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Australian Libraries' Copyright Committee

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REVIEW OF TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS

Supplementary Comments

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An Exception for Consumers

An exception for consumers should adequately cover a consumer's use of legitimately acquired property. Technologies on the market such as iPods, and more recently 'home movie servers', allow consumers to place legitimately purchased works onto an alternative device for use. Such technologies are on the market and consumers should not be turned into criminals if they format shift legitimately acquired works so that they are more easily accessible to them.

To provide an example of the issues that may arise with TPMs and circumvention devices:

> A CD is 'copy-protected' by decreasing the quality so that it is not able to be copied onto a consumer's computer hard-drive. The copy-protection also means that the consumer can't play the CD in his/her car because of the technological differences between the CD player in the car and the CD player attached to the stereo at home. Consumers who have legitimately bought such CDs should be able to utilise software to effectively improve their quality so that they can listen to it either through their hard-drive or via their car. Indeed, some consumers may not have access to the particular type of stereo that the CD is able to be played on, making the work useless to the consumer.

This scenario was recently seen when music publisher Sony BMG put XCP content-protected software on CDs which not only prevented the CD from being played but also essentially destroyed the computers which the CDs were attempted to be played on, by placing hidden programs that seriously compromised the security and/or functions of consumers' computers, in their hard-drives. Some consumers used software such as ExacAudioCopy or DCEx to remove the copy-protection (essentially errors on the CDs) so that they could listen to the CDs and so that they could put them in their hard-drives without crashing their computers.[1]

To outlaw consumers taking such actions and to craft law which effectively enables companies to bring legal actions against consumers for taking such actions, would essentially allow companies to dictate where and when consumers should be able to enjoy legitimately acquired property. Additionally, it would encourage companies to place such restrictions on works in order to maximise profits by forcing consumers to purchase a separate copy of the work for their computer, and a separate copy for their car, and a separate copy for their stereo.

The Copyright Act should not be able to be manipulated for purposes unrelated to copyright, at great cost to the consumer. Absence of a broad exception for consumers to circumvent TPMs in circumstances where they have **legitimately purchased** a work, would go beyond any purpose of copyright. In crafting these laws, it is important to keep in mind that this legislation intends to protect copyright, and as was

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[1] For further background information, see:
http://pcworld.about.com/magazine/2011p127id104699.htm
http://ukcdr.org/issues/cd/bad/

discussed by the High Court in Stevens v. Sony[2], 'copyright' depends heavily on a balance between users and owners. The purpose of copyright is not profit-maximisation for owners, nor is it to distort markets by preventing competitors from accessing a particular market. The Copyright Act should not be able to be manipulated for such purposes.

Any exception should therefore be drafted in a manner which does not make legitimate and lawful use of property, illegal. It should not be limited to specific situations such as time-shifting for example, or to certain technologies, because these technologies will continuously be developing and the nature of such activities will therefore constantly evolve.

In addition to such an exception, dealings in circumvention devices for this purpose should also be legalised so that consumers may access them, and thus for any such exception to be workable.

Examples of TPMs, How They May be Used, and the Potential Conflict that Exists Between Creators Intentions' and TPMs

The definition of TPM appears to broadly cover a wide variety of 'devices' that protect access to a copyrighted work.

In the digital world, creators may embed works in various formats, software, hardware or operating systems, which may act as 'TPMs'. To provide the Committee with a non-exhaustive list of examples of some such different formats, please see the attached table.

This table illustrates that software and hardware is constantly evolving, and thus also becoming obsolete at a fast pace. This results in circumstances where a work created in a particular format, may not be able to be accessed, because the hardware/software necessary to physically access it is unavailable.

For example:

1. An institution acquires the audio files which contain significant cultural music, but it cannot access the material because in order to gain access the institution also requires a particular type of software and a particular type of hardware dongle. The institution must therefore purchase both the software and the dongle at significant cost. If either the software or hardware dongle is no longer commercially available, the institution cannot access the material unless it circumvents the 'access protection measure' via alternative means.

2. An institution acquires software containing old maps. The software requires password protection. The institution does not have the

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[2] Stevens v. Kabushiki Kaisha Sony Computer Entertainment Pty Ltd [2005] HCA 58 (6 October 2005)

password and the company which produced the software no longer exists.

3. A copyright holder voluntarily deposits items contained in software with an institution. The software requires a PIN in order to be able to access the work. Sometime later, the institution loses the PIN (number) and cannot locate the copyright holder.

Various types of formats utilise dongles, PINs, passwords and other means by which a work can be accessed. Works may be created in such formats in order to protect them, or they may be created in such formats for other reasons, such as ease of accessibility of the format or other features of the format. For example, maps are often created in GIS format because this allows you to display various characteristics of the map on their own, for example the rivers. GIS and other types of proprietary formats[3] may however have a 'TPM' automatically associated with them (depending on how 'TPM' is defined), in that, because the 'source code' for such formats is not automatically available, access to the embedded work for purposes such as preservation may not be possible without utilising alternative technological means.

Problems may also arise in the following circumstances:

*   Where a particular part of the equipment necessary for access, such as the dongle, or the software application, is no longer able to be purchased; or
*   Where the work is licensed under a license which contains a condition that the work not be locked up, such as a creative commons license[4], but at the same time, the author created the work via software that effectively contains a 'TPM' (effectively making the intention of the author unclear); or
*   Where the intention of the author is not easily able to be discerned.

In such circumstances, where TPMs physically 'protect' a work, but that protection is unrelated to the creator's intention to protect the copyright in the work, and rather related to obsolescence or unavailability of hardware or software, or because of the unavailability of the author, an exception should exist allowing circumvention to gain access to the work. Such an exception should apply to both institutions and consumers. In relation to institutions, if such an exception is not included, a risk-averse institution will not circumvent a TPM if to do so risks being embroiled in legal proceedings. This will in turn directly impact upon the institution's obligations of preserving and facilitating access to cultural material.

The following articles prepared by Canadian copyright & technology law experts for the Canadian Department of Heritage may further assist the Committee. The first part, under the heading 'TPMs' indicates more types of 'devices' that could be considered to be TPMs, including; cryptography techniques such as device binding, trusted device detection, online access controls, content scramble systems, digital tickets, macrovision, serial copy management systems, & others.

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[3] Formats where the source code is not openly available for others to access.
[4] For more information about Creative Commons licenses, see; http://www.creativecommons.org.au/

"Technology Protection Measures Part 1"
http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protection/index_e.cfm

"Technology Protection Measures Part 2"
http://www.pch.gc.ca/progs/ac-ca/progs/pda-cpb/pubs/protectionII/index_e.cfm

The Direct Nexus Between the AUSFTA and the Author's Intention

The definition of 'Effective technological measure' is defined in the AUSFTA as meaning 'any technology, device, or component that, in the normal course of its operation, controls access **to a protected work**, performance, phonogram, or other protected subject matter, or protects any copyright'. This mimics Article 11 of the WIPO Copyright Treaty (WCT), and is consistent with the evidence produced by Government representatives before the JSCOT Committee inquiring into the AUSFTA.[5]

The types of 'TPMs' that must be protected are those **connected with** an authors [copyright] rights **or** those that do not protect acts **otherwise permitted** by law. The use of the treaty wording in the drafting of the AUSFTA indicates a willingness by Australia and the US to accede to the obligations contained in the WCT. It should not be interpreted to mean that Australia must commit itself to obligations above and beyond the WCT because the US may [arguably] have chosen to do so in its domestic laws. This interpretation of the AUSFTA is consistent with the fact that at the time the AUSFTA was being negotiated, Australia was not yet a signatory to the WCT.

Particularly in light of the extensive devices which could potentially be defined as 'TPMs', removing the nexus between TPM protection and the creators intention would extend the definition of TPMs beyond the WCT and therefore also beyond what was intended by the AUSFTA wording.

The Harsher Penalties, Their Broader Application and Inadvertent Liability

The AUSFTA at 17.4.7(a) requires Australia to apply civil and criminal remedies as outlined in Article 17.11.13 if a person knowingly, or 'having reasonable grounds to know', circumvents a TPM.

This is in contrast with the current laws, which outlaw 'dealings with' circumvention devices only. That is, the law prohibits making, selling, letting for hire, distributing, importing, and trading such devices if the person knew or ought reasonably to have known that the device or service would be used to circumvent a TPM, but it does not outlaw use of a TPM.

Given the range of devices, as discussed above, that could be construed to be 'TPMs', circumstances may arise where consumers inadvertently 'circumvent' and therefore become criminally liable as per the AUSFTA. For example:

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[5] This is discussed further at pages 6 – 9 of the ADA/ALCC submission to this Committee.

- A consumer buys or downloads software from the internet because s/he has purchased a CD which does not work and this software will 'fix' it.

- A consumer has a collection of legitimately purchased DVDs which are copy protected. There is software available to be purchased which will enable him/her to copy the collection and put it onto his/her newly acquired home movie server.

- A consumer or institution misunderstands the exceptions because they are too technical and complicated and therefore uses a circumvention device to because its only for 'time-shifting' or for 'preservation' which is a 'legitimate' use of the material.

How Reviews Should Work & How Often

The ADA and ALCC are of the view that broad exceptions are required to adequately address institutions undertaking activities which they are mandated to undertake, and consumers using legitimately acquired copies of works. Preferably, broad purpose-based exceptions should be enshrined in legislation and should not be required to be justified during the course of every review period. Imposing onerous requirements on institutions and consumer groups to justify why an uncontroversial exception should simply continue to exist would place a large administrative burden on institutions which already function on limited funding.

Reviews should instead focus on problem areas which have arisen and which need to be specifically addressed as a result of changes in circumstances. If broad based exceptions are introduced in accordance with the submissions made by the ADA and ALCC, then the ADA and ALCC see no reason to have reviews over and above the requirements of the AUSFTA (every four years). However, if such exceptions are not introduced, then the ADA and ALCC would support a much more frequent review process. Specific exceptions which refer to particular types of technologies risk redundancy in a short space of time. Therefore, in such circumstances, the preferred review method would be via regulations rather than legislation, and the ADA and ALCC would envisage this should occur much more frequently than once every four years, perhaps every six months to one year.

Responsibility for responding to the changing needs of institutions and consumers as they arise should rest with a policy body. The ADA and ALCC are of the view that the Copyright Tribunal's terms of reference are too narrow to enable it to exercise such a policy function.

Range of Requirements/Dependencies for Physical Format Digital Objects

These details are based on the minimum requirements for the use of items in the National Library of Australia's collections.

Hardware (minimum) required for the use of Collection Material

Hardware:	Also known as:	Model:
Apricot PC		
Apple		II II+ IIc IIe IIgs
BBC	British Broadcasting Corporation Microcomputer	model B master
Commodore		64 128
Mac	Macintosh, Apple Macintosh	 68020 LC SE Classic Plus 68030 68040
Power Mac	PowerPC; Power PC, Power Macintosh	
G3	Macintosh G3	
PC	IBM compatible PS/2 MPC (with 8-bit sound board, VGA graphics, 30Mb HD, CD-drive 150 kbps) DX2/66; 2/DX 66; also refered to as "486" ie no reference to "PC"; MPC2 compliant, DX4, i486, 486-66	 80n27 8086 8088 XT AT 286 386 386SX 486 486SX 586
Pentium	Intel Pentium; Pentium processor, Pentium-based processor 90 MHz 200 Mhz or faster	 II 90 133 MMX
UNIX		
Solaris		

sound card	Soundblaster compatible, Soundblaster 16 compatible, sound capabilities	
	(true colour display)	16 bit
graphics	graphics card, monitor	
		EGA
	Hercules	CGA
	256 colour	VGA
	super VGA, thousands of colours, video display driver, video card	SVGA
microphone		
speakers		
modem		

Software required for the use of Collection Material:
Operating system requirements

Operating System	Also known as:	Versions:
DOS	MS DOS; MSDOS	
		2.0
		2.1
		3.0
		3.1
		3.2
		3.3
		4.0
		4.1
	5; MS-DOS Ver 5.0	5.0
	6	6.0
PC DOS	*IBM DOS*	
		2.1
		3.1
Win	Windows	
		3.0
		3.1
		3.1.x
	Windows for Workgroups	3.11
		3.x
	95+, Windows 95	95
	Windows 98	98
	Windows ME, Windows Millennium Edition	ME
	Windows 2000	2000
Win 32		*95, 98, ME, 2000, NT*
Win NT	Windows NT	
		3.51
	With service pack 3.0 or later, Service pack 4, SP4, NT4	4.0
		4.1
		98
		2000
System	Macintosh OS, Mac OS	
		6.05
		6.07

	MacOS7	7.0
		7.1
		7.1.1
		7.1.2
		7.5
		7.5.3
		7.5.5
		7.6
		7.6.1
		8.1
		8.6
	68K	PPK

Software required for the use of Collection Material: Application software system requirements

Application Software	Also known as:	Versions:
Access	MS Access, Microsoft Access	
		1.0
		2.0
		7.0
Microsoft Data Access Components		2.5
ActiveX		
Arc Explorer		3.1
Arc Reader		1.1
Arc View		1.0
		2.0
Adobe Acrobat	Adobe Acrobat Reader; Acrobat Reader; Acrobat pdf	
		2.0
	3	3.0
		3.01
	4	4.0
		+ Search
	With search	4.05
		5.0
	MAC version	MAC
Alchemy Search	Windows	5.0
Aldus Freehand		
		3.0
Ami Pro		
		2
		3.1
Apple DOS		
		3.3
Apple soft BASIC		
Apple Works		
ASX Media Player		
AutoCAD	N	
BASIC	MS BASIC	
Basica		
Borland's Quattro		
Borland Database Engine (DBE), Borland IDAPI		2.5.1.1

CDS/ISIS		
Check2000 lite		
Claris Works		
Corel DRAW		
Dbase		IIIplus
DemoShield Run-Time Player		6.70.15.0
Diet/1		
DirectX	Microsoft DirectX	4.04
		5
		6
		8.0
Duosoft courseware		
DynaText		
Easy CD Creator	For .cl4 files	
Easy Office Freeware		
eComPress Viewer		1.7.6.7
Encarta		97
Elecard MPEG2 Player		
ERMapper		5.2 5.5
Excel	Microsoft Excel 3 5, Version 5.0 95 (for Windows 3.11)	3.0 5.0 7.0 95 97 2000 Viewer
Extensis Portfolio Browser		4.0
File maker Pro		
Flash Player	Macromedia Flash player	3.0 4.0 5.0
Flash Plugin	Macromedia Flash/Shockwave plugin	3.0 4.0 5.0
Flexi Learning Kit		
Folio bound Views Retrieval		
Folio Views		4.2
Folio Rights Browser		4.2
Folio Infobase		
FormFlow Filler		
FORTRAN		
GeoScape Viewer		3.0.0 Build 4
GeoVIEWER.WA		1.0.67 (DLL 1.0.67)
Hypercard		2.1
HyperStudio Player		4.0
ICD-10-AM Browser		1.0
IDRISI		
Illustrator	Adobe Illustrator	
		3.0
INMAGIC	DB Search Works DB textworks	

Internet browser	(non specific); web browser; browser; internet browser capable of handling frames	
Internet Explorer	Microsoft IE, IE, MS Internet Explorer	
	Vsn 3.0	3.0
		3.1
		4.0
		5.0
		5.5
IrfanView 32 bit	Shareware JPEG viewer.	3.05
ISYS Advanced Search Engine		
ISYS query	ISYS query by Odyssey Software Development Pty. Ltd.	6.02
Java		
JavaScript		
Jetform		
Kidpix		
Linux with 'C' Comiler		
Lotus 1-2-3		1.2
Lotus Mobile Screen Show Player	Lotus Freelance Graphics (plays .PRZ files)	96
Lucid Player Plus		2.1
Map Info		5.0
Media player	MS Windows Media Player	
	Version 4.0 for Win 95, 98 and NT	4.0
Microsoft Applications Test Tool		
Microsoft .NET Framework		1.1
Microsoft Pack and Go Setup		9.0.0.1772
Microsoft Photodraw	Photodraw (for .mix files)	2000
Microsoft Picture It!	Picture It! (for .mix files)	
Microsoft SQL Server		
Mozilla		1.6
MP3 player *MPEG player*	MP3 MPEG or MPG	
MYOB	M.Y.O.B. 8	8.0
Netscape	Vsn 2.0	2.0 2.02
	Netscape Navigator Version 3.1 4.0	3.1 4 4.01
	Netscape Navigator 4.05	4.05
Netscape Communicator		4.08 4.5 4.6.1 4.7 6.0
Novell Netware		
Norton		2000 3.11
Office	MS Office 97, Office 97	97
Office	Word, excel	2000

Opera		6.01 (Windows) 5.0 (Mac) 7.54 (Windows)
Paintbrush		
Pascal		
Page Maker	Pagemaker, Adobe Pagemaker	4.0 5.0 6.5
Perfect Pictures		3.1
PC Exchange		
Photoshop	Adobe Photoshop	
Pkunzip		
PKSFX for Windows	Version 2.50	
PowerPoint	MS PowerPoint	4 97 2000
ProCite		
Project	Microsoft Project version 3.0, working version	3.0
Publisher	MS Publisher	3
QFHSdatasearch		1.5.24
QuarkXpress (PC)		2.0
QuarkXpress (Mac)		6.0
Quattro		
Quicken		
Quicksbook 6.0	PRO V6.0	6.0
Quicktime	QuickTime Player, Movie Player	1.1.1 1.5 1.6 2.0 2.1 2.1.2 2.1.1.57 2.5 3.0 4.0 4.1 4.1.2 5.0.2
Quicktime Plug-In		1.1
SPSS	For Windows	7.0, 7.5, 8.0
SPSS/PC+		
SPIRS	Silver Platter	
Stuffit Expander	Stuffit	
Sun Microsystems JAVA 2 Runtime Environment		1.4.2_06
Supermap		
text editor	ASCII	
Table-aware web browser		
TechSmith Camtasia Player		2.0.1
TuneUp		1.1.1

Video	for Win 3.1, for Windows	
VIEWS	Folio VIEWS	
Visual Basic		
	4	4.0
	5	5.0
Visual Basic for Applications		
Winbury		
Windows Explorer		
Windows Metafile viewer		
Windows Media Video (*.wmv)	Windows Media Player	
Winzip Self-Extractor	Winzip	7.0
Word	MS Word, Word for Windows	
		2.0
		2.0a
	(for Mac)	4.0
	(for Mac)	5.0
		5.0
	(for Mac)	5.1
	6	6.0
		6.0a
	7, IBM Word 7	7.0
		97
	Converter for Mac Word 5.2 and 6.0	97
		2000
		Viewer
WordPerfect		
		2.0
		5.0
		5.1
		5.2
		6.0
		6.1
		8.0
Wordstar		
Works	MS Works	
		2.0
Works for Windows		95
Write	MS Write for Windows	
		3.1