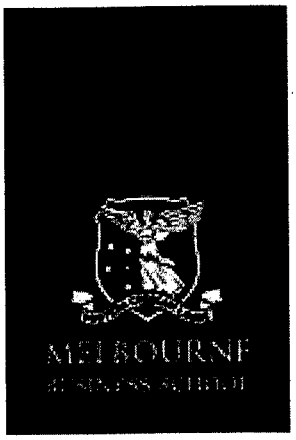

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1st September, 2005

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

Re: Submission to Review on Technological Protection Measures Exceptions

Dear Sir/Madam,

In response to your letter of the 25th August, 2005, I am happy to provide this short submission to the Review. I am currently a Professor of Management at the Melbourne Business School, University of Melbourne and an Associate Director of the Intellectual Property Research Institute of Australia (www.ipria.org) which is funded in part by IP Australia. The views I represent here are my own and should not be construed as the position of any of these organisations.

I am a long-standing researcher in the economics of innovation and technological change as well as having conducted both academic research and consulting in competition policy and regulation. As such, I believe I am well qualified to comment on the economic issues as they relate to technological protection measures.

What are technological protection measures?

Technological protection measures are additional technical modifications to existing technology that are placed by manufacturers for certain ends. On such end is the protection of copyright. Another such end is to allow the manufacturer or copyright holder to engage in certain marketing, pricing and business plan arrangements. An example of this are modifications that make a technology inoperable in a given region.

Innovation incentives and protection measures

Copyright holders have a legal protection to restrict unauthorised copying of their materials. While legal liability is clear, difficulties in enforcement have meant that copyright holders have sought additional technological means of restricting copying. An example of this includes new copy protection measures on CDs to prevent the transfer of

the copyrighted material on those CDs to a user's computer. Video tapes and DVDs containing video also have in-built technology that makes copying difficult. Finally, some computer software requires the registration and provision of access keys to prevent use by multiple users.

Often these measures are commercially costly. They reduce the value of the copyrighted material to users and hence, their willingness to pay. Presumably, they are put in place because the private profits from restricting use outweigh the value of unrestricted use to users.

Given this trade-off, it appears appropriate to permit copyright holders a right to devise measures that they build in to their goods that might restrict copying. This is a means of enforcing existing intellectual property rights and is likely to be compatible with raising incentives to innovate.

Activities to overcome protection measures

The question for this review is not whether copyright owners should be permitted to put in protection into their products but whether others should be allowed to devise and promote technologies that might under-mine that protection?

In stating this, I want to distinguish between piracy and 'work arounds.' Piracy involves the direct infringement of copyright for commercial and other gain. That is, it involves undertaking copying of the material. In contrast, a work around is a technology that allows users to engage in copying for their own individual use. That said, that technology carries with it the possibility that those individuals may also engage in piracy. Thus, work arounds make both legitimate and illegitimate copying easier. Examples of this include:

- Photocopiers and scanners: allow books and magazines to be copied
- CD and DVD burners: allow CDs and DVDs to be copied
- Computers and portable music players: allow CDs to be copied

It seems to me that to prevent these technologies would be onerous and a poor response to copyright protection issues.

The more difficult issues come in relation to targeted technologies. For example, this could be a modification or software that was designed to make pirated copies operable – as might arise in certain video game consoles. These are directly aimed at undermining the copyright protection and to enable illegitimate use. There is a case that these modifications should not be permitted.

Protection of marketing

A targeted technology to enable to consumption of pirated technology needs to be contrasted with technology that enables consumption of legitimate copies purchased legally. For instance, modifications to DVD players or video game consoles to allow playing of copyrighted material legally purchased overseas. No copyright infringement has occurred although some violation of a license agreement may have arisen. To this I note that such licensing restrictions are murky to the average consumer and are hardly consistent with fair contract term requirements in Federal and State consumer protection legislation.

Restrictions on the use of copyrighted material based on time (e.g., when such material can be consumed) and space (where it can be consumed) are not primarily for the protection of copyright but for the protection of marketing plans. Put simply, those restrictions – while profitable for the copyright holder – are to engage in broad

practices of price discrimination. Price discrimination is, of course, something that, in general, can be valuable as a marketing tool and should be permitted. However, it is not a desirable end in of itself and in all other industries it is recognised that if consumers – by arbitrage or other means – can get around price discrimination then that is legitimate business activity. (See the attached working paper on DVD regional encoding by myself, Emily Dunt and Stephen King; published in *Economic Papers*, Vol.21, No.1, March 2002, pp.32-45).

Technological measures designed to protect marketing should not receive any special attention in our intellectual property laws. In so doing, the government will be perpetuating and protecting an *intellectual monopoly* rather than simply *intellectual property* (as Michelle Boldrin and David Levine point out in their recent work; http://levine.sscnet.ucla.edu/general/intellectual/intellectual.htm). Business people in Australia should be permitted to engage in technological measures that facilitate arbitrage.

I note that this is consistent with long-standing positions on parallel imports. To ensure maximal competition within Australia, we should not put in additional legal restrictions on international competition. To do so is hardly consistent with free trade.

Moreover, this can go two ways. At present, Australian users are prevented from utilising the iTunes Music Store so that they can purchase electronically delivered music for their iPods. Why? Because Apple has yet to come to agreement with copyright owners of music in Australia. But they have come to agreement with their owners in the US. So we have the absurd situation whereby the only legitimate means for Australian consumers to purchase locally or internationally produced music to carry on an iPod is by a CD whereas their US counterparts can purchase Australian made music electronically. Thus, Australian copyright owners are restricting a legitimate source of international trade.

Summary

The government should be very wary of imposing liability on the legitimate business activities of Australians who are enabling Australian users to obtain more value from legally purchased copyright material. It is only where those activities are targeting a violation of intellectual property that there should be a special liability scheme. For those engaged in competition promoting attempts against intellectual monopoly, no special liability is required.

If you have any questions or queries I can be contacted at J.Gans@unimelb.edu.au.

Sincerely,

Joshua Gans