



Australian Libraries' Copyright Committee

PO Box E202, Kingston ACT 2604

Australian Digital Alliance

Tel: (02) 6262 1273 Fax: (02) 6273 2545

Ms Helen Daniels
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON 2600

21 September 2006

Dear Ms Daniels

Re: Copyright Amendment (Technological Protection Measures) Bill 2006

The Australian Digital Alliance (ADA) and Australian Libraries' Copyright Committee (ALCC) write in relation to the *Copyright Amendment (Technological Protection Measures) Bill 2006* ("draft Bill") and thank the Government for the opportunity to consult in relation to this Bill which is extremely important to the interests of both ADA and ALCC members.

2. 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.

3. 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
- National and State Libraries Australasia
- Australian Council of Archives
- Australian Government Libraries Information Network
- Council of Australian University Librarians
- National Library of Australia

4. The ADA and ALCC recognise the hard work of the Attorney-General's Department in achieving draft legislation which acknowledges the important functions of the members of the ADA and ALCC within the context of the Australia-US Free Trade Agreement ("AUSFTA"). We herein make comments, further to those provided to your department on 3 August 2006 (attached), in relation to remaining areas of concern that we have.

Subsection 10(1): Definitions of Technological Protection Measure and Access Control Technological Protection Measure

5. The ADA and ALCC support the Department's drafting of the definitions of 'technological protection measure' ("TPM") and access control TPM as contained in section 10(1) of the proposed Bill, and particularly, we commend the link to copyright infringement contained in these provisions

6. However, the ADA and ALCC seek further clarification of the following issues raised by these definitions in the Bill:

(a) That regional coding is not intended to be incorporated by the TPM scheme;

7. The ADA and ALCC understand that regional coding is not intended to be covered by the TPM scheme and commend such an approach; however it is not clear whether the wording in the note following the subsection actually has this intended effect. This is particularly so given the insertion of the word 'solely', which may render the note ineffective, particularly if future devices are not designed for one purpose only. The addition of 'solely' therefore makes the provision technologically specific rather than neutral.

8. Furthermore, the ADA and ALCC recommend that the Government's intention to exclude regional coding from the TPM scheme be incorporated in legislation. The use of a note may work to complicate legislative interpretation.

(b) that the TPM scheme will not protect anti-competitive conduct prohibited by the *Trade Practices Act 1974* ("TPA");

9. The ADA and ALCC understand that the intent of the legislation is to not incorporate in the scope of the legislation, circumstances which have anti-competitive effects. We commend such an approach and understand that the draft Bill, by linking the definitions of TPM and access control TPM with copyright infringement, will enable courts to avoid circumstances such as those that arose in the US in the cases of *Skylink*¹ or *Lexmark*², where companies attempted to oust competition via copyright law when there was no identifiable act of copyright infringement, in Australia.

10. The ADA and ALCC however have remaining concerns that the Bill does not adequately address the danger of circumstances where a TPM, whilst protecting material from copyright infringement, is in the particular circumstances in question, facilitating anti-competitive conduct within the meaning of the *TPA*. For example, this may particularly be the case with devices that function both to prevent copyright

¹ *The Chamberlain Group Inc. v. Skylink Technologies Inc.* No.04-1118, 31 August 2004

² *Lexmark International, Inc., v. Static Control Components, Inc.*, No. 03-5400, 26 October 2004

infringement, and to prevent competitors entering a market thus substantially impeding competition in that market contrary to the TPA.

11. Thus, as the ADA and ALCC have submitted previously, it is important that the question of whether a device falls within the definition of 'TPM' depends on how it operates in the particular circumstances in question. If a device, in effect, prevents competition in a market, however the ancillary effect of it is to prevent a copyright infringement, this should not fall within the scope of the definition, particularly where this would cause a conflict with long-standing principles enshrined in Australian law. In other words, there is an important policy consideration in relation to how the law should respond in circumstances where companies developing new technologies utilise access control measures to prevent competitors entering the market for those technologies. Copyright laws should not be able to override principles contained in the TPA.

12. The ADA and ALCC would therefore support clarification in the legislation that TPMs that contravene Australian law are not protected by the TPM scheme. Alternatively, this should be made clear in the explanatory memorandum.

(c) Malfunctioning/ineffective TPMs

13. In our initial submissions to the House of Representatives Legal and Constitutional Affairs Committee inquiring into TPM exceptions, the ADA and ALCC recommended that devices which protect works only by reason of technological obsolescence, be excluded from the definition of TPM, or alternatively that a specific exception be included to allow circumvention. The ADA and ALCC commend the Government for addressing this issue. However, we are concerned that the inability under the scheme (and particularly, section 116AL), to be able to manufacture devices to circumvent ineffective TPMs, would frustrate the Government's exceptions contained at 20Z(k) and (j) of the *Draft Copyright Amendment Regulations 2006* and would therefore effectively protect such TPMs, over and above the requirements of the AUSFTA.

14. The ADA and ALCC therefore recommend that, in accordance with Article 17.4.7 of the AUSFTA, only 'effective' TPMs be protected by the TPM scheme, and that the definitions of 'TPM' and 'access control TPM' be amended to exclude ineffective or malfunctioning TPMs.

(d) Stevens v. Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005) and Consistency with Australian Law

15. The definition of TPM in the Government's implementation of the AUSFTA ensures that TPM is linked directly to copyright infringement. The ADA and ALCC strongly support and commend this approach. However, we have remaining concerns that the draft Bill only partly implements the important precedent of *Stevens v. Sony*.

16. In this regard, the ADA and ALCC recommend implementation of the principles of the *Stevens v. Sony* case to ensure that the various essential attributes of Australian law referred to therein, are reflected in this legislation:

“Moreover, the submissions in the present case...called to attention a number of considerations that may need to be given weight in any clarification of the definition of TPM... Such considerations included the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. They are integrated in the protection which that law offers to the copyright owner's interest in its intellectual property.” (*Per Kirby J, at 224*)

17. The ADA and ALCC thus believe that clarification that the TPM scheme does not intend to override principles of Australian law, including trade practices laws and fair dealing laws, will ensure not only consistency with *Stevens v. Sony* but also, that the TPM scheme fits neatly within the overall framework of Australian law.

(e) Broadcasts and the operation of Part VAA of the Copyright Act

18. The definition of TPM in the draft legislation includes devices which protect both works and subject matter other than works including broadcasts. This is not in accordance with what the ADA and ALCC initially understood would be the case. The ADA and ALCC therefore seek clarification in relation to why broadcasts are included in the scope of the TPM scheme, particularly given that the AUSFTA does not require that broadcasts be covered by the scheme.

19. The ADA and ALCC further seek clarification in relation to how the TPM scheme is intended to operate in relation to the scheme set out in Part VAA of the Act regarding broadcast decoding devices. We particularly seek clarification regarding whether defendants may be caught by both schemes in relation to the same set of circumstances.

Subsection 10(1) Definitions of circumvention device and circumvention service

20. The ADA and ALCC are concerned that the proposed definitions of circumvention device and circumvention service are unduly broad. Devices and services which are ‘promoted, advertised, or marketed as having the purpose of circumventing the TPM’ will fall within the scope of the definition of circumvention device or service, even if they are not in fact circumvention devices or services.

21. The ADA and ALCC seek clarification that the intention of provisions 116AL and s132APB is that those sections will not be contravened unless the circumvention

device is a **circumvention device for a TPM**, meaning that in effect a device which circumvents another device which is not a TPM is not a circumvention device.

22. The ADA and ALCC are concerned that the new definition of circumvention device may lead to confusion and prefer the definition currently in the *Copyright Act 1968*.

Sections 116AL-O Manufacturing, Providing etc., a circumvention device or service

23. These draft provisions remain an important concern for the ADA and ALCC. We reiterate our comments made to you in our letter of 3 August 2006 that logic requires that the draft Bill must ensure that the exceptions to the ban on circumvention can be properly utilised via access to circumvention devices and services.

24. The ADA and ALCC are of the view that this could be done via inclusion of a provision akin to section 116A (3) of the current *Copyright Act 1968* which permits the supply of circumvention devices and services to a person for use for a permitted purpose. This type of provision would ensure, not only that the exceptions are workable, but also that devices can only be dealt with in the limited circumstances prescribed by law, and compliant with the AUSFTA.

25. Alternatively, the ADA and ALCC support the view that remedies for breach of the TPM scheme should not be available in cases where a person does a prohibited act pursuant to s.116AL only to assist a person who has appropriately used an available exception. Legal commentary³ has discussed legislative options for such an approach; for example, remedies for breach could be made contingent upon harm being shown by the plaintiff, with a presumption that there is no harm resulting from acts assisting a person with the benefit of an exception.

26. The ADA and ALCC also understand that the word ‘person’ in the draft Bill will be defined in accordance with section 22 of the *Acts Interpretation Act 1901*, to mean ‘a body politic or corporate as well as an individual’. The ADA and ALCC strongly support the maintenance of this definition to ensure that the TPM scheme is workable within institutions. The scheme would not be workable if ‘person’ were to be defined as ‘individual’.

27. In summary, it is essential for ADA and ALCC members that provisions relating to manufacturing etc. a circumvention device and providing etc. a circumvention service (proposed section 116AM), facilitate the proper operation of the TPM scheme. Institutions particularly will be affected if the legal mechanism by which the TPM exceptions may be used is not clear, given their accountability and thus risk averse practices. Pirates on the other hand will no doubt be prepared to circumvent these laws. Many ADA and ALCC members do not have the resources or know-how to manufacture circumvention devices themselves and will require a legal mechanism which allows them to share information and/or devices between them, in order to take advantage of the exceptions.

³ For example, see the comments of Ms Kimberlee Weatherall on “Weatherall’s Law” (<http://weatherall.blogspot.com/>), post dated 15 July 2006.

202A Groundless threats of legal proceedings in relation to circumventing an access control technological protection measure

28. The ADA and ALCC support the inclusion of this section to deter groundless threats of legal proceedings. However, we view the current scope of the provision as outlined in the draft Bill as too narrow to effectively deter groundless legal threats altogether. For example, a plaintiff could avoid the effect of the provision by threatening to bring an action under 116AL instead. We would therefore support the extension of this provision to cover:

- Groundless legal threats to bring actions under 116AL & AM
- As per 116AO(2)(c) a provision allowing a court to take into account the flagrancy of the defendant's acts that are the subject of the action and any detriment to the defendant as a result of those actions.

Criminal Penalty Provision: Sections 132APB & 132 APC

29. The ADA and ALCC seek clarification in relation to:

- a) The breadth of the criminal penalty provision at sections 132APB and 132APC;
- b) The relationship of these provisions to the civil liability provisions at sections 116AL and 116AM.

30. The ADA and ALCC are concerned that people will risk imprisonment for manufacturing etc. a circumvention device or providing etc., a circumvention service if that act is done 'with the intention of obtaining a commercial advantage or profit'.

31. As noted above, many public organisations or indeed small private organisations simply do not have the know-how or technical expertise to manufacture circumvention devices in-house. Thus, the ADA and ALCC envisage many situations where an institution or private organisation might engage a consultant to provide them with a circumvention device or service in circumstances where the consultant reasonably believes that the institution or company is entitled to circumvent a TPM in order to access material legitimately acquired. Of course, in such circumstances it is most probable that the consultant providing the device or service will be seeking a fee, thus the element of 'intention of obtaining a commercial advantage or profit' will very easily be proved.

32. Given the heavy penalties available for commission of these offences, the ADA and ALCC submit that it is essential that these provisions apply only where the intention of obtaining a commercial advantage or profit is:

- a) Linked to an intentional act of infringement; and
- b) Results in infringement on a commercial scale.

33. Our main concern here are that these provisions will act as a huge disincentive to those providing potential circumvention devices and services, even in circumstances where circumvention is legitimate, in aid of an exception, or unrelated to copyright infringement. Thus, this will amplify the 'lamentable and inexcusable flaw' contained in the AUSFTA and implemented via 116AL as discussed above.

Contracting Out

34. It is imperative that contractual provisions purporting to exclude or modify any of the exceptions in the Copyright Act, including the TPM exceptions, are unenforceable. Unequal bargaining power between 'owners' and 'users' necessitates the inclusion of such a provision. As the ADA and ALCC have argued in the context of the Fair Use and Other Copyright Exceptions Review, failure to clarify this issue by way of legislative reform frustrates the very policy justifications for including exceptions in the Act. 'Balance' between owners and users cannot be achieved through exceptions if the exceptions can be easily excluded.

35. In relation to the provisions at sections 47B(3)- 47F of the Copyright Act, the policy justification behind inclusion of section 47H will be frustrated if there is no equivalent provision in the TPM exceptions.

The ADA and ALCC thank the Government for this opportunity to consult in relation to the proposed TPM scheme. Please do not hesitate to contact the writer should you have any further queries or concerns.

Yours sincerely,

Sarah Waladan
Australian Digital Alliance
Australian Libraries' Copyright Committee