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## Copyright Agency Limited

Inquiry into technological protection  
measures (tpm) exceptions

October 2005

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07 October 2005

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

Dear Committee members

***Inquiry into technological protection measures (TPM) exceptions***

CAL has considered the terms of reference for the inquiry into TPM exceptions. Please find attached an Introduction to CAL's submission and CAL's submission.

Also attached, for the Committee's reference, is a copy of the US Librarian of Congress' last rulemaking for a similar review conducted in 2003. This document is highly instructive about both the mechanism for reviewing applications and the considerations applied during this process in the US.

Following is a summary of CAL's recommendations made in our submission:

Para 17 – 29	CAL supports a regular review process which is consultative and pays particular attention to the effect of any exception to the development of a digital publishing industry in Australia.
Para 30 – 31	CAL suggests the Attorney-General's department and the nomination of the Attorney-General, or the Copyright Tribunal as offices appropriately equipped to undertake the review of applications for exceptions to the prohibition on the use of TPMs.
Para 32 – 33	Once applications for additional exceptions have been successful, CAL recommends they are reported in the Government Gazette.
Para 34 – 40	CAL would consider narrowly drafted exceptions for the print-disabled and for preservation copying undertaken by libraries.

I thank you for the opportunity for CAL to provide comment to the Committee as it undertakes the review of possible exceptions to TPMs. Should the Committee require any additional information, CAL would be happy to assist.

Yours sincerely

Michael Fraser  
Chief Executive

## Introduction

The very title “parliamentary committee investigation into whether additional exceptions should be allowed to the new technological protection measures (TPM) scheme required by the US Free Trade Agreement” gives the immediate impression that this is a review of great complexity best left to copyright and IT experts.

Not so. While the detail is critical in providing a framework within which we can all operate with some clarity, it is the simple foundation principles that matter most.

The principles are those we were taught from childhood. They have been core planks of legal, ethical and religious frameworks from the 10 Commandments’ “*thou shalt not steal*” around 1400BC and the Buddhist Five Precepts of morality, *panca-sila*, laid down over 2,500 years ago which includes abstinence from taking what is not given, through to current anti-theft laws.

The principles are permission and respect. Don’t take without permission and respect the property of others.

That, in a nutshell, is what this investigation is all about. Put simply, TPMs are the high-tech version of the security fence around a business. It says - I own what’s on this side of the fence.

So too do copyright owners use TPMs. In effect they are saying, I own this work and I don’t want you to take it without permission, thank-you.

To circumvent such a device is no different to taking the bolt cutters to the security fence, breaking in and stealing the goods. It should be illegal. It is taking without permission, or stealing someone else’s property.

The fact that the property is a written work or design – and not a house, car or other more tangible property makes it no less the property of its owner. And that owner has rights and the law is there to enshrine those rights.

What about exceptions to the prohibition of such circumvention? No one law is capable of foreseeing every situation and the principle of respect comes into play – as does common sense. A regular review of exceptions should occur in which interested parties can state their case before a suitably qualified forum.

CAL recommends the Attorney-General’s department for this role – as a body that is suitably qualified in copyright, which has a record in considering public submissions and which does not have a perceived interest in the outcome of such a review. Alternatively, the Copyright Tribunal would also be suitable for this role. It is, on one hand, suitably qualified and, on the other, well experienced at hearing directly from affected people without legal qualifications. It is both legally and socially responsive.

CAL supports an appropriately worded exception in which the print disabled – who are not capable of accessing the things most can access easily and lawfully – are granted the ability to circumvent TPMs. Such an exception makes sense and is respectful of the competing rights of this group and those of the copyright owner.

Similarly, when libraries are merely attempting to preserve a copy of a work that is deteriorating, an exception makes practical sense.

The following submission goes into more detail to assist the Committee put the necessary legal framework around the principles of permission and respect. For the purpose of this submission, CAL uses the term TPM as meaning only those devices used to stop unlawful access to copyright owners' works. CAL does not making any comment on using technological measures for the purpose of regional coding or similar practices for the purpose of this investigation.

## ***Inquiry into technological protection measures (TPM) exceptions***

### **Introduction**

1. The Copyright Agency Limited (CAL) is a copyright collecting society that administers, on a non-exclusive basis, the copyright controlled by its members.
2. CAL is a not for profit company limited by guarantee.
3. CAL currently represents the reproduction rights of over 24,000 Australian authors and publishers. CAL also represents thousands of other copyright owners through reciprocal agreements with overseas collecting societies.
4. CAL has been declared by the Attorney-General to be the collecting society for the reproduction and communication of works by educational institutions under Part VB of the *Copyright Act 1968* (the Act). CAL has also been declared by the Copyright Tribunal to be the collecting society for government copying for the purposes of Part 2 of Division VII of the Act.
5. Pursuant to these declarations, CAL administers statutory licences through which educational institutions and Commonwealth, State and Territory governments remunerate copyright owners for the copying of their works.
6. In addition, CAL offers voluntary licences to the public and corporations for the right to copy and communicate published works. As a single resource, CAL can provide copyright clearances for hundreds of thousands of books, articles and artistic works through its licences to copy.
7. CAL strongly supports legislative provisions in relation to copyright, which will benefit all copyright owners and the community in Australia and internationally.

### **Background to the TPM Review**

8. CAL understands that the Committee has been tasked to consider additional exceptions to the prohibition on the use of circumvention devices to disable TPMs placed on digital works by copyright owners. TPMs are used by copyright owners to control copy and access rights in their works, and include mechanisms such as encryption, password protection and watermarking. Implementation of these provisions is a requirement under Australia's recently negotiated Free Trade Agreement with the US.
9. To understand the importance of TPMs in copyright law, it is important to have an understanding of the legislative history and environment in this area, and how it affects the Australian publishing industry.
10. The digital environment poses many challenges for copyright owners and disrupts the equilibrium between various interest groups. The digital environment offers CAL's author and publisher members great opportunities to provide works in new, interactive formats and to provide content in packages customised to the needs of users. At the same time, digital technology also

creates the potential for mass infringement of copyright. Digital copies are of a quality often equal to the original and can be rapidly copied and distributed to many.

11. As the digital environment developed, copyright experts recognised that specific protection was needed for copyright owners to encourage the development of digital publishing.
12. With these specific concerns in mind, the 1996 World Intellectual Property Organisation (WIPO) Copyright Treaty adopted by Diplomatic Conference on December 20, 1996, requires countries to provide "adequate protection against the circumvention of technological protections employed by copyright owners to protect their works from infringement."<sup>1</sup>
13. Australia implemented legislation to provide protection for TPMs in its *Copyright Amendment Digital Agenda Act 2000*. These amendments provided a prohibition on the production, manufacture and trade in circumvention devices. Importantly, and in contrast to the US and the UK, the use of circumvention devices was not prohibited. A possible justification for this was that if the trade and manufacture of circumvention devices was prohibited, the use of such devices would not be an issue.
14. This legislative environment, perceived as providing less security to rightsholders than that contained in comparable overseas jurisdictions, left Australian publishers and authors feeling reluctant to provide their works in digital format. This view was clearly demonstrated in a survey of publishers' attitudes towards publishing in digital formats undertaken by AMR Interactive in 2003 where they expressed their lack of confidence in the level of protection under the Australian Copyright Act for digital works. In CAL's submission to the Digital Agenda Review conducted in 2003, CAL submitted that this was a key reason for the slow development of a digital publishing industry in Australia when compared to such industries in the US and the UK.
15. Australia entered into a Free Trade Agreement with the US (the AUSFTA) which commenced on 1 January 2005. Australia was given an additional two years to implement domestic legislation which met the requirements of the AUSFTA for TPM provisions. These provisions require TPMs to be given greater protection than under the pre-AUSFTA Australian copyright law. This means narrowing the circumstances in which TPMs can be circumvented legally, and by prohibiting both the manufacture and trade of circumvention devices, as well as their use.
16. CAL believes that the amendments required by the AUSFTA which will prohibit the use of circumvention devices under Clause 17.4.7(a)(i), and diminish the exceptions to the general prohibition (Clause 17.4.7(e)), will address some of our members' concerns, and will therefore encourage the development of an Australian digital publishing industry. It will also provide sufficient safeguards for the community to ensure that they have appropriate access to copyright works.

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<sup>1</sup> WIPO Copyright Treaty, Art. 11.

### **Review Process for possible exceptions to the general prohibition on the use of circumvention devices**

17. Clause 17.4.7(e)(vii) of the AUSFTA contemplates that there may be circumstances where additional exceptions to the narrowly defined exceptions contained in 17.4.7(e)(i) – (vi) are required.
18. The terms of the AUSFTA require Australia to institute a mechanism for assessing applications for additional exceptions to the general prohibition on the use of circumvention devices. Clause 17.4.7(e)(vii) requires that this assessment be undertaken at least every four years in a legislative or administrative review.

### **Overseas Examples**

19. Overseas countries with similar provisions in their copyright laws provide instructive examples of such review mechanisms which could be adopted by Australia in implementing this provision of the AUSFTA. In particular the US and the EU have working models which appear to be functioning effectively in their jurisdictions.

#### *The US: Rulemaking under section 1201 of the US Copyright Code*

20. The US system for processing applications for additional exceptions to the prohibition on the use of circumvention devices is for its Register of Copyrights to conduct a three yearly review of such applications and to make recommendations to the Librarian of Congress. In undertaking this review, the Register of Copyrights is required to “carefully balance the availability of works for use, the effect of the prohibition on the particular uses and the effect of circumvention on copyrighted works”<sup>2</sup>.
21. A central consideration to any application for an additional exception is the effect it would have on the value and market for copyright works. This would take into account the legitimate concerns outlined above, which were reported in the 2003 survey of publishers’ responses to the digital environment in Australia.
22. Further, it is clarified that those seeking the additional exception bear the burden of proving that the exception is necessary. This requires that they prove a substantial adverse effect exists – not minor problems or mere inconveniences.
23. Additionally, a previous ruling does not create a presumption that a ruling will be made at the next review. Those desiring to rely on an additional exception must prove that an adverse impact exists at each three-yearly review. This means that changes to the environment can be taken into account and the provisions are responsive to the rapidly-changing digital environment.

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<sup>2</sup> US Federal Register/ Vol. 68. No. 211/ Friday, October 31, 2003/ Rules and Regulations, p. 62012.



24. For an exception to be granted, a demonstrated adverse effect of the prohibition on the use of circumvention devices for a particular category of works on a particular class of users needs to be demonstrated.
25. In making recommendations, the Register of Copyright is required to consult broadly with those who propose the additional amendment, as well as the rightsholders who would be affected by the exception. This ensures that any rulings have been informed by the concerns of rightsholders, and that rightsholders have an opportunity to address the perceived adverse impact over their works and the market for their works.

#### *The EU*

26. The EU has adopted a different approach which allows its members some flexibility in the way they consider this issue. The EU places an emphasis on voluntary agreements being struck between copyright owners and other parties. This could include users and those who produce digital equipment.
27. The EU's directive was drafted to take into account the possibility of development of new business models as digital technology evolves. The main thesis of this system is to allow digital markets to evolve. Exceptions are to be drafted as narrowly as possible to meet the perceived need for them. Member states are given wide discretion in the way that they will provide exceptions in the absence of voluntary agreements – the Directive only stating that “member States shall take appropriate measures...”<sup>3</sup>
28. In the European Union there is a three-year reporting requirement for the European Commission as to whether the TPM provisions provide a sufficient level of protection or if acts permitted by law are adversely affected by TPM use.
29. The Copyright Directive also establishes a contact committee to examine the impact of the Copyright Directive on the functioning of the internal market and as a forum for the assessment of the digital market in works including private copying and the use of technological measures.

#### *Possible Review Mechanism for Australia*

30. There is no body with identical characteristics to the US Copyright Register in Australia. There are, however, several bodies whose attributes would be well suited to undertaking such reviews in Australia. The attributes required for undertaking such a review are specialist copyright law expertise, in addition to the ability to consider detailed expert evidence and to weigh up the arguments put by parties with conflicting interests, and making rulings based on their deliberations.
31. The Attorney-General's office has all these attributes, with a dedicated copyright law branch with lawyers who have a great depth of experience and knowledge

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<sup>3</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society.

in copyright law and practice in Australia and overseas. The department could undertake the review, and make recommendations to the Attorney-General.

32. Alternatively, the Copyright Tribunal of Australia also meets all these requirements, especially as it is constituted exclusively to consider copyright issues. Its experience in hearing cases in relation to collective licence terms – including fees and survey methodologies – would be ideally suited to conducting such reviews.

*Methods for instituting exceptions when they have successfully been applied for.*

33. As possible exceptions are required to be reviewed at least every four years, incorporating such additional exceptions into the text of the *Copyright Act* would not be practical. A mechanism which permits rapid alteration of the list of exceptions is required. As stated earlier, in the US this is done through publication of the Librarian of Congress' rulemaking in the Federal Register. In Australia, gazettal would be a comparable method – and now that the Government Gazette is available online, this would make access to the ruling relatively simple.
34. An alternative would be to contain a list of additional exceptions in the *Copyright Act Regulations*. This would also be broadly accessible as all federal legislative instruments are available on the internet.

#### **Possible Exceptions in Australia**

35. A review must be conducted in Australia to determine if there should be any further exceptions other than those envisaged by the proposed law. To achieve an additional exception, those affected must demonstrate that an adverse impact on their lawful use of copyright works has occurred as a result of being unable to circumvent TPMs.

As a body which represents rightsholders, CAL believes this initial review, calling for possible evidence arguing the need to create new exceptions should include a consultative process with the rightsholders whose works would be affected by any exception. CAL would therefore request an opportunity to respond to applications for exceptions which would affect our members' works.

36. There are two exceptions that CAL would be pleased to explore. In CAL's submission in response to the recent review into the possible adoption by Australia of a Fair Use doctrine, CAL stated its recognition that the print disabled are a particular group of users who may be unintentionally disadvantaged by the current operation of the *Copyright Act*. CAL stresses that for any exception to be implemented in Australia, an adverse impact in relation to a class of works should be demonstrated. The benefit in permitting circumvention of protection measures applied to that class of works must demonstrably outweigh the detriment to rightsholders of the affected works.

37. The ability of rightsholders to develop new business models for marketing their works should be protected as this will support the development of a vibrant Australian digital publishing industry.
38. Regarding possible exceptions to the prohibition on the use of TPMs, CAL is aware of the exception which has been granted in the US for the print-disabled where works are published in e-book format and do not have the read-aloud function activated. If a similar gap in the provision of works is perceived to exist in Australia, so long as the terms of such an exception were drafted in similar terms to the exception granted in the US for the needs of this particular class of users, CAL would support such an exception.
39. For works published in e-book format, the read-aloud function would have to be disabled. Publishers should be given the opportunity to provide these users with e-books which have read-aloud functions activated before the exception is to apply. However, the exception must not authorise the creation of an e-book where none exists, as this would encroach on the exclusive rights of the copyright owner contained in s. 31 of the *Copyright Act*. This exception should be as narrowly drafted as possible, and restricted to addressing any adverse impact demonstrated by the print disabled.
40. The second possible exception which might affect CAL's members and which CAL would potentially support, is where libraries encounter works held by them in digital files which have become unstable. For archiving purposes, they may require the ability to circumvent TPMs to make preservation copies.
41. If the committee considered that such an exception were desirable, CAL argues it should be drafted narrowly, only to meet the requirements of preservation. Before libraries are able to rely on such an exception, they should be required to check for commercial availability of the work in a stable digital format.