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BY: LACA

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

Dear Sir/Madam

**Re: Submission to Review of Technological Protection Measures  
Exceptions**

I am making this submission to the above review due to my concern that the proposed increase in the scope of the provisions prohibiting the circumvention of Technological Protection Measures (TPMs) in the *Copyright Act 1968* (Cth) (the Act) poses a significant threat to Australia's future cultural, intellectual and technological development.<sup>1</sup> Copyright legislation exists to provide a balance between rights granted to creators to encourage further creativity, and rights granted to, or lack of restriction on, users in order to further the social, cultural and intellectual development of society. It is not appropriate for copyright legislation to be viewed as predominantly a mechanism for protecting property rights, it is a mechanism for protecting Australia's overall cultural and intellectual future. The changes being made to the Act as a result of the Australia-United States Free Trade Agreement (FTA) must be carefully structured to preserve the appropriate balance in Australian copyright legislation.

I am aware that the committee has only been asked to review the introduction of exceptions to the TPM liability scheme. However it is not possible to respond to the question of what exceptions should be introduced into the liability scheme without also discussing the drafting of the revised definition of

<sup>1</sup> The author is a solicitor at Swinburne University of Technology and a Research Fellow at the Centre for Media and Communications Law at the University of Melbourne and completed an LLB(Hons) thesis *Copyright and the Digital Agenda: Threats to Economic and Private Freedoms* in 2003. This submission contains my own personal views not those of my employers.

a technological protection measure, possible changes from the government's inquiry into Fair Use and Other Copyright Exceptions,<sup>2</sup> and the potential impact these changes to the Act will have on those who may wish to seek specific exemptions to the anti-circumvention provisions. My submission is divided into the following four areas:

1. Technological Protection Measures and the public domain
2. Use of TPMs for purposes other than protecting copyright
3. TPMs and fair dealing/fair use exceptions
4. Protecting the activities of cultural and educational organisations

### **1. Technological Protection Measures and the public domain**

The proposed changes to the provisions prohibiting the circumvention of Technological Protection Measures (TPMs) in Australian copyright legislation resulting from the FTA, appear likely to increase the capacity of owners of copyright to extend their monopoly control over copyright works<sup>3</sup> by giving them rights more extensive than those previously provided by Australian copyright legislation. As a result there is the potential for a consequential reduction in the existing freedoms of copyright users to access and use copyright material. This threatens the social contract underlying copyright law which provides only a limited monopoly to copyright owners to encourage further creativity, in return for the maintenance of an unregulated area outside of those monopoly rights enabling the use and re-creation of intellectual property for the good of society.

In order to preserve the balance underlying copyright law, the Australian government should act to ensure that copyright owners cannot take advantage of the anti-circumvention provisions to 'lock up' material in which copyright does not subsist (works in the public domain). Despite suggestions that because only an 'owner' of copyright can take action under the TPM liability scheme stronger anti-circumvention provisions pose no threat to works

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<sup>2</sup> Attorney-General's Department, *Fair Use and Other Copyright Exceptions Issues Paper*, May 2005, <<http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>> (at 20 October 2005)

<sup>3</sup> In this submission, references to 'copyright works' should be read as referring to both works and subject-matter other than works as referred to in Parts III and IV of the *Copyright Act* 19968.

in which copyright no longer subsists<sup>4</sup>, TPMs do pose a threat to the accessibility of public domain works. In this era of content aggregation by large copyright owners, the practical effect of the legislation is highly likely to result in material in the public domain being locked behind technical access control mechanisms along with other material and, due to the prohibition on trading in circumvention devices, citizens having no way of circumventing the TPM even if the prohibition does not legally apply. In addition the same TPM could be used on different categories of works, so a copyright owner could simply take action on the basis of an item in which copyright subsists and therefore assert control over any other material protected by that TPM. The prohibition on circumventing TPMs would then effectively prevent citizens gaining access to publicly owned material, and provide an undeserved economic benefit to private individuals or corporations. The Australian government should act to protect citizens' lawful access to the public domain by either prohibiting the placement or retention of TPMs on material which is in, or comes into, the public domain, or by the provision of an exception to the prohibition of the circumvention of TPMs for users wishing to access the class of works in the public domain. If innovative users wish to create a marketable product using public domain material, any use of TPMs should be restricted to the 'value-added' components of the product, and not be allowed to restrict access to the public domain material itself.

The public domain 'consists of a great, invaluable bounty of knowledge, art and culture. Its value lies in the paradoxical fact that it is openly accessible to all.'<sup>5</sup>

It is important that the economic concerns of certain commercial operations at this particular point in our history are not used as a justification to effectively lock away human intellectual capital from this moment in time onwards. The committee should consider how claims by current copyright owners that it is better for them to be allowed to apply 'locks' to copyright material than risk access by potential 'pirates', should be properly balanced against the risk that

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<sup>4</sup> US Library of Congress, 68 FR 211, 62015 (2003), Leif Gamertsfelder, 'Digitising Copyright Law – an Australian Perspective Part 2' (2001) 14(1) *Australian Intellectual Property Law Bulletin* 3.

<sup>5</sup> David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth* (2002) 119.

access to important intellectual and creative works may be effectively locked away from Australia's future creative and intellectual innovators.

... now that the distinctions among accessing, using and copying have collapsed, copyright policy makers have found themselves faced with what seems to be a difficult choice: either relinquish some control over copying or expand copyright to regulate access and use, despite the chilling effect this may have on creativity, community and democracy.<sup>6</sup>

The rate of transition to digital media in many areas of intellectual product means that it is not sufficient to argue, as has been done in the US, that public domain material is generally also available in another form, and therefore users are not necessarily disadvantaged.<sup>7</sup> Already many libraries in Australia only subscribe to certain information by buying access to digital databases rather than acquiring hard copies, and soon many films and sound recordings may not even be available in analogue format. Most of these digital products are, or will be, protected by some form of TPM limiting users' rights. If public domain material is to remain freely accessible, users will increasingly need the ability to circumvent or to legally require the removal of TPMs, as such material will only be available in these locked formats.

**Therefore an exception should be provided for accessing material in the public domain.**

<b>Likely adverse impact of anti-circumvention provisions on non-infringing use</b>	An ever increasing reduction in the accessibility of works in the public domain, resulting in an impoverishment of human creative and intellectual heritage.
<b>Class of copyright material to which exception relates</b>	Works, or subject matter other than works, in which copyright does not subsist.
<b>Whether suggested exemptions impair enforcement of TPM</b>	No person or organisation should be permitted to use a TPM to restrict access to a work in the public domain

<sup>6</sup> Siva Vaidhyanathan, *Copyrights and Copywrongs* (2001) 152-153.

<sup>7</sup> US Library of Congress, 65 FR 209, 64572 (2000).

## 2. Use of TPMs for purposes other than protecting copyright

The recent High Court decision in *Sony v Stevens*<sup>8</sup> has highlighted a situation where a copyright owner attempted to utilise the anti-circumvention provisions in Australia's copyright legislation to control areas of consumer activity previously unregulated by copyright law.

Sony sought to impose restrictions on the ordinary rights of owners, respectively of the CD ROMS and consoles, beyond those relevant to any copyright infringement<sup>9</sup>

The High Court pointed out that unless the definition of TPMs in the Act is defined narrowly, the anti-circumvention prohibition could potentially be used to restrict activities which do not infringe copyright law. It is important for the government to take this into account when re-drafting the definition of TPM in the Act in response to the FTA. Copyright legislation should not provide a defacto legal mechanism for copyright owners to protect other aspects of their business, to potentially disadvantage consumers or competitors or to undermine other government policies such as trade practices and parallel importing legislation. It should also be noted that the increasing granularity of uses which copyright owners are able to control through the use of TPMs or Rights Management Information (RMI) can provide the ability to restrict both infringing and non-infringing uses through the one mechanism. In a US case concerning usage controls applied to an eBook, the court noted that the publisher could chose to 'grant or withhold a range of privileges from the consumer'.<sup>10</sup> These included the ability to copy the eBook, to print it out in whole or in part, to 'lend' it to another computer on the network and to have it read audibly by a speech synthesizer program. Interestingly these controls have already been applied to eBook versions of books in the public domain.<sup>11</sup>

The government should ensure that the current re-drafting of the anti-circumvention provisions in the Act favours a narrow interpretation and

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<sup>8</sup> *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (6 October 2005)

<sup>9</sup> *Ibid* [175] (Kirby J)

<sup>10</sup> *US v Elcom Ltd a.k.a. ElcomSoft Co Ltd and Sklyarov* 203 F.Supp. 2d 1111 (N.D. Cal 2002) 2

<sup>11</sup> Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (2004) 148-153.

ensures that TPMs cannot be used by copyright owners to restrict existing freedoms of consumers.

A technical regional coding mechanism such as was used on Sony Playstation 2 games in *Sony v Stevens* is also used on audio-visual material made available on DVDs and could potentially be used for other media. Regional coding, or any conduct which potentially disadvantages consumers or removes freedoms which had previously been available to citizens, should not be protected by copyright legislation. Just as a US courts considered that anti-circumvention provisions in the DMCA should not be used to stop a competitor from creating a generic printer cartridge,<sup>12</sup> the Australian government should be wary of drafting copyright legislation which has the potential to provide protection for a TPM which can be used for any purpose other than protecting the exclusive rights of copyright owners.

**Therefore unless the definition of a TPM provides appropriate protection, an exception should be provided for accessing material protected by a TPM which has any purpose other than to prevent copyright infringement.**

<b>Likely adverse impact of anti-circumvention provisions on non-infringing use</b>	Uses of copyright material which were previously unregulated by copyright law can be prohibited by copyright owners.
<b>Class of copyright material to which exception relates</b>	Works, or subject matter other than works, protected by a TPM which has a purpose other than to prevent the infringement of copyright.
<b>Whether suggested exemptions impair enforcement of TPM</b>	Those implementing TPMs should be aware that a TPM which has a purpose other than to prevent the infringement of copyright will not be provided with protection under the Act.

<sup>12</sup> *Lexmark v Static Controls Corp* 387 F3d 522 (6<sup>th</sup> Cir 2004)

### 3. TPMs and fair dealing/fair use exceptions

The Australian government is currently considering submissions made to its Inquiry into Fair Use and other Copyright Exceptions<sup>13</sup> in response to concerns raised during hearings on the introduction of the FTA, that the lack of a fair use right as available in the USA restricted the rights of Australian citizens to use copyright material.<sup>14</sup> The inadequate legal protection for Australian users who wish to exercise private non-commercial uses of material outside of the narrow fair dealing provisions currently available in the Act,<sup>15</sup> demonstrate how changes in technology and the contemporary social consumption of media have overtaken the drafting of the Act. As a result many aspects of Australian copyright legislation are ignored daily by the vast majority of the population.

Technology, heedless of law, has developed modes that insert multiple acts of reproduction and transmission – potentially actionable events under the copyright statute – into commonplace daily transactions. Most of us can no longer spend even an hour without colliding with the copyright law.<sup>16</sup>

If the government decides to incorporate some form of broader exception into the Act similar to the fair use exception provided in the US, then it would be unfortunate if the enactment of the stronger anti-circumvention provisions under the FTA were to almost simultaneously render that exception effectively unusable in the digital environment. In the US, courts have recognised that the anti-circumvention provisions in the Digital Millennium Copyright Act (DMCA)<sup>17</sup> have the potential to restrict the exercise of fair use; 'The use of technological means of controlling access to a copyrighted work may affect

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<sup>13</sup> Attorney-General's Department, *Fair Use and Other Copyright Exceptions Issues Paper*, May 2005, <<http://www.ag.gov.au/agd/WWW/agdhome.nsf/AllDocs/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument>> (at 20 October 2005)

<sup>14</sup> Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia, *Report 61 The Australia-United States Free Trade Agreement* (2004) 233-238.

<sup>15</sup> *Copyright Act* 1968 Part III Div 3, Part IV Div 6.

<sup>16</sup> Jessica Litman, 'The Exclusive Right to Read' (1994) 13 *Cardozo Arts & Entertainment Law Journal* 29.

<sup>17</sup> 17 USC §§ 1201-05 (1998)

the ability to make fair uses of the work.<sup>18</sup> In light of the recent consideration of the need for a 'fair use' or similar exception in Australia, it would be appropriate for the committee to consider ensuring that the anti-circumvention provisions cannot be used to effectively remove that right in the digital world. The solution may not just be to provide an exception to the anti-circumvention provisions for fair dealing or fair use, but to take a more innovative approach such as requiring those implementing TPMs to provide some form of limited access. Copyright owners are already demonstrating that this is technically possible through their implementation of increasingly granulated control mechanisms to protect their own rights, therefore they could also be required to use these mechanisms to protect the rights of copyright users.

... there are more effective ways of restoring the copyright balance than creating exceptions to the anti-circumvention provisions. These include imposing limits on the situation in which copyright owners can use technological protection measures, and on the amount of works they can protect, and also the provision of direct government subsidies for making work available online.<sup>19</sup>

**Therefore some form of exception or other appropriate mechanism should be provided to ensure fair dealing/fair use is maintained in the digital world.**

<p><b>Likely adverse impact of anti-circumvention provisions on non-infringing use</b></p>	<p>Any decision to create or extend private use exceptions as a result of the government's inquiry into Fair Use and Other Copyright Exceptions will be undermined in the digital environment.</p>
<p><b>Class of copyright material to which exception relates</b></p>	<p>That portion of works, or subject matter other than works, which should be available to users under Australian legislating permitting fair use/fair dealing or equivalent.</p>

<sup>18</sup> *Universal City Studios, Inc. v Reimerdes* 111 F.Supp. 2d 346 (S.D.N.Y. 2000) 41

<sup>19</sup> Forsyth, M., 'The Digital Agenda Anti-circumvention Provisions: A Threat to Fair use in Cyberspace', (2001) 12/2 *Australian Intellectual Property Journal* 82, 103.



<b>Whether suggested exemptions impair enforcement of TPM</b>	Those implementing TPMs should be required to ensure the technology does not prohibit the exercise of fair use rights.
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#### **4. Protecting the activities of cultural and educational organisations**

The Australian legislation currently provides specific exceptions to copyright infringement for certain activities of cultural and educational organisations, and a number of these are recognised in the anti-circumvention provisions in the existing s. 116A. It is particularly important to the future operations of these organisations that these exceptions are not eroded by the re-drafting of the Act or the use of TPMs. All the exceptions previously provided for 'permitted purposes' under s. 116A(3)(b)(v) should be retained in the revised version of the Act.

There is also one specific example of a TPM which could restrict the legitimate activities of Australian educational institutions in the future which should be added to these exceptions. The current policy of the Australian government to move to digital broadcasting for free-to-air television broadcast could potentially lead to a significant erosion of the rights of Australian educational organisations to make non-infringing uses of copyright material under Part VA of the Act when coupled with the anti-circumvention provisions. The European organisation which regulates the DVB digital broadcasting standard<sup>20</sup> which has been adopted for use in Australia is currently investigating the use of a technological control mechanism called Content Protection Copy Management (CPCM). This is similar to the broadcast flag previously proposed for use in the ATSC digital broadcast system used in the US, but it appears likely to provide broadcasters with a much greater control over consumer re-use.

<sup>20</sup> Digital Video Broadcasting Project <<http://www.dvb.org/index.php?id=1>> (at 21 October 2005)

DVB CPCM by contrast, is specifying remarkably fine-grained and elaborate means by which broadcasters can control the detailed functionality of receiving devices.<sup>21</sup>

If the CPCM was introduced into Australian free-to-air broadcasts, educational institutions could potentially be restricted in the way they use broadcasts they legally have the right to copy and re-use under Part VA, and for which payment is made to the collecting society Screenrights. Restrictions proposed under CPCM are reported to include commands such as 'Copy Once', 'Copy Never', 'Proximity Control' and 'View No More' and could restrict use to 'authorised' networks.<sup>22</sup> These types of restrictions have the potential to reduce the ability for educational institutions to engage in public debate by reducing their ability to access free-to-air television, which is of particular concern in a country like Australia with such a strong culture of universal access to broadcast television.

In addition the government should be careful to ensure that the anti-circumvention provisions do not restrict the ability of educational institutions to undertake legitimate scientific research including bona fide research into the operation of copy protection and computer security software. Cultural and educational organisations also require specific exceptions which will allow circumvention of TPMs in situations where media or access controls have become obsolete.

The activities of cultural and educational institutions are a critical part of our democratic society and it is imperative that the increasing use of digital media does not reduce the ability of these organisations to engage with material protected by copyright. These institutions must have access to appropriate exceptions from the anti-circumvention provisions for all their legitimate activities. Cultural and educational organisations have a long history of complying effectively with the terms of their existing exceptions. In particular

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<sup>21</sup> Cory Doctorow, Electronic Frontier Foundation *The Digital Video Broadcasting Project Content Protection and Copy Management: a stealth attack on consumer rights and competition* <[http://www.eff.org/IP/DVB/dvb\\_critique.pdf](http://www.eff.org/IP/DVB/dvb_critique.pdf)> (at 20 October 2005) 4.

<sup>22</sup> Ibid 7.

the rights provided to educational institutions under Part VA and Part VB of the Act are paid for, and used under terms approved by copyright owners.

**Therefore exceptions should be provided for the legitimate activities cultural and educational institutions.**

<b>Likely adverse impact of anti-circumvention provisions on non-infringing use</b>	Inability of cultural and educational institutions to exercise rights provided under the <i>Copyright Act</i> which are necessary for their proper functioning in Australian society.
<b>Class of copyright material to which exception relates</b>	Works, or subject matter other than works, legally accessible by cultural or educational institutions under existing exceptions, particularly Part VA & VB and any appropriate additional exceptions.
<b>Whether suggested exemptions impair enforcement of TPM</b>	Australian cultural and educational institutions have a long history of working with copyright owners to ensure that usage rules protecting the rights of copyright owners are correctly applied.

### **Conclusion**

It is important that the changes to the anti-circumvention provisions in the Act resulting from the FTA are not permitted to damage the balance struck in Australian copyright law between the temporary monopoly provided to copyright owners and the rights provided to users.

The public interest requires a balance between the public domain and private rights. It also requires a balance between the free competition which is essential for economic vitality and the monopoly rights granted by intellectual property laws.<sup>23</sup>

In addition technology in the area of TPMs is changing rapidly and it is difficult for copyright users to predict every likely or actual adverse impact on non-infringing uses of copyright material which could occur in the near future.

<sup>23</sup> The Adelphi Charter on Creativity, Innovation and Intellectual Property, <<http://www.adelphicharter.org/default.asp>> (at 20 October 2005)

Because of this the Australian government should put in place a mechanism which enables a review of requests for necessary exceptions more regularly than the three year review period undertaken by the Library of Congress in the US under the DMCA. Also once approved, exceptions should not be removed unless challengers are able to provide sufficient evidence of actual harm as part of a public review process.

I thank the committee for the opportunity to make a submission to this review.

Yours sincerely

Robin Wright