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REVIEW OF TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS

Submission of the Australian Digital Alliance and the Australian Libraries' Copyright Committee

October 2005

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Executive Summary

Copyright law, since its inception in Australia, has been based on a fundamental balancing act which requires the proper protection of the rights of creators on the one hand, and adequate tempering provisions facilitating access to information by users on the other.

In the digital age and under the Australia-US Free Trade Agreement (AUSFTA) particularly, the protection of copyright has ostensibly extended to protect not only the rights provided by copyright itself, but the right of access, which has never before been protected by law or associated with the exclusive rights of the copyright holder.
This is a sub-optimal outcome of the AUSFTA that distorts the balance created through various consultative processes in the past in Australian copyright law and indeed risks being challenged on Constitutional grounds[1].

The AUSFTA does however, provide Australia with this opportunity to minimise any distortion that laws (anti-circumvention laws) designed to prevent circumvention of technological protection measures (TPMs) will introduce, by allowing for the creation of 'balancing' exceptions via this process.

The ADA and ALCC will demonstrate in this submission how laws which are designed to protect copyright in the digital environment should be implemented in a manner consistent with this purpose, and consistent with the 'balance' that has been struck in the print environment. Critical to this review, this submission will indicate how anti-circumvention laws should replicate that balance through adequate exceptions, so that user groups such as the members of the ADA and ALCC are not seriously impaired in their functions of educating the community and preserving its culture.

In doing so, the ADA and ALCC will explain why Australia **is not required** to follow the US example of crafting narrow exceptions which are limited in functionality and which risk becoming redundant in a short space of time.

This submission will conclude by recommending that the Committee support technologically neutral exceptions to anti-circumvention laws which cover the following activities:

- Access to public domain works;
- Access to works for the purpose of making non-infringing copies of those works;
- Access to works which the creator did not intend to be protected by TPMs;
- Access to works which are protected only by reason of technological obsolescence;
- Access to works to undertake activities pursuant to s.49, s.50, s.51A, and s.183 of the *Copyright Act 1968*;
- Access to works pursuant to Part VB and Part VA of the *Copyright Act 1968*;
- Access to legitimately acquired material by consumers;
- Access to computer programs for purposes set out in s.47D-47F.

Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA), and the Australian Libraries' Copyright Committee (ALCC).

[1] Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005); per Kirby J at 218

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans across various sectors, all members are united in their support of copyright law that balances the interests of rights holders with the interests of users of copyright material. As per the ADA's Statement of Principles, all members:

- Support balanced copyright and related laws that advance the interests of society as a whole;
- Believe copyright laws must balance effective protection of the interests of rights holders against the wider public interest in the advancement of learning, innovation, research and knowledge;
- Believe that fair dealing and other exceptions and limitations must be preserved and carried forward into the digital environment;
- Support appropriate and flexible compulsory licences that ensure guaranteed access for fair payment;
- Support the fundamental principle that copyright protection extends to expressions and not to facts, ideas, procedures, methods of operation or mathematical concepts as such;
- Support clear limitations of liability for copyright infringement in circumstances where compliance cannot practically or reasonably be enforced;
- Oppose laws that would give rights holders' power to use technological or contractual measures to distort the balance of rights set out in the Copyright Act.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Council of Australian State Libraries
- Australian Council of Archives
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia

The ADA and ALCC thank the Committee for this opportunity to make comments on matters raised by the Terms of Reference for the review of technological protection measures exceptions.

In this submission the ADA and ALCC will address the terms of reference by commenting on:

- How the AUSFTA can be implemented in a manner consistent with the Australian legal environment, and consequently, how the requirements specified in Articles 17.4.7(e)(iii) and 17.4.7(f) of the AUSFTA should be understood;

- The importance of the current exceptions and the adverse consequences that will be felt by libraries, educational and cultural institutions, and consumers, if the current exceptions are removed and not replaced in substance;

- The vital relationship between this review and the implementing legislation that will ban the act of circumvention and therefore define 'TPM'.

The submission concludes with its recommendations contained in Part V.

Part I: Implementation of Exceptions Must Suit Australian Legal Context

The ADA and ALCC appreciate that the exceptions to the ban on circumvention must:

1. Be consistent with the AUSFTA; and
2. Effectively operate in the Australian context.

These matters will be addressed in turn.

1. Consistent with the AUSFTA

The idea behind the TPM provisions of the AUSFTA is not to put educational and cultural institutions out of 'business', nor is it to provide additional sources of revenue to rights holders in respect of goods already legitimately acquired. Rather these provisions aim to prevent circumvention of TPMs, done **for purposes of financial gain,** when those TPMs have been placed on works by authors **in connection with their [copyright] rights[2].**

This is evidenced by Article 17.4.7 (a) which specifically enables the parties to exclude libraries, archives & educational institutions from the criminal procedures and penalties attached to breach of the provisions:

> 'Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the (above) activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.'

It is also consistent with advice provided by Government to the Joint Standing Committee on Treaties (JSCOT) regarding its inquiry into the AUSFTA[3]:

> *The Committee notes that the advice received from the Government provides for sufficient exceptions that can be crafted to suit Australia's domestic regime, and has been informed that the two year transitional period will flesh out these concerns in much greater depth so as to ensure that no sector, including consumers, will be disadvantaged"*[4].

Thus, the policy direction of the agreement, and indeed the core section banning circumvention of TPMs, contained in Article 17.4.7(a), allows for copyright law to continue to recognise a balance of interests. The ADA & ALCC submit that this is an important aspect of the agreement and that the provisions relating to exceptions contained in Articles 17.4.7(b)

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[2] Article 17.4.7(a), The Australia-US Free Trade Agreement. This can be viewed at: http://www.dfat.gov.au/trade/negotiations/us_fta/final-text/index.html

[3] The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 61 The Australia-United States Free Trade Agreement, June 2004

[4] Ibid at 241.

through to 17.4.7(f) should be read in the context of 17.4.7(a), and with respect to the intention of the Australian Government as evidenced by its submissions to JSCOT[5].

2 Effectively Operate in the Australian Context

The ADA and ALCC recognise that the terms of reference for this review narrowly define the scope of this inquiry. However, it is submitted that it is not possible to recommend exceptions without analysis of the environment within which they will need to operate. Without such analysis, there is a danger that resultant exceptions will not effectively operate in the environment for which they are designed.

On this basis, the ADA and ALCC recommend that the Committee consider the exceptions requested in Parts 3 and 5 below and in the attached appendix, in light of the following points:

2.1 Relevance of Other Jurisdictions in Implementing Australian Law

Whilst Australia is committed to implement the provisions of the AUSFTA, there are varying methods of implementation that could be adopted. For example, one method would be to closely follow the US Copyright Act in providing very narrow and specific exceptions[6]. Another would be to follow closely the wording of the AUSFTA in our domestic legislation. The Singaporean Copyright Act, which has implemented substantially similar TPM provisions as a result of its free trade agreement with the US[7], has taken this approach:

> (2) The Minister may...exclude the operation of section 261C (1) (*a*) [*banning circumvention*] in relation to a specified work or other subject-matter or performance, or a specified class of works or other subject-matters or performances, if he is satisfied that any dealing with the work, subject-matter or performance or with the class of works, subject-matters or performances, being a dealing which does not amount to an infringement of copyright therein or an unauthorised use thereof (as the case may be), has been adversely impaired or affected as a result of the operation of this section[8].

Thus this illustrates how Singapore has adopted anti-circumvention laws substantially similar to those that Australia is now required to adopt, in a manner consistent with the Singaporean legal environment rather than duplicating the US approach.

The ADA and ALCC recommend implementation of the anti-circumvention laws in a manner consistent with the Australian legal environment, as described below.

2.2 The Digital Agenda, and the History of the Anti-Circumvention Provisions

The current law relating to TPMs reflects the Government's recognition of the need to maintain an appropriate balance between owners and users of copyright material. The exceptions that currently exist were incorporated so that the law continue to represent a

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[5] Ibid.
[6] 17 U.S.C. Section 1201 (2005)
[7] See Article 16.4.7 of the Singapore-US Free Trade Agreement, which can be viewed at: http://www.sice.oas.org/Trade/USA-Singapore/Chap16_e.asp#arti16.6
[8] Copyright Act 1987 (Singapore), can be viewed at: http://statutes.agc.gov.sg/non_version/cgi-bin/cgi_legdisp.pl?actno=1999-REVED-63&date=20050915&method=whole&doctitle

balance of interests in the digital environment[9]. For example, in a publication explaining TPM laws, the Attorney-General's Department stated:

> *"The new provisions will operate to provide owners and their exclusive licensees with an effective means of enforcing their rights in an online environment, and combating online piracy. However, in order to preserve the existing balance in the Copyright Act between the interests of owners and users, the new enforcement provisions will allow for some of the existing exceptions to the exclusive rights of copyright owners".*[10]

This legislation was in pursuit of implementation of the WIPO Copyright Treaty, Article 11 of which provides that:

> *"Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures* ***that are used by authors in connection with the exercise of their rights under this Treaty*** *or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned* ***or permitted by law****."*[11]

This agreement makes clear that the type of 'effective technological measures' that must be protected are:

1. Those ***used in connection with an author's [copyright] rights;*** and
2. Those that do not protect acts ***otherwise permitted by law*****.**

The treaty thus specifically excludes from protection, effective technological measures that restrict acts which are otherwise permitted by law. The U.S. implemented the anti-circumvention provisions contained in its Copyright Act subsequent to and in pursuance of this agreement[12].

In addition, in relation to the interpretation of the US law itself, the US Federal Circuit Court of Appeals has held that a strict interpretation of the US Copyright Act[13] 'would lead to absurdities',[14] that the [US] Act 'does not create a new property right for copyright owners'[15], and that 'Chamberlain's proposed severance of 'access' from 'protection' is entirely inconsistent with the context defined by the total statutory structure of the Copyright Act'[16].

Whilst parties may agree to implement obligations above and beyond treaty obligations, the ADA and ALCC submit that the treaty language indicates the intention behind the adoption of the anti-circumvention provisions. That intention was to protect copyright law in its entirety, that is, the protective provisions as well as the public interest exceptions.

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[9] For example, see *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000*, the Attorney-General's Department, this can be viewed at:
http://www.ag.gov.au/agd/seclaw/Copyright%20Amendment%20Act%202000.htm
[10] Ibid.
[11] WIPO Copyright Treaty, Article 11; available online at:
http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html
[12] See; Circular 92: Copyright law of the United States of America. This can be viewed online at:
http://www.copyright.gov/title17/92preface.html
[13] 17 U.S.C. (2005)
[14] *The Chamberlain Group Inc. v. Skylink Technologies Inc.* No.04-1118, 31 August 2004, at 37
[15] Ibid
[16] Ibid at 40

The ADA and ALCC therefore submit that the copyright provisions of the AUSFTA should be construed as intending to protect access to copyrighted works which have been intentionally access protected by the rights holders of those works, in order to protect copyright in those works, **and** to which the exceptions do not apply.

The ADA and ALCC further submit that, consistent with the WIPO Copyright Treaty, the digital agenda reforms, and with the Government's stated intention in respect of those reforms[17], appropriate exceptions are required to facilitate the legislative intention behind the introduction of the anti-circumvention laws.

2.3 Stevens v. Sony

The High Court recently interpreted the scope of the current anti-circumvention laws in the case of *Stevens v. Sony*[18]. In doing so it provided direction not only in relation to the current *Copyright Act 1968* but on the fundamental principles of copyright law, and the relationship of copyright law to other areas of the law including anti-competitive conduct and property law.

The decision supports the introduction of exceptions which adequately take into account public interest issues such as those raised in this submission. It supports exceptions which facilitate use of legitimately acquired personal property, and more broadly, exceptions that ensure that the interests of user groups are not discarded via this process.

The High Court has made it very clear that it will read down legislation that purports to take away individual rights:

> *"..in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it."*[19]

Similarly, the Court has clearly stated that discarding user rights in spite of the delicate 'balance' that copyright requires, may exceed the power granted by the Constitution:

> *"To the extent that attempts are made to push the provisions of Australian Copyright legislation beyond the legitimate purposes traditional to copyright protection at law, the Parliament risks losing its nexus to the constitutional source of power. That source postulates a balance of interests such as have traditionally been observed by copyright statutes, including the Copyright Act".*[20]

The ADA and ALCC submit that exceptions must be consistent with the fundamental principles outlined in this decision, which apply not only to the current version of the Copyright Act but also to the limitations of the power granted by the Constitution in respect of copyright law.

2.4 Contract

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[17] Op. Cit.
[18] Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005)
[19] Ibid; per Gleeson CJ, Gummow J, Hayne J and Heydon J at para 47
[20] Ibid; per Kirby J at para 218

The broad definition of TPM contained in the AUSFTA may give rise to circumstances where a creator has not intended for his or her work to be protected by a TPM, however for some other reason it is so protected. Examples of such circumstances include 'TPMs' which are so only by reason of technological obsolescence, or works where authors have used Creative Commons licenses[21] in respect of the works. In such circumstances, the ADA and ALCC submit that consistent with principles of contract law, in respect of that particular work, the device protecting access should not be considered to be a 'TPM' on the basis that the device has not been placed on that work by that author in connection with his or her rights.

If the legislation does not reflect this, then exceptions should be crafted to facilitate the author's intention in such circumstances. For example, in the Creative Commons scenario, if such a work is bundled with other works and protected by a TPM, then if that particular work is or subsequently becomes not otherwise readily available, then any TPM 'protecting' that work should be able to be circumvented, consistent with the intention of the creator of the work.

2.5 Competition

The *Stevens v. Sony* decision confirms that TPMs should not provide a tool for rights holders to engage in anti-competitive conduct:

> *"…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 as such. In effect, and apparently intentionally, those restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit."*[22]

The ADA and ALCC submit that to the extent that the new TPM provisions effectively provide rights holders with stronger rights of exclusion, more akin to patent law, in circumstances where protection is much more easily obtained[23] there is a risk of market failure, that is, there is a risk that the rights granted by copyright can be used by the rights holder to claim not only a share of the gains society obtains from the creation, but also rents that arise from market power, leading to a loss of the overall benefits for society as a whole[24]. The ADA and ALCC notes the comments of the Intellectual Property and Competition Review Committee:

> *"Where rights are ..used for purposes beyond the intention of the original grant, significant competition policy issues arise that need to be addressed. Intellectual*

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[21] Examples of Creative Commons licenses can be found on the 'Creative Commons Australia' website: http://www.creativecommons.org.au/

[22] Op. Cit. per Kirby J at para 175

[23] The ADA and ALCC refer to the low standard of originality required in Australia according to *Telstra Corporation Limited v Desktop Marketing Systems Pty ltd 25 May2001*, the lack of any 'inventiveness' requirement in copyright, and the lack of any registration system.

[24] Review of intellectual property legislation under the Competition Principles Agreement, September 2000, Final report by the Intellectual Property and Competition Review Committee, at 24-27.

> *property rights should not therefore provide blanket immunity from competition laws. Rather, the community's interest in competitive markets needs to be protected by ensuring that abuse of those rights is prevented".*[25]

The ADA and ALCC therefore submit that the AUSFTA should be implemented in a manner which does not facilitate anti-competitive conduct, whether this is through narrowly defining 'TPM', or by crafting adequate exceptions to infringement which counter any negative effects on consumers of the provisions themselves.

2.6 Property Law

The ADA and ALCC submit that, consistent with the *Stevens v. Sony* decision, copyright law should not oust the ordinary rights that consumers acquire upon purchasing property. The House of Representatives Committee undertaking this inquiry has indicated[26] that the breadth of the AUSFTA definition of TPM may result in 'devices' such as regional coding being considered to be 'TPMs', with the result that these laws may prevent consumers accessing lawfully acquired property.

The ADA and ALCC submit that if a broad interpretation of 'TPM' is adopted which does not allow an individual to enjoy property lawfully acquired, then an equally broad exception is required to ensure that circumvention is allowed for the non-infringing activity of accessing lawful acquired property. In the absence of such an exception, the definition of 'TPM' would effectively enable companies such as Sony to create and divide global markets and to impose differential price structures in those markets. As Kirby J points out in *Stevens v. Sony*, this is inconsistent with the balances ordinarily inherent in copyright legislation[27].

2.8 Effects of Harsher Penalties

The AUSFTA requires harsher penalty provisions to apply not only to 'dealings' in circumvention devices, but also to use of such devices. Use of circumvention devices is currently not proscribed by the Act[28]. Whilst the AUSFTA makes clear that exceptions for certain entities (including libraries & educational institutions)[29] may be made, for the average consumer, this will be a major shift in the law putting them at greater risk, not only of breach of the Copyright Act, for acts quite unrelated to the bundle of rights provided by copyright itself, but also of the harsher penalties that the AUSFTA requires.

The ADA and ALCC submit that the introduction of harsher penalties further supports a method of implementation that will counter the effects of criminalising legitimate consumer activities.

2.9 Fair Dealing, the Current Review, and 'Non-infringing'

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[25] Ibid at 27
[26] Information paper, Inquiry into Technological Protection Measures Exceptions, House of Representatives Committee on Legal and Constitutional Affairs. This can be viewed at: http://www.aph.gov.au/house/committee/laca/protection/infopaper.pdf
[27] Op. Cit. per Kirby J at para 215
[28] Copyright Act 1968
[29] See Article 17.4.7(a); Austalia-United States Free Trade Agreement

Although integral to the copyright 'balance', 'fair dealing'[30], is not one of the current exceptions to the ban on *dealings with* circumvention devices. This has been of great concern to user groups including members of the ADA and ALCC, particularly given the growth of technologies and the increase in creation and use of digital works and consequently TPMs. In light of the additional ban on *use* of circumvention devices which the AUSFTA requires, the ADA and ALCC support the introduction of exceptions to anti-circumvention laws to enable circumvention for each of the fair dealing purposes.

The current fair dealing review[31] may also extend categories of uses which the Act deems to be non-infringing. Where a use of a work is specifically deemed to be non-infringing in the course of this review, the ADA and ALCC submit that circumvention of a TPM preventing access to a work for the purpose of making such a use should also be exempted from infringement of the anti-circumvention laws.

The ADA and ALCC note their submissions to the Attorney-General's Department in relation to the fair dealing review[32], that fair dealing should be extended to cover the following [non-exhaustive] dealings:

- Dealings for purposes of time-shifting;
- Dealings for purposes of format-shifting;
- Dealings in respect of orphaned works;
- Dealings for preservation and back-up copying purposes.

The ADA and ALCC would support exceptions to anti-circumvention laws for these purposes.

The ADA and ALCC further submit that:

- To allow anti-circumvention laws to protect such non-infringing uses of works would be contrary to the original intention with which these laws were created and would remove the required nexus between the TPM and the author's rights[33];
- Allowing circumvention for fair dealing purposes would not adversely impact upon the effectiveness of anti-circumvention laws as it would only allow circumvention in very limited circumstances, namely, the set of **non-infringing** uses set out in those provisions.

In Summary, the factors discussed at 2.1-2.9 above all contribute to the matrix which constitutes the Australian legal environment, within which the TPM laws will need to operate. The AUSFTA does not require Australia to implement the US Copyright Act. Australian law however, requires that anti-competitive conduct is outlawed, that consumers are free to enjoy lawfully acquired property, and that copyright laws pertain to the protection of copyright. In view of all of the factors outlined in this part, the ADA and ALCC

[30] Copyright Act 1968; Sections 40-43

[31] For more information see: http://www.ag.gov.au/agd/WWW/agdhome.nsf/0/E63BC2D5203F2D29CA256FF8001584D7?OpenDocument

[32] The submissions of the ADA and ALCC are available at: http://www.digital.org.au/submission/submission.htm and http://www.digital.org.au/alcc/

[33] WIPO Copyright Treaty; Article 11

recommend interpretation of the AUSFTA as outlined in Part I (1) above and in Part II below.

Part II Interpretation of Criteria Consistent with Australian Law

In the context of the AUSFTA and the Australian legal environment, as outlined in Part 1, the ADA and ALCC will in this part advise the Committee of their interpretation of the requirements that exceptions must comply with pursuant to Articles 17.4.7(e)(iii) and 17.4.7(f) of the AUSFTA.

Criteria (1): Exceptions must be confined to acts of circumvention of access control measures

Consistent with US interpretation and implementation of the anti-circumvention provisions, the AUSFTA requires that circumvention be banned in relation to *access control measures* only[34]. Given the breadth of potential implications that anti-circumvention laws may have[35], the ADA and ALCC recommend that Australia not implement provisions over and above those required by the AUSFTA.

In relation to all acts requested herein and in appendix A as exceptions to the ban on circumvention, the ADA and ALCC necessarily also seek legal means to *deal with* the devices to execute those exceptions. Without such means the exceptions themselves would be meaningless.

Criteria (2) Prohibition on Circumvention Must Have a Credibly Demonstrated Likely or Adverse Impact on a Non-Infringing Use of Copyrighted Material

The current exceptions covered by section 116A(3)(b)(v) of the current legislation covers a range of exemptions based on the public interest in maintaining the copyright balance, including:

- the reproduction of computer programs to make interoperable products,
- activities covered by the library & archive exceptions,
- activities covered by the statutory licenses for educational institutions and institutions assisting people with disabilities under Part VB, and
- use of copyright material by the crown;

As discussed at 2.2, the inclusion of these exceptions in 2000 reflect the Government's recognition of the need to maintain an appropriate 'balance' between the interests of owners and users of copyright material, and the importance of that balance to the fundamental principles of copyright has been further emphasised by the *Stevens v. Sony*[36] case.

Consistent with the ADA and ALCC's view that implementation of our AUSFTA obligations should as far as possible be undertaken in a manner consistent with our existing body of copyright law, implementation of this criterion should facilitate

[34] Australia- US Free Trade Agreement; Article 17.4.7
[35] As discussed in Part 1 of this submission.
[36] Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005); as discussed in Part 1 above.

exceptions that as far as possible:

- reflect the rapid pace of technological change, via technologically neutral provisions which do not risk redundancy in a short space of time; and

- as far as possible, reflect copyright's purpose, that is, it should reflect both user interests in accessing information, as well as the rights of creators to equitable remuneration, in order to maximize creativity and innovation.

Thus, the ADA and ALCC submit that important adverse consequences of implementing narrower and more limited exceptions include:

1. They risk becoming redundant quickly, requiring frequent reviews that amend legislation regularly;

2. Unless the current exceptions are replaced in substance, copyright law will undergo a detrimental change in purpose and no longer reflect the public interest.

In relation to the first point, given the contrast between the pace of legislative change, and the pace of technological advancement, the ADA and ALCC see this approach as impractical and do not recommend it.

In relation to the second point, the ADA and ALCC would view all non-infringing uses of copyright material which are currently covered but which potentially will no longer be covered by the new exceptions, as significant 'adverse impacts'. These adverse impacts will only increase as technologies develop and the use of digital resources increase.

If the Committee finds that contrary to the recommendations contained herein, this criterion requires narrow and specific exceptions such as exist in the US, then the ADA and ALCC would recommend that (a) a working group or committee be set up specifically to amend exceptions as required, consistent with the pace of technological change, and that (b) methods alternative to legislative amendment are explored to amend the exceptions at a pace consistent with the pace of technological change.

Criteria (3) Relate only to a Particular Class of Copyrighted Material

Consistent with principles of technological neutrality and the public interest, the ADA and ALCC recommend that a 'particular class of work' should be read broadly, for the following reasons:

1. The narrower the construction, the less likely that it will provide technologically neutral provisions in the copyright act, and the more likely that such provisions will become redundant quickly. For example, an exception where the class of work is "a computer program protected by a dongle" risks redundancy if superior methods of hardware protection become available.

The danger of narrow constructions is not unfamiliar to copyright law. One driving factor which resulted in the current fair dealing review is that a large percentage of Australians are

breaching the law[37] as a result of 'technological advancements', such as the VCR, that occurred more than 2 decades ago, which the Copyright Act was not able to accommodate due to the narrow exceptions that it contains.

2. As discussed in Part 1 of this submission, Australia is not required to implement the provisions of the US Copyright Act. The fact that the US Copyright Office found it appropriate to implement an extremely narrow & specific set of exceptions should not govern Australian Copyright law. Rather, Australia's obligations are to implement the AUSFTA in a manner consistent with the Australian environment described above.

3. From the perspective of libraries, educational & cultural institutions, and as indicated by Appendix A to this submission, it is not the form that a particular work takes that is of primary importance, but rather the cultural and educational value of that work. Therefore, from the perspective of such institutions, as far as this process requires particular sub-classes of works to be defined for circumvention purposes, it is superficial and irrelevant in the sense that, cultural and educational materials take many forms. It is not the form that is important, but the material that is required to be accessed for purposes of user access and preservation.

4. From the perspective of consumers, unduly narrow constructions are of equally low functional value. As was discussed in the case of *Stevens v. Sony*[38], copyright law should not prevent consumers who have legitimately acquired material from other jurisdictions from accessing that material in Australia. This is so regardless of whether the work is a sound recording or film or other type of access protected work.

5. In addition to the broad issue of narrow constructions defeating the intended purpose of the exceptions, narrow exceptions increase the likelihood of definitional disputes. For example, if an exception were to specifically apply to 'new media', this would raise contentious issues of what 'new media' constitutes and therefore, what types of 'media' such an exception should actually apply to[39].

For the reasons outlined, the ADA and ALCC submit that 'class of work' requires a broad definition. Exceptions should apply to:

- all 'access-protected works' or
- all 'digital works'.

Alternatively exceptions should be duplicated in drafting of the legislation to cover all forms that works might take for purposes of preservation and access of such works and subject matter other than works, whether published or unpublished, as indicated at Appendix A.

Criteria (4) Not Impair the Adequacy of Legal Protection or the Effectiveness of Legal Remedies Against Circumvention of TPMs

[37] Speech of the Hon. Philip Ruddock MP, at the Centre for Intellectual Property and Agriculture Conference on 18 February 2005

[38] Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005); as discussed in Part 1 above.

[39] For example, see "New media's name – who cares?" at https://mail.cofa.unsw.edu.au/pipermail/empyre/2004-May/msg00087.html

This criterion reflects the wording contained in Article 11 of the WIPO Copyright Treaty (WCT) and Article 18 of the WIPO Performances and Phonograms Treaty (WPPT).[40] As a result of the *Copyright Amendment (Digital Agenda) Act 2000*, Australia has already implemented the main obligations of both the WCT and the WPPT, including the obligations contained in Articles 11 (WCT) and 18 (WPPT). This was recognised by the JSCOT Report on the AUSFTA[41].

[40] WIPO Copyright Treaty; See Article 11

[41] The Parliament of the Commonwealth of Australia, Joint Standing Committee on Treaties, Report 61: The Australia-US Free Trade Agreement, June 2004, at Chapter 9.

Part III: Implications of Removal of Current Exceptions Necessitate Substantially Similar Exceptions Under AUSFTA

As discussed above, the AUSFTA allows for the introduction of technologically neutral exceptions which meet the needs of Australian consumers and institutions. The ADA and ALCC submit that if the current exceptions are removed, public interest considerations ingrained in our law require their replacement in substance. Additionally, the exceptions should be updated to provide for consistency with the current fair dealing review, and with the recent High Court decision of *Stevens v. Sony*[42].

In making its recommendations for exceptions, the ADA and ALCC will address some issues that arise in relation to the specific categories raised by the terms of reference, which further support the introduction of technologically neutral exceptions via this process.

3.1 Activities of Libraries, Archives and Cultural institutions

The ADA and ALCC support exceptions which encompass the current exceptions relating to the range of **non-infringing** purposes covered by s.49, s.50, s.51A, and s.183.

These sections of the Copyright Act recognise that in the particular circumstances outlined, the public interest dictates that **in spite** of rights holders' exclusive rights, the essential functions of libraries and cultural institutions require them to be able to

a) copy materials in order to fulfil their functions
b) circumvent technological protection measures if such measures prevent them from doing a).

The activities of these institutions in preserving and providing access to culture are fundamental. Such activities are mandated by legislation that requires them to effectively fulfil these functions[43]. The AUSFTA should be read in a manner consistent with the enabling legislation of these institutions.

One example of the potential detrimental effects that removal of the current exceptions may have can be demonstrated by the role of the National Library and the State and Territory libraries as 'deposit libraries'. Legislation requires that a copy of materials published in Australia be deposited with the National Library and with State and Territory libraries in order to facilitate cultural preservation[44]. Whilst the Federal Government has committed itself to extending these provisions to include digital materials in the future[45], at a national level, and in all States and Territories apart from Tasmania and South Australia, these provisions currently only require the depositing of print materials.

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[42] Op. Cit.
[43] For example: Section 5 of the Australian National University Act 1991, Section 5 of the Archives Act 1983, Section 6 of the National Museum of Australia Act 1980, Section 5 of the Australian National Maritime Museum Act 1990, Section 6&7 of the National Library of Australia Act.
[44] For example, the Copyright Act 1968; Section 201
[45] Department of Communications, Information Technology and the Arts, Corporate Plan 2005-2008: http://www.dcita.gov.au/home/department/corporate_plan_2005-08/our_priorities_for_2005-06

With the increase of Australian cultural material that is being created in digital form, deposit libraries are necessarily required to actively find and capture culturally significant online material. For example, Philips explains what this entails for libraries in practice:

> *"The challenge for deposit libraries with responsibilities for the published output of their jurisdictions is threefold: capture online publications before they disappear forever; find the ways and means to preserve them in an every-changing technical environment; and achieve this in a situation where there are as yet few standards, a multiplicity of formats in which publishers disseminate their information, a dearth of technical solutions and infrastructure for accomplishing the task, and a variety of views on what and how much should be preserved"*[46].

Adequate exceptions to anti-circumvention laws are required in order to facilitate the preservation of culturally significant online materials which are TPM protected.

In addition to the example of legal deposit, Appendix A contains a list of functions which libraries and other cultural institutions are required to undertake in the course of their duties which requires them to circumvent TPMs. This list provides the example of the National Library of Australia as Australia's national collecting institution, and the impact of TPM on its particular functions. The ADA and ALCC would support exceptions which encompass all of the activities stated at Appendix A.

In summary, the functions of libraries and archives which are mandated by statute should not be overridden by provisions which are not aimed at their activities. This has been recognised by Government in implementing the Digital Agenda Amendments[47], which resulted in the current exceptions, and should continue to be recognised in the context of the AUSFTA.

3.2 Activities of educational & research institutions

The ADA and ALCC recommend that exceptions to the ban on circumvention should cover the activities of universities under both Parts VB and VA of the Copyright Act in their entirety.

The Part VB exception covers circumvention of TPMs for a broad range of **non-infringing** reproductions and communications of works by educational and other institutions including reproduction and communication of articles in both hard copy and electronic forms, and reproduction of works for people with print disabilities or intellectual disabilities[48]. This exception was introduced in the Copyright Act in order to facilitate the use of copyrighted works for educational purposes, in return for equitable remuneration. As noted by the Attorney-General's Department:

> *"Under the statutory licence scheme the basis for such copying and communication is the payment of equitable remuneration to the declared collecting society… Before the Digital Agenda amendments, the statutory licence under Part VB only applied to copyright material in hardcopy form…The Digital Agenda extended the statutory*

[46] Philips, M. *The Preservation of Internet Publications*, The National Library of Australia, April 1998. This publication can be viewed at: http://www.nla.gov.au/nla/staffpaper/www7mep.html
[47] For example, see DCITA Fact Sheet "*Guide to the Copyright Amendment (Digital Agenda) Act 2000*
[48] The Copyright Act 1968, Part VB

> *licence to allow educational institutions and institutions assisting persons with a disability to electronically copy and communicate material on the basis of the payment of equitable remuneration"*[49].

When these provisions were introduced, the legislature recognised that educational institutions engage in legitimate uses of copyrighted works and that given the extensive limitations that exist in respect of the educational licenses[50] there is little risk of abuse or piracy as a result of such exceptions.

It was understood at the time that the license should operate broadly enough to encompass future technological developments, and that fundamental to its operation was the agreement of the relevant parties.[51] To remove the exception for Part VB in the current technological environment would fundamentally alter the nature of Part VB which would ultimately result in it being unworkable. Not only would this significantly compromise the fundamental teaching and learning role of universities, but it may also adversely affect the remuneration of rights holders.

Part VB contains extensive provisions applicable to people with disabilities[52]. Educational institutions could potentially find themselves in breach of equal opportunity laws if as a result of AUSFTA implementation they are unable to provide the same level of access to educational materials for people with disabilities, as they are for people without such disabilities[53]. The ADA and ALCC understand that it is common practice to convert works to more accessible formats to facilitate access by people with disabilities and submit that such activities must be covered by appropriate exceptions to the anti-circumvention laws.

The Part VA license covers the copying and communication of broadcasts by educational and other institutions[54]. Whilst there is no current exception to the anti-circumvention laws to cover activities conducted under Part VA, for the same reasons as described with Part VB above, the ADA and ALCC submit that it is appropriate that such an exception be introduced. In light of the increase in use of TPMs, and the development of TPM technology that we can expect in the near future, not to allow an exception for Part VA will equally result in an unworkable license. This again would defeat the legislative intention of facilitating use of copyright works for education purposes.

In summary, the impact of TPMs on educational and other institutions is certain to increase with the growth of digital delivery of information. The educational licenses have proved workable for both educational and other institutions as well as rights holders. They reflect a compromise by all parties involved. The workability of these licenses should not be compromised by limiting their practical use to information that is not access-protected. To do may lead to a set of redundant provisions, counter to

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[49] The Attorney-General's Department, *Copyright Reform: Copyright Amendment (Digital Agenda) Act 2000*
[50] For a detailed discussion, the ADA and ALCC refer the reader to the submission of the Australian Vice-Chancellors' Committee to this inquiry.
[51] Ibid. See also; *National Forum on Accessible Tertiary Materials, Digital Agenda and Copyright Issues*, UTS 20 May 2002. This can be viewed at:
http://www.hreoc.gov.au/disability_rights/education/forum02/attorney_generals.htm
[52] Copyright Act 1968; Part VB, Divisions 3 and 4
[53] For example, see the Disability Discrimination Act 1992 (Cth). NB State equal opportunity Acts may also be breached.
[54] Copyright Act 1968; Part VA

the intention of the legislature in their enactment. That intention was to ensure that the provisions would be flexible enough to develop with developing technologies.

In addition to the matters raised by this submission, the ADA and ALCC also support the submission of the Australian Vice-Chancellors' Committee to this inquiry.

3.3 Implications for Consumers

The ADA and ALCC would strongly support the introduction of exceptions to allow consumers, whether individual, commercial, not-for-profit or other, to circumvent TPMs to access legitimately acquired goods.

An example of the importance of adequate exceptions in this regard is provided by regional coding, which this Committee in its information paper initiating this review indicated is a 'TPM'[55]. The legal implications of defining regional coding as a TPM were discussed in Part 1 above. The ADA and ALCC note however that there are also implications for the availability of educational and cultural materials. The ADA and ALCC understand that information and works contained on formats subject to regional coding such as DVDs are not accessible uniformly throughout the world. Different regions may have different works and versions of works which may also be available in only specific languages depending on the region. It may be that not all versions and languages are available in Australia. In order for Australians to be able to access information which may not be available in Australia but is available in another region, adequate exceptions are required.

Other examples of where consumers may need to circumvent TPMs in order to access legitimately acquired materials include circumstances where despite having paid for access, the consumer has for unforseen reasons lost, forgotten, or accidentally destroyed the legitimately acquired means of accessing the material. For example if someone has lost a particular password required for access.

3.4 Implications for Computer Programs

The ADA and ALCC support the submission of SISA in relation to the importance of maintaining the current exceptions that exist in relation to computer programs at s.47D – s.47F of the Copyright Act.

[55] Information paper, Inquiry into Technological Protection Measures Exceptions, House of Representatives Committee on Legal and Constitutional Affairs. This can be viewed at: http://www.aph.gov.au/house/committee/laca/protection/infopaper.pdf

Part IV Legislation Banning Circumvention, 'TPM' Definition, and this Review

This submission has focussed on the matters raised by the terms of reference and information paper initiating this review. However, the ADA and ALCC note that fundamental to this review, and to the process of drafting appropriate exceptions to any proposed anti-circumvention laws, is the scope of the anti-circumvention laws themselves.

The manner in which this legislation is drafted will necessarily impact upon the exceptions that are required. The ADA and ALCC would therefore like the opportunity to make further submissions in light of the draft implementing legislation outlawing TPMs.

One particular issue of concern that the ADA and ALCC request clarification in relation to is that of 'unintentional TPMs', or devices that act as 'TPMs' but were not intended to so act by the creator. For example, devices may act as 'TPMs' as a result of technological advancement or obsolescence. Such devices may for example constitute software or hardware that effectively prevents access to a protected work, and may indeed prevent all access to that software or hardware. It is assumed that such devices are not '**effective** TPMs' as they are not used 'by authors in connection with the exercise of their rights' as required by the WCT, and thus exceptions to circumvention of such devices are not required to be sought in the course of this review.

If this is not the case, the ADA and ALCC necessarily submit that an exception is required which exempts circumvention of devices that effectively act as 'TPMs' but do so only by reason of technological obsolescence.

The issue of when a TPM is 'effective' raises further issues which extend beyond obsolescence. There may be circumstances where a particular device may act as 'an effective TPM' in one situation, but not in another. For example, a device that could in one circumstance be used in connection with an owner's rights, may in another circumstance be used in a manner unrelated to such rights or to protect interests unrelated to copyright which ought not to be so protected.

The ADA and ALCC support a definition of TPM which recognises the direct connection that is required, by the WCT, the WPPT, and arguably the AUSFTA, between the specific device in any given situation, and the rights that it is protecting.

Part V Recommendations

1. **That the Committee interpret the AUSFTA requirements contained in Articles 17.4.7(e)(viii) and 17.4.7(f) in light of Article 17.4.7(a), with regard to the rapid pace of technological change, and with regard to the Australia legal environment as outlined in Part 1.**

2. **That exceptions relating to acts of circumvention of access control measures extend to dealing in the devices required to undertake the acts exempted.**

3. **That 'TPM' be interpreted in such a way as to exclude devices that protect works that are not in copyright, or alternatively, that a specific exception be included to allow circumvention in circumstances where a public domain work is protected by a 'TPM' and is not otherwise easily accessible.**

4. **That 'TPM' be interpreted in such a way as to exclude devices that protect works where this is inconsistent with the creator's intention, or alternatively that a specific exception be included to allow circumvention in circumstances where it is evident that the 'TPM' is 'locking-up' the work in a manner inconsistent with the creators intention.**

5. **That 'TPM' be interpreted in such a way as to exclude devices which protect works only by reason of technological obsolescence, or alternatively, that a specific exception be included to allow circumvention in circumstances where technological obsolescence results in a work effectively being 'locked-up' and the creator of that work is not locatable.**

6. **That 'TPM' be interpreted in such a way as to exclude devices where those devices facilitate anti-competitive conduct, or alternatively, that a specific exception be introduced to outlaw anti-competitive behaviour.**

7. **That the library and archive exceptions that currently exist for activities conducted pursuant to s.49, s.50, s.51A and s.183 be preserved to facilitate the preservation and access functions outlined in this submission and at Appendix A.**

8. **That the exception to the ban on circumvention that currently exists in relation to the educational statutory licence at Part VB of the Act be preserved, in full, and that an additional exception be introduced in relation to circumvention undertaken to facilitate copying pursuant to the license at Part VA of the Copyright Act, for the reasons outlined in Part 3 above.**

9. **That exceptions be introduced to allow circumvention of TPMs to access non-infringing, legitimately acquired material, including legitimately acquired consumer goods, and to enable uses of copyright material pursuant to fair dealing.**

10. **That the current exceptions that exist in relation to computer programs at s.47D-47F be preserved.**