Minister for the ACT, Commonwealth Department of Education, Science and Training.

²¹ The Recommendation of the Register for the rulemaking procedure in 2000 and 2003 does not indicate any submissions were made in relation to uses under statutory licence.

appears to regard uses under statutory licence as within the scope of this inquiry,²² so we address those uses below.

As a primary point, none of the submissions ARIA has seen regarding statutory licences provide evidence of an actual or reasonably foreseeable adverse impact of TPMs on any particular class that includes sound recordings. The submissions do not even claim such an impact with respect to sound recordings. Part VA of the Copyright Act permits copying of broadcasts in specified circumstances. The use of TPMs in relation to *sound recordings* therefore has no impact on uses under Part VA. Part VB does not apply to sound recordings at all. Therefore we do not consider that an exception for uses permitted under Part VA and Part VB, even if crafted to be within the scope of this inquiry (see below), could be justified.

We stress that under the terms of Article 17.4.7(e)(viii), uses that are permitted under a statutory licence scheme are not in a special category, and must be judged by the same set of criteria as any other non-infringing use. It will be important for the Committee to take the same focussed, methodical approach to uses permitted under statutory licence as it takes to any other non-infringing uses. Importantly, these statutory licences do not create an absolute right to copy irrespective of TPMs or other access controls. For example, it could not be seriously contended that activity authorised under Part VA entitles a user to decrypt an encrypted broadcast such as a subscription television signal in order to copy a program to which the user would not otherwise have access (e.g. because they were not a subscriber).

In light of the clear guidance from Article 17.4.7(e)(viii), confirmed by the Attorney-General's Department, that an exception under Article 17.4.7(e)(viii) may not be based upon a particular category of user, and must be based upon a particular class of copyright works, it seems clear that an exception to the prohibition on circumvention which specified all uses permitted under Part VA and Part VB would be outside the scope of the Committee's Terms of Reference and indeed outside the scope of what is permitted under the AUSFTA.

None of the proponents of the above exceptions have identified a "particular class" of works, with the level of specificity required by Article 17.4.7(e)(viii).

Proposals regarding broadcasting uses

Submissions from ABC and SBS propose exceptions to the prohibition on circumvention, for certain non-infringing uses relating to broadcasting, being:

- reproductions of a sound recording for the purpose of broadcasting, permitted under section 107 of the Copyright Act; and/or
- uses of sound recordings permitted under a blanket licence provided by sound recording copyright owners.²³

²² AGD submission paragraphs 43 to 45.

²³ The ABC submission also proposes exceptions to cover all uses that constitute fair dealing under the Copyright Act. This proposal has been addressed above.

It has already been mentioned above that an exception based on the user or category of user is outside the scope of the inquiry, because it does not relate to a particular class of copyright work. It is up to the proponent of such an exception (in this case ABC or SBS) to identify a particular class of copyright works which it says are or are likely to be adversely impacted, and provide evidence of such actual or likely impact.

This aside, and assuming that a particular class of copyright works can be identified for further consideration, we stress once again that the particular exceptions in the Act for broadcasting are not in any way special cases, and any proposed exception to the prohibition in order to allow such uses must be assessed against all of the criteria in the usual manner. They are exceptions (or defences) to activity which would otherwise be infringing – they do not create a “right” to copy.

We note also that the exceptions for the purpose of broadcasting are not properly termed “statutory licences”, as the ABC submission describes them. A statutory licence is a mechanism for permitting specified acts that would otherwise be an infringement of copyright, and providing for a method of payment. The exceptions for broadcasting uses do not provide for payment.

In applying the criteria in the usual manner, ARIA submits that the ABC has not provided evidence of an actual or reasonably foreseeable adverse impact on non-infringing uses. The uses that ABC makes of sound recordings, that it says are adversely impacted, appear to be:

- copying sound recordings in CD format into another format, in order to easily transport content to another physical location for the purpose of broadcasting it (page 10); and
- loading CD content on to ABC’s production, editing and transmission equipment for the purpose of editing for broadcast (page 11)

First, it is not clear that these uses are all non-infringing. The ABC states that these uses “may be legitimately justified under a blanket licence or statutory licence”, but does not indicate whether such uses are in fact within the terms of the blanket licence. As to exceptions in statute, these are relatively limited and do not provide broad rights to copy and edit sound recordings. In the case of the section 107 exception, this is a restricted exception that permits a person to make one copy of a sound recording for the purposes of broadcasting. The making of further copies, or copying in other circumstances, is expressly prohibited.²⁴ The ABC must first show that the uses for which it seeks an exception do not infringe copyright.

In addition, the ABC has not provided credible evidence of actual or reasonably foreseeable adverse impact to justify an exception. ABC states that it would be expensive for it to request the provision of content in a particular format, but it does not state whether it has made that request, and what the response was. ABC also does

²⁴ Section 107, Copyright Act.