“Getting the Balance Right”

A Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into technological protection measures (TPM) exceptions

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Since the very beginning of the digital revolution copyright owners have been fearful of the immense capacity of networked digital technologies to evaporate the value they hold in creative and other forms of content. They learnt more quickly than others that technology was an important solution and garnered the support firstly of international law through the WCT and WPPT and more recently national “anti-circumvention” legislation like the Australian *Copyright Act* and the *Digital Millennium Copyright Act* (DMCA) in the US.

In his seminal work *Code and Other Laws of Cyberspace*[1] Stanford University Law Professor Lawrence Lessig explained that technology

[1] (1999, Basic Books NY)

or as he called it “code” is a powerful means for controlling actions in the digital environment. Just as we stop a car speeding through the architecture of speed bumps we can “regulate” copying in the digital environment through the architecture of technology or code.

The enormous power of digital technology to enable copying and communication of content is matched by the enormous power of technology to constrain activity. Copyright owners realised this from the start. The death of copyright was to be matched by the reinforcement of technology as a form of regulation.

As they developed self executing technologies to constrain the activities of digital content users the copyright owners also sought the enactment of anti-circumvention laws which reinforced the power of technology.

Technologies were developed largely by private companies to act as a form of governance or regulation yet they were not subjected to any parliamentary scrutiny in the same way as legislation. This “code as law” as Lessig describes it - meaning technology is as powerful a regulator as law in the digital environment - was not scrutinised in the public interest. TPMs could be as mean spirited and as self interested as the private corporation wished. And who would suffer? The citizen and their (digital) liberty. What was previously available to be accessed without anyone’s permission either as fair dealing, an insubstantial amount or public domain was in danger of being “locked up”. What was available for access through reading in a library would no longer be available if technology regulated otherwise.

The missing element in the anti-circumvention laws has always been the insertion of public values that address the needs of citizens to access digital content in a spirit of innovation, education and creativity.

In further legislating in this area we suggest that the Australian Parliament closely considers the values it wants to uphold in the area of technological regulation and to reinforce this through the exceptions. The Parliament should keep in mind the fact that technological measures protect private governance, private interests and private “law” making by private corporations that are not required to act in the public interest. If the consumers and users of digital content in this country are to inhabit a digital environment that respects the basic rights and liberties normally guaranteed in a democracy then the Australian Parliament needs to legislate a robust and principled set of exceptions to balance the enormous power already bestowed upon the copyright owners. Creativity,

innovation, information and access means knowledge, power and prosperity for Australians and Australia. Parliament needs to understand the importance of seamless access to and reuse of (digital) knowledge as part of our innovation system while establishing a sensible and considerate legal framework for technological protection measures. Technology should not be used as an excuse for "locking out" or "dumbing down" Australia.

The recent decision of the High Court in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*[2] highlights the great concern held in our community in relation to over-broad anti-circumvention law.[3] TPMs that are designed to interfere with a competitive market economy or the fundamental rights of citizens to enjoy private property are not the kind of strategies the Australian Parliament should endorse in legislation in the name of copyright protection.[4]

On specific exceptions we suggest the following (in addition to the adaptation of the existing exceptions in s 116A):

A. Protection of exceptions from limitation by agreement

The first principle that must be recognised is that any rights provided by exceptions to liability for circumvention must be protected from exclusion by agreement. Section 47H provides that an agreement which purports to limit the application of the computer program exceptions has no effect. The exceptions to the anti-circumvention measures in s116A are not similarly protected from exclusion. Both the CLRC in its *Copyright and Contract Report* (2002) and the more recent Phillips Fox, *Digital Agenda Review* (2004) recommended that the *Copyright Act* should be amended to prevent these exceptions from being excluded by agreement.[5]

An example of the significant detriment to innovation that can arise if the permitted purpose exceptions are able to be overridden by contract is found in the recent US decision, *Davidson & Associates v*

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[2] [2005] HCA 58.
[3] see further B Fitzgerald "The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?" (2005) 10 *Media and Arts Law Review* 89.
[4] see *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.
[5] Copyright Law Review Committee, *Copyright and Contract*, 7.28 <http://www.ag.gov.au/agd/WWW/clrhome.nsf/AllDocs/092E76FE8AF2501CCA256C44001FFC28?OpenDocument>; Phillips Fox, *Digital Agenda Review: Report and recommendations*, 18.56 <http://www.ag.gov.au/DigitalAgendaReview/reportrecommendations>.

Internet Gateway.[6] In that case, the Eighth Circuit Court of Appeals ruled that the defendants had contractually waived their rights to circumvent a technological protection measure for the purpose of creating an interoperable computer program.[7] The technological protection measure in question was embedded in computer games, and the defendants had created an interoperable multiplayer server, which users of the computer games could use to play those games online, with increased control over the rules and participants in multiplayer games. The End User Licence Agreements (EULA) which accompanied the games purported to waive the right to reverse engineer the software. In Australia, the right to reverse engineer to create interoperable programs is firmly enshrined in s 47D, which is protected from exclusion by s 47H. The exception is also present in s 116A, but is not similarly protected from exclusion through contract.

Restrictions to the limitation of exceptions by agreement should not be limited to the permitted purposes of ss 47D, 47E, 47F, but should extend to all exceptions to circumvention and dealings with circumvention devices and services. There is no reason to allow any exceptions to be contractually limited, particularly given the potential negative impacts on consumers and the limited bargaining power in consumer contracts.

B.Protection of access to open access and public domain material

In response to lawsuits over the sharing of unauthorised copyright material such as songs, the Creative Commons project has emerged to provide a space in the Internet world where people can share digital material without the fear of being sued. Creative Commons does this by asking copyright owners to share material by signalling permission in advance through a label that tells the user what they can and cannot do. To this point at least 53 million objects on the Internet have utilised or been linked to Creative Commons licences.

Creative Commons Australia, an initiative led by Queensland University of Technology and Creative Commons International, provides simple licences by which owners of copyright can make their material available on terms of their choosing.[8] The licences

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[6]No. 04-3654 (8th Cir. September 01, 2005).

[7]pp 15, 19.

[8]see further <http://creativecommons.org> B. Fitzgerald "Creative Commons (CC): Accessing, Negotiating and Remixing Online Content", in J. Servaes and P. Thomas (eds), C*ommunications, Intellectual Property and the Public Domain in the Asia Pacific Region: Contestants and Consensus* (forthcoming 2006) available

provide a simple way for owners of copyright to declare that anyone can reproduce, communicate, display, and perform their copyright materials, as long as they credit the author, and meet some optional restrictions, which can be mixed to suit an individual owner's needs. These types of Open Access copyright licences are becoming increasingly popular, spanning the fields of open source software, education, scientific research, creative material and public sector material.

In fact most governments around the world are working hard to utilise Creative Commons styled licences in their public sector information strategies: see the recent UK Common Information Environment (CIE) Project report.[9]

In relation to any material that is licensed out (and labelled) for open access under a Creative Commons or equivalent licence consumers should be permitted to circumvent a TPM in order to gain access to that material. Once the copyright owner has stamped material as open access the presumption must be that such material will always be available on those terms.

A more complex question arises in relation to the recent CLRC recommendation of April 2005 that "copyright in certain materials produced by the judicial, legislative and executive arms of government be abolished".[10] If such an approach were adopted it is our submission that if this material, or any public domain material, is covered by a TPM it should be the right of Australians to be able to circumvent that TPM in order to access such material in a way that would not otherwise be a copyright infringement.

C. Exception to allow making and use of backup material

There is uncertainty in Australian law as to whether it is lawful to make a back up copy of a Compact Disc (CD) of music or a computer game. We both subscribe to the view that such a right exists.[11] The Commonwealth Attorney General is currently examining these issues as part of the *Fair Use Review*. Comments made by Justice Kirby in the recent High Court decision of *Stevens*

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at <http://www.law.qut.edu.au/about/staff/lsstaff/fitzgerald.jsp>

[9] Intrallect Ltd and AHRC Research Centre for Studies in Intellectual Property Law, "Environment Members of a study on the applicability of Creative Commons Licences" <http://www.common-info.org.uk/docs/CC-Report.pdf>

[10] Copyright Law Review Committee, *Crown Copyright* (2005), 9.38.

[11] B Fitzgerald "The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?" (2005) 10 *Media and Arts Law Review* 89.

v Kabushiki Kaisha Sony Computer Entertainment[12] further highlight the issue.

The Australian Parliament needs to turn its mind to the issue of whether backup copies are lawful. If they decide that they are then it would be necessary to allow an exception that permits circumvention in order to make and utilise a backup copy.

D. Exception to allow access to licensed material on technology platform of choice – sponsoring digital diversity and interoperability

Some technological protection measures prevent non-infringing access to lawfully acquired or possessed copyright material. These include the use of encryption on DVDs which prevents them from being played in DVD players which have not licensed the decryption algorithm. This means that consumers are unable to watch legitimately licensed DVDs in software such as GNU/Linux without circumventing the technological protection measures.[13] Similarly, music CDs are often protected by access control measures which prevent the consumer from listening to the CD in a computer, and computer games and DVDs are often region coded to be unplayable in regions other than the one in which they are purchased. Unless the consumer is allowed to circumvent these protection measures, they have the effect of mandating the equipment that is allowed to be used to access licensed material. This anti-competitive behaviour should not be sanctioned by anti-circumvention law – a vendor of copyright material should not be encouraged to lock-in customers to certain brands or types of consumer equipment.

An exception to liability should apply for circumventing measures which restrict the ability to access lawfully acquired or possessed copyright material in equipment of the lawful user's choosing. Technological protection measures which purport to inhibit copyright infringement but have the additional effect of limiting the rights of a legitimate user are over-broad in design and should not be protected from circumvention. To guard against any fear the consumer will communicate unprotected copyright material to the world the exception can be narrowly tailored.

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[12] [2005] HCA 58 at [215] .

[13] *Universal v. Reimerdes* (SDNY 2000) 111 F.Supp.2d 294; *Universal City Studios Inc v Corley* 273 F.3d 429 (2nd Cir. 2001)

The decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*[14] suggests that many of the measures suggested in the preceding two paragraphs will not be TPMS for the purposes of the Australian *Copyright Act*. Nevertheless the submission remains valid in the context of those measures that will be held to be TPMS.

E.Format shifting

A significant point of interest in the current *Fair Use Review* is the extent to which there should be an exception (remunerated or otherwise) to copyright infringement for format shifting of licensed material, for example the encoding of sound recordings from CD on to personal music players. If it is accepted that this use of non-infringing copyright material is allowable, then a circumvention exception should properly be extended to cover circumvention of access control methods which prevent this use. For example, measures which have the effect of preventing music CDs from being readable in a computer need to be able to be circumvented by consumers in order to shift that music to a personal player. The same principle applies for format shifting of all media, not just music.

F. Fair Dealing for Lawful Users

We submit that users or consumers of lawfully acquired or possessed copyright material should have the right to access any material that is available for use under the fair dealing doctrine or any other exception under copyright law. This is common sense and respects the balance of rights currently struck by the *Copyright Act*. The concern of copyright owners is that if we let one consumer crack the TPM then they will send that unprotected version to others via the Internet. This can be avoided if the exception is tailored in such a way to ensure that anyone relying on it will need to show that they have not communicated the copyright work to the broader community.

In short any material that could otherwise be accessed and utilised without causing copyright infringement before a TPM was placed on it should be available for access by lawful users without liability. TPMs are to protect against copyright infringement.

[14] [2005] HCA 58.

G. Restrictive or Detrimental Intent to Australian Consumers

Australia prides itself on strong and caring consumer protection laws. In this context where it can be shown (objectively or subjectively) that the copyright owner in setting the TPM has acted with an intent to achieve some purpose other than or along with copyright protection that is clearly detrimental to or restrictive of the accepted activities of Australian consumers there should be grounds for circumvention. This could be operationalised through an exception which provided that consumers could circumvent a TPM where they can show that the TPM has been set for unjustified reasons which could be listed in the primary or delegated legislation (e.g. anti-competitive conduct).[15] The ACCC may have further advice to offer in this regard and potentially a process for determining periodically what TPMS are justifiable in the face of the *Trade Practices Act*. In fashioning these exceptions the Australian Parliament should be careful that its focus on copyright law does not take its attention away from the need for other important consumer and competition law principles to be brought into the balance.[16]

H. Circumvent any Access Control on Lawfully Acquired or Possessed Copyright Material but Cannot Communicate it to Any Other Person

We suggest that any user or consumer be permitted to circumvent a TPM relating to lawfully acquired or possessed copyright material so long as they do not communicate the copyright material to any other person. This would allay the copyright owner's concern over digital distribution while allowing lawful users and consumers a broad right of controlled access.

Conclusion

We are concerned that TPMs are not always designed to enhance public good and that legislatures throughout the world have been too eager to adopt them without getting the balance right. In

[15] See further: *The Chamberlain Group Inc v Skylink Technologies Inc* 381 F.3d 1178 at 1203, 1204 (Fed Cir. 2004) *Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 387 F.3d 522; 2004 U.S. App. LEXIS 27422; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

[16] *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58.

harmonising our law with that of the US we should not be embarrassed to lead the way in implementing a more vibrant, innovative and respectful TPM regime that fits with the strong democratic ideals of both countries. The AUSFTA certainly does not seem to preclude this.

The submission we make is that the Australian Parliament through the exceptions it will legislate needs to maximise the economy of copyright ownership while giving strongest consideration to the ways in which creativity, innovation, knowledge and access can be sponsored in a manner that will allow the children of this country the opportunity to be the social, business and academic leaders of the future. This is the way the law has operated in the past; the advent of digital technology should not be an excuse for anything less.

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Brian is a well-known intellectual property and information technology lawyer. He is co-editor of one of Australia's leading texts on E Commerce, Software and the Internet - *Going Digital 2000* - and has published articles on Law and the Internet in Australia, the United States, Europe, Nepal, India, Canada and Japan. His latest (co-authored) books are *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and E Commerce* (2002); *Jurisdiction and the Internet* (2004); *Intellectual Property in Principle* (2004). Over the past four years Brian has delivered seminars on information technology and intellectual property law in Australia, Canada, New Zealand, USA, Nepal, India, Japan, Malaysia, Singapore, Norway and the Netherlands. In October 1999 Brian delivered the Seventh Annual Tenzer Lecture - Software as Discourse: The Power of Intellectual Property in Digital Architecture - at Cardozo Law School in New York. In October 2000 he was invited as a part of the Distinguished Speaker series hosted by the Ontario wide Centre for Innovation Law and Policy to deliver an address on "Digital Property" at the University of Western Ontario Law School in London, Canada. Through the first half of 2001 Brian was a Visiting Professor at Santa Clara University Law School in Silicon Valley in the USA. In January 2003 Brian delivered lectures in India and Nepal and in February 2003 was invited as part of a distinguished panel of three to debate the Theoretical Underpinning of Intellectual Property Law at University of Western Ontario in London, Canada. During 2004 Brian has presented talks in Germany, India and China and was a Visiting Professor in the Oxford University Internet Institute's Summer Doctoral Program in Beijing in July 2004. He is also a Chief Investigator in the newly awarded ARC Centre of Excellence on Creative Industries and Innovation. His current projects include work on digital copyright issues across the areas of Open Content Licensing and the Creative Commons, Free and Open Source Software, Fan Based Production of Computer Games, Licensing of Digital Entertainment and Anti-Circumvention Law. Brian is a Project Leader for Creative Commons in Australia. From 1998-2002 Brian was Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia and in January 2002 was appointed as Head of the School of Law at QUT in Brisbane, Australia.

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