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BY:

Submission No. 18
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Secretary of Legal and Constitutional Affairs
Technical Protection Measures Inquiry
House of Representatives
Parliament House
Canberra
ACT 2600

Dear Secretary,

In response to your request for public submissions regarding the proposed amendments to the Technological Protection Measures (TPMs) exceptions as part of Australia's obligations through the Australia United States Free Trade Agreement (AUSFTA), please accept a submission on behalf of the National Gallery of Australia (here after the Gallery), a portfolio agency of the Department of Communications, Information, Technology and the Arts (DCITA).

Executive summary

The Gallery's activity in the areas specifically requested for comment in this enquiry are currently an integral part of this institution's operations and over the next 12 months they will increase considerably to enable the successful delivery of the Director's long-term vision.

In addition, the Gallery's continued commitment to preservation of its collection, including the Research Library collections, is its key concern. As we purchase or come into possession of more digital content, the Gallery' reliance on these exceptions will become even more important for it to meet those expectations set for us by both the Government and the public, that of providing wider access to and safely protecting this valuable collection.

The recent Australian National Audit Office (ANAO) *Safe and Accessible National Collections* report makes recommendations that can only be achieved through continuing to allow use of these exceptions in the same practical and industry-wide ways for which we currently utilise them.

Terms of Reference

(A) The activities of libraries, archives and other cultural institutions

The Gallery, as included in the definition of library and archives is currently entitled to provide copies of its material to other libraries and archives and to reproduce or copy this material for preservation purposes. Being able to perform this function enables the access to its collection to the public for future generations, without fear of deterioration of the valuable and often irreplaceable originals.

The Gallery believes the library and archive provisions in this area do not go far enough – the ability to circumvent material to facilitate purchasing decisions does not accurately reflect how institutions like the Gallery work. Often material is donated or gifted to the Gallery or already exists in the collection or that the material is too important NOT to purchase it, even if it has a TPM on it.

Also, digital material may be loaned from other institutions or companies to support exhibitions or other projects and no official purchase is made, however to protect the integrity and security of the original, a 'working copy' is often made, which is then made available to view by the public, generally on looped TV/plasma screens or dumb terminals on the Gallery premises. Should the ability to be able to circumvent some of this material we would be forced to use the original and expose it to damage by playing it 8-9 hours a day, continuous.

Similarly, as more and more artists move into digital media, the Gallery is collecting this new genre. The presence of an access control measure should not be the deciding factor to buy or not to buy a new digital work.

If exceptions did not exist for this kind of preservation purpose the Gallery would be required to go through laborious licensing to obtain appropriate permissions from the copyright holders and in most cases with multimedia works, there are multiple copyright holders.

In addition, the Gallery requires the ability to migrate the digital media from one format, for example, DVD to another DVD or other future stable storage device to comply with disaster recovery policies and to ensure issues of software and hardware obsolescence does not prevent future Gallery (or public) access or display. This would effectively mean that we would no longer be able to fulfil two of our major strategic goals, number 3, to Maintain and protect the national collection and number 4, Deliver outstanding displays and exhibitions.

(B) The activities of educational and research institutions

While the Gallery is not an educational institution, it does have a role to play in teaching and enhancing the public's awareness and knowledge of art in its collection. The Gallery has an Education department dedicated to creating educational material for each exhibition and for the general collection. The staff are integral to the creation of an exhibition's educational program to specifically target teachers to ensure they have access to appropriate teaching material for their students.

There is an increasing interest in and pressure on the Gallery to provide access to its collection, including ephemeral material held by the Research Library which includes a range of different media, via digital means to the public. Exceptions are made for particular groups such as those with disabilities and the Gallery has an obligation to make this material available to them, particularly if they are not local. Should this kind of service no longer be available those excepted parties may be forced to pay money and go to great lengths just to get hold of the same material purely for research which has no commercial impact on the creator's market.

It may also restrict the Gallery in ways in which it may provide this access, thereby making it unable to fulfil several of its major strategic goals including Goal 5, to Provide and promote access to the national collection.

(C) The use of databases by researchers

The Gallery has no comment on this issue.

(D) Activities conducted by, or on behalf of, people with disabilities

See B, above.

(E) The activities of open source software developers

The Gallery wishes to obtain access to certain software it has purchased to ensure interoperability with other existing pieces of software or hardware. The Gallery may also wish to develop software which automates specific workflows or processes in particular technological areas, such as digitising in the Imaging department, or to ensure that one database, hardware or software is able to talk to others.

As its digitisation projects expand and the Gallery's Digital Asset Storage Strategy (DASS) comes into effect in 2006 it will be imperative to have the ability and confidence to know that we are able to perform this circumvention when required to ensure the complete and successful implementation of this important gallery-wide strategy.

In addition, to this the Gallery wishes to explore the opportunity to create open source software to specifically suit its own needs and at the same time, comply with future disaster recovery requirements.

The Gallery's IT Policies and procedures require that all proposed and legally purchased software undergoes extensive security testing before it is permitted to be loaded onto the Gallery's secure network. As the access is purely for investigation purposes and is currently allowed in the Act, the Gallery believes this exception should be extended.

(F) Activities conducted in relation to regional coding of digital technologies.

Often the Gallery will acquire or borrow digital material for exhibition display or to be shown as part of a free film program for the public. In many cases the exhibition support material or related DVD / audio-visual material comes from overseas which requiring access to allow them to be shown on our zone's machinery within the Gallery premises. Often this material is historical and privately owned and not mass manufactured and therefore not commercially available and made for other country's zones.

Without the ability to circumvent this material the Gallery's public experiences will not be enhanced and the educational purposes and activities the Gallery is able to provide, will suffer.

This activity is in way commercial in nature and is more of an educational and value-added illustrative component to a visit to the Gallery, adding to the public's enjoyment of their visit.

The Gallery's Director, Ron Radford, has recently outlined his vision for the Gallery. It includes a major focus on collecting material from the Asia Pacific region to support the existing Australian collection. To support the art collection the Research Library is focusing on collecting research collection material, mainly digital media, from this area, in line with this vision and to support research. Without the ability to confidently collect this material, provide access to it and preserve it for the future, the Gallery will not be able to perform its basic functions which are outlined in the institution's strategic goals and set out in our governing Act.

Recommendations:

That the current exceptions be maintained and strengthened to allow the Gallery, through the library and archive exceptions, to deal with circumvention devices for the purposes of gaining access to the material to enable it to fulfil its Strategic goals (non-commercial preservation and administration) by:

- providing inter-library loan of digital material to other not-for-profit institutions;
- gaining access to material to support exhibition related use to enhance a visitor's experience;
- gaining access to digital material already in its collection, donated, purchased or loaned to the Gallery to make a working copy to ensure preserve the integrity of the original;
- to migrate digital media from one format to another under its disaster recover / preservation policies to ensure the long-term protection and accessibility of its collection;
- enable the Gallery to undertake routine security testing of software before installation;
- enable the Gallery to allow interoperability of its systems; and
- enable the Gallery to utilise material from other regional codes

Specifically, the Gallery wishes to obtain access to the material in the categories or 'works' (i.e. artistic and literary) and 'subject matter other than works' (i.e. cinematographic and general multimedia content).

The Gallery in no way wishes to enter into arrangements for the manufacturer, selling or distribution of circumvention devices. Its interest in these devices is purely for non-

commercial, educational, preservation and access purposes for the public's benefit, as per the Gallery's main objectives set out in its Strategic Goals 2004 - 2007 (found at <http://www.nga.gov.au/Home/Frameset.cfm?View=../Menus/Info.htm>) (attached to hard-copy submission).

The Gallery continues to respect and work within Australia's Copyright legislation and hopes that proposed narrowing of these provisions under the AUSFTA does not continue as it will only greatly reduce the ability for cultural institutions to perform and succeed in their key functions.

Should you wish to discuss any issues raised in this submission please do not hesitate to contact us.

Sincerely,

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