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Our Ref: DOJ 2000/06232
Author: Jeff Saville

OFFICE OF THE DIRECTOR GENERAL

16th Floor
141 St Georges Terrace
Perth WA 6000

GPO Box F317
Perth WA 6841

Telephone: 08 9264 1711
Facsimile: 08 9264 1121
www.justice.wa.gov.au

ABN: 70 598 519 443

Mr Peter Slipper MP
Secretary
House of Representatives
Standing Committee on Legal and
Constitutional Affairs
Parliament House
CANBERRA ACT 2600
Australia

Dear Mr Slipper

**HOUSE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS - INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES
EXCEPTIONS**

On 14 September 2005 the Secretary of the Attorney General's Department wrote to me bringing this review to my attention and requesting that I bring it to the attention of other agencies in the Western Australian government. On 27 September 2005 the matter was referred to the Public Sector Management Division of the Department of the Premier and Cabinet, which advised 24 agencies of the review and sought input from them.

The Department of the Premier and Cabinet is the agency in Western Australia responsible for the management of the whole of government statutory licences under s.183 of the Copyright Act 1968. The Department of Justice, through the State Solicitor's Office, advises the Department of the Premier and Cabinet in relation to those matters, and also advises agencies in the Western Australian government generally on copyright matters.

This submission is a joint submission from the Departments of the Premier and Cabinet and Justice. I understand that the Department of the Premier and Cabinet obtained an extension to the date for lodging this submission, although that extension has unfortunately now expired. In view of the responses

received from departments, it was felt appropriate to make this submission to you notwithstanding that it is a little out of time. I trust the Committee will nevertheless be able to consider this submission, as I understand that the Committee is required to report in February 2006.

Yours sincerely


Colin Murphy
A/DIRECTOR GENERAL

8 November 2005

**SUBMISSION TO THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS
INQUIRY INTO TECHNOLOGICAL PROTECTION
MEASURES (TPM) EXCEPTIONS**

**by the Western Australian Department of the Premier and Cabinet
and Department of Justice**

On 14 September 2005 the Secretary of the Commonwealth Attorney General's Department wrote to the Acting Director General of the Department of Justice referring to the inquiry being conducted by the House of Representatives Standing Committee on Legal and Constitutional Affairs concerning technological protection measures and requested that the Acting Director General bring the matter to the attention of other agencies in Western Australian Government. On 27 September 2005 the Department of Justice referred the matter to the Public Sector Management Division of the Department of the Premier and Cabinet, which division then referred the matter to 24 other agencies within the Western Australian Government. Of those 24 agencies, 14 responded. Five either had no comments, or expressed no concerns about the use of technological protection measures in relation to their agencies, whilst 9 of the agencies which responded did have concerns. These concerns are detailed further at the end of this submission.

TERMS OF REFERENCE

"The Committee is to review whether Australia should include in the liability scheme any exceptions based on Article 17.4.7(e)(viii), in addition to the specific exceptions in Article 17.4.7(e)(i) to (vii). The Committee must ensure that any proposed exception complies with Article 17.4.7(e)(viii) and 17.4.7(f)."

Article 17.4.7(e) of the Australia - United States Free Trade Agreement (AUSFTA) contains the provision which requires each Party to confine exceptions to any measures implementing sub-paragraph (a) to the specific activities or purposes mentioned in sub-subparagraphs (e)(i) to (e)(vii), and then specifies a more general paragraph in sub-subparagraph (e)(viii) of "non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or

administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding."

Copyright Owners Rights

Section 31 of the *Copyright Act 1968* (the *Copyright Act*) specifies the nature of copyright in original works. Sections 85 to 88 specify the nature of copyright in subject-matter other than works. Those rights in s.31 are generally, to reproduce work in a material form, to publish a work, to perform a work in public, to communicate a work to the public, to make an adaptation of a work, and to reproduce, publish, perform in public or communicate an adaptation of a work. There are also rights to enter into commercial rental arrangements in respect of computer programs, and literary, dramatic or musical works reproduced in sound recordings.

Similarly, the rights of an owner of copyright in a sound recording in s.85 are to make a copy, to cause the recording to be heard in public, to communicate the recording to the public, and to enter into a commercial rental arrangement in respect of the recording. In relation to films, s.86 provides that copyright is the exclusive right to make a copy of the film, to cause the film to be seen and heard in public, and to communicate the film to the public. Section 87 tells us that copyright in broadcasts is the exclusive right to make a film or a copy of a film of a television broadcast, the exclusive right to make a sound recording or a copy of a sound recording of a sound broadcast, and in the case of both television and sound broadcasts, to rebroadcast it or communicate it to the public otherwise than by broadcasting it. Section 88 indicates that copyright in a published edition is the exclusive right to make a facsimile copy of the edition.

Nowhere in the *Copyright Act* is it specified that it is a copyright owner's copyright right to prevent access to a work or other subject matter. Of course, that does not preclude copyright owners from preventing access to their copyright materials through the use of encryption, passwords or other technological locks. That is quite legal. However the AUSFTA requires that it be made a civil and criminal offence to circumvent a technological protection measure employed by a copyright owner to prevent access to a copyright work. The effect of this is to elevate the right of access to a copyright work to a right of copyright. This should not be so, as access prevention measures do not specifically target infringing uses of copyright materials.

Copyright Users Rights

Just as the *Copyright Act* specifies a number of rights which it gives to copyright owners, it also gives many rights to users of copyright materials. Some of those provisions are sections 14 (which on one view is a right given to

copyright users to copy, communicate, etc insubstantial portions of a work, or on the other hand can be seen as a right given to a copyright owner to enforce copyright rights in relation to part only of a work in the same manner as the owner would be entitled to in respect of the whole of the work), section 28, sections 40, 41, 42, 43, 43A, 43B, 44, 45, 46, 47, 47B, 47C, 47D, 47E, 47F, 48A, 49, 50, 103A, 103B, 103C, 104, 104A, 105, 106, 107, 108, 109, 110, 111, 111A, 111B, 112, Part VA and Part VB, and of course section 183. This is by no means an exhaustive list of the provisions which give users rights in copyright materials. Some of these uses are free, and some, such as under Parts VA and VB and s.183, require payment.

In *Law Society of Upper Canada v. CCH Canadian Ltd* 60 IPR 650 the Supreme Court of Canada in 2004 discussed the nature of the rights accorded to owners and users of copyright under the *Canadian Copyright Act*. At paragraphs 10 to 13 McLachlin C.J., giving the judgment of the Court, said –

"Binnie J. recently explained in *Theberge*, supra, at paras 30-31, that the *Copyright Act* has dual objectives:

The *Copyright Act* is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator ...

The proper balance among these and other public policy objectives lies not only in recognising the creator's rights but in giving due weight to their limited nature.

In interpreting the *Copyright Act*, courts should strive to maintain an appropriate balance between these two goals. Canada's *Copyright Act* sets out the rights and obligations of both copyright owners and users. Part I of the Act specifies the scope of a creator's copyright and moral rights in works ...

Part III of the *Copyright Act* deals with the infringement of copyright and exceptions to infringement. Section 27(1) states generally that "it is an infringement of copyright for any person to do, without the consent of the owner of the copyright, anything that by this Act only the owner of the copyright has the right to do". More specific examples of how copyright is infringed are set out in s.27(2) of the Act. The exceptions to copyright infringement, perhaps more properly understood as users' rights, are set out in ss.29 and 30 of the Act. The fair dealing exceptions to copyright are set out in ss.29-29.2. In general terms, those who deal fairly with a work for the purpose of research, private study, criticism, review or news reporting, do not infringe copyright. Educational institutions, libraries, archives and museums are specifically exempted from copyright infringement in certain circumstances: see ss.29.4-30 (educational institutions), and ss.30.1-30.5. Part IV of the *Copyright Act* specifies the remedies that may be awarded in cases where copyright has been infringed. Copyright owners may be

entitled to any number of different remedies such as damages and injunctions, among others.

This case requires this court to interpret the scope of both owners' and users' rights under the *Copyright Act*, including what qualifies for copyright protection, what is required to find that the copyright has been infringed through authorisation and the fair dealing exceptions under the Act."

And again at paragraph 48, the Chief Justice said –

"The fair dealing exception, like other exceptions in the *Copyright Act*, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and users' interests, it must not be interpreted restrictively. As Professor Vaver, *supra*, has explained, at p.171: "user rights are not just loopholes. Both owner rights and user rights should therefore be given the fair and balanced reading that befits remedial legislation.""

The court went on to give a generous interpretation of "research" and "fair dealing".

TPMs and Users Rights

It is submitted that, whatever may be the case with the United States legislation which has a history different from the legislation in Canada and Australia, the approach of the Canadian Supreme Court is the correct approach, and should be adopted as far as is possible by the Committee in considering the granting of exceptions to liability for circumvention of technological protection measures. To do otherwise will allow copyright owners using TPMs to totally negate the rights which the *Copyright Act* currently gives to copyright users. It must be assumed that more and more copyright material will be made available in electronic form, and more and more of that material will incorporate TPMs which prevent access, and therefore prevent both legal and illegal use of copyright material, even if the use under provisions such as Part VB and s.183 will result in a payment of a licence fee to a copyright owner. It is submitted that this is especially the case where the right to prevent access to copyright material is not itself a copyright right. Unless wide exceptions are introduced, circumvention of TPMs will create crimes even though no infringement of copyright whatever results from the circumvention. This does not seem logical or appropriate.

Given the number of DVD players which have been sold in Australia which have had the regional coding turned off or "circumvented" prior to sale, often by large department store chains, one has to query whether the use of such DVD players will itself become a criminal offence, even to play DVDs coded for Australia, in the absence of appropriate exceptions.

As other Submissions have pointed out, any exemptions to circumvention liability will be meaningless if there is no accompanying exception to the manufacture or marketing of the circumvention devices which will be used to allow that circumvention in respect of which an exception to liability exists.

The "Guide to Copyright and Patent Law Changes in the US Free Trade Agreement Implementation Bill 2004", Current Issues Brief No. 3 2004-05 published by the Information and Research Services of the Parliamentary Library at pages 31, 32 and 33 under the heading "Extension of Monopoly Rights" also shows that the use of TPMs can have anti-competitive results, and can in fact be used for the very purpose of creating monopoly rights, totally contrary to the concept of free trade.

Another publication of the Information and Research Services of the Parliamentary Library, Research Paper No. 14 2003-04 entitled "Intellectual Property Rights and the Australia - US Free Trade Agreement" contains relevant information setting the scene for the Free Trade Agreement, and as such is perhaps useful in determining how the Australian Parliament should act when implementing the Free Trade Agreement. Under the heading "So what is the US motive?", the paper says –

"It is important to recognise that many of the measures included in the AUSFTA are not necessarily seen as addressing a problem in the Australia-US bilateral relationship. Rather, there appear to have been pressures on the US negotiators to establish strong IPR regimes as precedents for further free-trade agreements that the US may want to negotiate. A very important one coming up is the Free Trade Area of the Americas, which is intended to include the 34 countries in the continent. The Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3) has been working closely with the US negotiators. This body includes representatives of the Recording Industry Association of America, the Intellectual Property Owners Association, Levi Strauss and Company, Pfizer, Inc., Eli Lilly and Company, Merck & Company Inc., and Time Warner. The committee's role was to give the President and Congress an 'advisory opinion as to whether and to what extent the agreement [AUSFTA] promotes the economic interests of the United States'. The IFAC-3 commented on the AUSFTA, saying:

IFAC-3 strongly supports the chapter on intellectual property and believes that, on the whole, it establishes key precedential provisions to be included in the other FTAs now being negotiated, including the FTAA. IFAC-3 wishes to underscore the importance that it attaches to a close working relationship between IFAC-3 and industry, on the one hand, and U.S. negotiators, on the other, in ensuring that the model FTA intellectual property text, which has been carefully developed through the course of negotiation of six FTAs, continues to form the basis for these other agreements.³⁴

Moreover, the IFAC-3 observes that while FTAs are a labour-intensive means of negotiating:

FTA negotiations provide the most effective approach currently available to the United States for improving global intellectual property protection. The negotiation of an individual FTA provides the opportunity to deal with specific intellectual property concerns that U.S. industry may have in the particular negotiating partner.³⁵

In an important opinion piece, US Trade Representative Robert Zoellick reinforced this theme and made it clear that US frustration with multilateral negotiations has caused it to pursue FTAs and so win concessions on items that have been hard to win in multilateral fora.³⁶

Under the heading "Technical protection measures" the Research Paper points out that Article 17.4.7 of the AUSFTA is based on the US *Digital Millennium Copyright Act 1998* (DMCA). The research paper continues at page 16 –

"The major problem with ETMs is that they give rights well beyond the rights normally associated with copyright. There are allegations that, for example, the DMCA has been abused by big business in the US. Rather than being used to counter piracy as it was intended, the allegations are that the DMCA is being used to preserve monopoly power on the part of copyright holders. In Australia there has been much concern about the practice of regional coding, by which a manufacturer divides the world into regions so that CDs and players can work together only if purchased in the same region. CDs purchased in one region will not work in another region. Australian consumers were briefly able to overcome those restrictions on Sony Playstations by purchasing a 'mod chip' that overcame the region coding. Sony took action, but the Federal Court accepted that the effect of regional coding was to restrict the playing of games, not to restrict copying of games and was therefore not worthy of protection under law.⁵⁰ That decision was overturned by the Full Court on appeal. ACCC chairman Graeme Samuel expressed disappointment, saying: 'this decision now means Australian consumers will be unable to enjoy games legitimately bought overseas, as well as legitimate back-up copies'.⁵¹ He also expressed concern that the decision may have the unintended consequence of eroding the gains on parallel imports (see section headed 'Parallel importation' at p. 18). Using rights management information, such things as computer programs could also be sold as an Australian version playable on Australian delivered computers and made inoperable if used with software purchased overseas.

Sony has also been active in the US, using DMCA litigation or the threat of it to stop software developers allowing Sony games to be played on ordinary PCs, and likewise for other games to be played on Sony Playstations.⁵² Restrictions on encryption have the immediate effect of denying a lot of the 'fair use' exemptions that normally apply under copyright legislation, such as making back-ups and recording for later viewing, as well as 'activities undertaken for purposes such as criticism, comment, news reporting,

teaching, scholarship or research'.⁵³ In the past, former ACCC chair Professor Allan Fels has expressed concern about the emerging practice of inserting copy protection measures into CDs, which has the effect of making illegal copying more difficult but also prevents the use of back-up copies and makes CDs unplayable on some equipment.⁵⁴

Whilst the US *Copyright Act* has its concept of "fair use" as the grant of rights to copyright users, that concept, although now appearing in statutory form in s.107 of the US *Copyright Act* of 1976, was originally judge made law.

"Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts. On the other hand, the courts have evolved a set of criteria which, though in no case definitive or determinative, provide some gauge for balancing the equities. These criteria have been stated in various ways, but essentially they can all be reduced to the four standards which have been adopted in section 107." [Copyright - Cases and Materials - 6th edition Robert A Gorman and Jane C Ginsburg 2002 Foundation Press at page 615]

Unlike the United States, Australia has a series of express exceptions giving rights to copyright users some of which are mentioned above. Whilst recourse can be had in the US to the courts under the ill defined "fair use" doctrine, in the absence of wide ranging exceptions to liability for circumvention of TPMs, Australian copyright users will see their users' rights under the *Copyright Act* effectively removed from them every time a copyright owner provides copyright material which incorporates a TPM. This would fundamentally alter the balance between copyright owners rights and copyright users rights in this country in a manner presumably not intended by those negotiating the AUSFTA for Australia.

Article 40, paragraphs 1 and 2 of the TRIPS Agreement states –

- "1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.
2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices, which may include for example grant back

conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member."

Therefore, it would appear appropriate for Australia to legislate for generous exceptions to liability for circumvention of TPMs where otherwise those TPMs may result in anti-competitive practices.

AGENCY RESPONSES

Whilst it appears no examples of TPMs causing problems have yet been encountered, a number of Western Australian Government agencies foresee that in the future this would be quite possible and that their rights, especially under Parts VA or VB or s.183 to use the paid statutory licences for using copyright materials would be totally negated. Some of the individual agency responses are as follows –

1. The State Records Office was concerned that if government records were created in a particular format, the State Records Office would have to acquire a separate licence for that format if it used an effective technological measure. The contents of the record would be the copyright of the government, but the format could cause a problem which under the current circumstances could be answered by reliance on s.183.
2. The Western Australian Police gave examples of the need for immediate use of archival media footage to identify or locate a missing person, or in a search for a person wanted for a criminal act, where time frames do not allow the obtaining of permission. TPMs could impede this use.

Also the use of encryption detection programs or devices may be needed in relation to the investigation of cyber-predator criminal matters such as children's pornography being circulated via the world wide web, irrespective of whether detection programs or devices are subject to copyright protection. The protection of s.183 should be retained.

3. The Department of Conservation and Land Management considered the use of s.183 should remain available regardless of TPMs. Examples given included where a copyright owner has given permission to use the material, but the material has a TPM installed; where regional coding of DVDs prevents access to legitimately acquired materials; where TPMs encourage the development of anti-competitive behaviour in industries that deal in copyright (eg make the

use of open source software more difficult in networks and systems dominated by proprietary software); and where TPMs prevent format change and thus prevent usage of materials in offices that do not have the most up to date computers and digital equipment.

4. The Fisheries Department also thought that the ability to rely on s.183 should be retained, and expressed concern that some information from other government agencies may incorporate TPMs.
5. The Department of Education and Training endorsed the submission by the MCEETYA Copyright Advisory Group giving the view of schools and TAFE colleges in Australia, and also expressed concern that the AUSFTA has fundamentally shifted the balance in the *Copyright Act* between the interests of copyright owners and the public, to the detriment of public access to information and the operation of educational institutions. As a practical example, the use of DVDs from other countries being prevented by regional coding was given. Another concern was the prospect of the increasing use of TPMs by copyright owners to "lock up" and hence "lock out" the content and only allowing access through expensive licences. It was also indicated that it is now possible to place TPM controls on off-air broadcasts, especially in digital formats.
6. The Department of Indigenous Affairs indicated that many proponents and their professional advisers and consultants increasingly prepare applications in electronic format or include information in electronic form. If password protected or otherwise encrypted, the Department of Indigenous Affairs may not be able to gain access to them or reproduce them. This will lock up information which should be available to the public.
7. The Disability Services Commission was concerned that those with print disabilities should not be detrimentally affected by the changes required by AUSFTA in relation to TPMs. The example of the US Copyright Office granting an exemption in relation to the read aloud function of an e-book was mentioned favourably.
8. The Library and Information Services of Western Australia had concerns with archives of websites. A concern was expressed that it was unclear whether a format with TPMs, once it had been transferred as an archive, that the archival institution will be able to access, provide public access, copy/preserve, migrate and do the other necessary things which archival institutions are set up to do. Similarly plans for systematic preservation of physical format e publications by copying for migration will also be prohibited under the new arrangements.

9. The Department of Health had concerns with the effect of TPMs on encryption and privacy, backing up data and software for disaster recovery capabilities, and record keeping where technology becomes obsolete.

CONCLUSION

A broad and generous view of the exceptions to be made available should be taken by the Committee in an attempt to maintain the current balance in the *Copyright Act* between the rights of copyright owners and the rights of copyright users. TPMs target the rights of legitimate users and will effectively re-write large portions of the *Copyright Act* by negating the ability of copyright users to use the rights provided to them in specific provisions of the *Copyright Act*.

As part of this broad and generous view, the Committee should take a realistic view of what is a credibly demonstrated likely adverse impact on non-infringing uses. The particular class of copyright material concerned should also be interpreted broadly, such that copyright material presented in electronic form should suffice as the class.