



Australian Government



**Submission to the House of Representatives
Standing Committee on Legal and
Constitutional Affairs Inquiry into
technological protection measures exceptions**

October 2005

1. Introduction

The AFC welcomes this opportunity to provide a submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs regarding the circumvention of technological protection measures (TPMs).

The Australian Film Commission (AFC) is an Australian Government agency, operating as part of the Commonwealth Film Program to ensure the creation, availability and preservation of Australian screen content. The AFC enriches Australia's national identity by fostering an internationally competitive audiovisual production industry, making Australia's audiovisual content and culture available to all, and developing and preserving a national collection of sound and moving image. As the major collector and analyser of data about the industry, the AFC leads opinion, outlook and policy about the audiovisual industries and screen content in Australia

The Australian Film Commission is a body corporate established by the *Australian Film Commission Act* (Cth) 1975. The AFC's enabling legislation provides that the purpose of the AFC is, among other things, to distribute programs and develop, preserve, maintain a national film and sound archive. The functions of the AFC are detailed in s.5: see Appendix A. Within the AFC, the National Film and Sound Archive ('NFSA') has direct responsibility for the AFC's archiving obligations.

The NFSA preserves and shares Australia's moving images and sound recordings. The AFC makes this collection available for all Australians to share through exhibitions, screenings, the NFSA website¹, traveling shows, video and audio products, live presentations, education programs, and television and radio productions.

The AFC is the Australian Government's development agency for screen content. The AFC fosters a competitive production industry by developing people, projects and the industry. The AFC strives to ensure that filmmakers and audiences throughout Australia have access to a variety of screen activities.

The AFC's mandate means it assists the creation of copyright and utilises copyright material. The AFC, supports the return to creators of valuable income from the exploitation of copyright.

The AFC's dual role of fostering an independent internationally competitive audiovisual production industry and developing, preserving and providing access to Australia's national collection of sound and moving image means that it supports the entire life-cycle of films.

¹ <http://www.screensound.gov.au>

Without detracting from copyright owners' markets, the AFC but seeks legal mechanisms to support the interests of owners and to promote and fulfil the government's cultural objectives.

2. Circumvention of Technological Protection Measures at the AFC

The AFC preserves, stores and provides access to a significant amount of material that includes some form of TPM. This includes recent digital audiovisual technologies such as DVD's, CDs, websites and computer games but also includes older technologies such as DAT tapes and VHS tapes.

Management of all collection items within a preservation system requires ongoing copying to migrate between hardware platforms and storage media as these become unserviceable or obsolete, leaving the content acquired on these formats at-risk and inaccessible. As TPMs are also on analogue, eg, oral history DAT recordings, then the AFC also have a need to migrate from analogue to digital. Migration to digital also facilitates effective storage. Ongoing copying for preservation and on-site access will not be possible without circumventing TPMs.

The AFC estimates that, of the volume of preservation and storage activities undertaken by the NFSA, currently less than two per cent of this is taken up by dealing with material requiring TPM circumvention. However, the AFC believes that this will increase significantly over the next three to five years to around 30-50 per cent as material is increasingly deposited with and donated to the NFSA in a digital format. Content delivered through digital distribution platforms is a major growth area in the audiovisual sector.

3. Permitted acts of circumvention under the current Copyright Act 1968

The AFC is lawfully able to circumvent TPMs under the Copyright Act 1968 ("the Act") and does so for purposes allowed under the Libraries and Archives exception to copyright infringement for sound and film in s110A-C.

Under the Act as it currently stands, making, dealing in, distributing and importing for trade purposes etc of a circumvention device is prohibited: s116A(3). There are currently no sanctions at present for the use of circumvention devices or services. Nevertheless, the unauthorised use of material made accessible through the use of a circumvention device can still be subject to a copyright infringement claim. The AFC's uses of material is covered under contractual arrangements with donors and depositors where not already covered under the library and archive exceptions.

The circumvention practices undertaken by the NFSA, which are currently permitted under the law, are also agreed upon by some² copyright owners under its agreements with depositors and donators. The AFC's Deposit and Donation Agreements allow uses such as repairing, restoring and preserving the material, copying material for research purposes and internal administrative purposes.

As the AFC seeks to uphold/respect the rights of copyright owners whenever it uses and provides access to copyright materials in the NFSA, the AFC will always speak to and maintain an ongoing relationship with the owners of copyrighted material held in and deposited with the library. However, the introduction of a liability scheme via Australia's obligations under the Australia United States Free Trade Agreement (AUSFTA) will significantly impact upon the AFC's ability to fulfil its statutory requirements in maintaining, preserving and making available a national film and sound collection.

4. Prohibitions against circumvention

The AFC notes that s116A(3) provides a number of exceptions to the prohibitions on the manufacture of and dealing in circumvention devices or services within the Act, including:

- reproducing and communicating works by libraries and archives for users (s49);
- reproducing and communicating works by libraries and archives for other libraries and archives (s50);
- reproducing and communicating works by libraries and archives for preservation and other purposes (s51A);
- use of copyright material for the services of the Crown (s183).

The Libraries and Archives provisions refer only to "works" and not to "subject matter other than works," ie. sound recordings, cinematograph films, television broadcasts and sound broadcasts. It is "subject matter other than works" that makes up the large majority of material held by the NFSA.

In its submission to the Attorney General's Department on its Issues Paper Fair Use and Other Copyright Exceptions: An examination of fair use, fair dealing and other exceptions in the digital age³ the AFC recommended that the Libraries and Archives provisions be consolidated into one section of the Copyright Act and be reformed in order to create consistency for both works and subject-matter other than works. The AFC sees no clear rationale for maintaining this distinction.

² The NFSA owns copyright to around only ten per cent of the collection and in many cases donors and depositors are not the copyright owners with copyright being held by 3rd parties.

³ <http://www.afc.gov.au/policyandresearch/policy/ip.aspx>

The AFC does not currently deal in, distribute or import for trade purposes, circumvention devices. Instead, the AFC relies on professional broadcasting and other equipment embedded with circumvention devices to legally circumvent material for access and preservation purposes.

The AFC foresees that given the rapid pace of technological change and the high degree of audiovisual format obsolescence (both analogue and digital) current circumvention devices, TPMs and the hardware and software containing embedded devices will also become obsolete. As a result, the AFC will incur considerable expense in acquiring spare parts or new software where copying equipment containing embedded devices malfunctions, is obsolete, or is no longer commercially available. The AFC may need to create replacement circumvention devices or engineer new devices to enable it to undertake preservation and other legitimate copying. To address and future proof for this problem the AFC believes that an exception should be introduced for all libraries and archives which is equivalent to the permitted purpose exceptions available for works under s 116A(3). This is consistent with the AFC's recommendations in its submission to the recent fair use review.

Arguably, the AFC might rely on s183, under which copying for the purposes of services of the government is permitted. However, the AFC does not consider this a valid option as the scope of s183 is unclear and the AFC has not been able to obtain consistent legal advice as to whether – in fulfilling its statutory mandate to facilitate access to its collection – it would fall within this provision.

5. Impact of the proposed AUSFTA TPM liability scheme on the AFC

Under the proposed liability scheme created under the AUSFTA, it will, in future, be prohibited to knowingly circumvent without authority technological measures that control access to a protected work. The AFC seeks to continue to be able to use circumvention devices for material held by the NFSA for the purposes permitted under the library and archive exceptions for works and subject-matter other than works and where specifically negotiated under contract with donors and depositors.

The AFC notes that under Article 17.4.7(a)(i) legal remedies are to be imposed upon the circumvention of any TPM that controls access to “a protected work, performance, or phonogram, or *other subject matter*.” There are two exception clauses that are likely to apply to the AFC. These are Article 17.4.7 (e)(vii), which allows circumvention for the sole purpose of making acquisition decisions, and Article 17.4.7 (e)(viii), which allows for other exception. However, these two articles only refer to “works, performances, or phonograms.” “Other subject matter” has not been included. It is the AFC's understanding that the international definition of ‘works’ includes films and that the term ‘other subject matter’ in the AUSFTA is not analogous to ‘Subject matter other than works’ in the Act.

The AFC seeks clarification that this reading of the AUSFTA is correct. The AFC believes that audiovisual material including cinematograph films which make up the bulk of holdings at the NFSA, must be included within the scope of Articles 17.4.7 (e)(vii) and (viii).

The AFC believes that further specific exceptions are required in order that the AFC be allowed to continue to legally use circumvention devices in working with preserved material.

The AFC believes that the legislation that is ultimately put into place must be clear, free from ambiguity, and it must allow the AFC to carry out its statutory functions.

The latter half of this submission details the current practices undertaken by the NFSA and seeks exceptions for each specific practice.

In detailing the AFC's current and expected practices involving TPM circumvention, the AFC has included circumvention of both copy control measures and access control measures. The AFC understands copy control measures to include those measures that specifically prevent copying while access control measures manage access to material such as passwords or encryption. However, some measures such as dongles can arguably be seen as both a copy control mechanism and an access control mechanism.

The AFC notes that there is further ambiguity in the text of the AUSFTA relating to what falls within the definition of TPM circumvention. While the definition of an "effective technological measure" under Article 17.4.7(b) refers to any technology that controls access to *both* a protected work or protects any copyright, Article 17.4.7 (a)(i) states that sanctions must be put in place for anyone who "circumvents without authority any effective technological protection measure that controls access to a protected work, performance, or phonogram, or other subject matter". It is unclear and ambiguous from this whether legal remedies against the circumvention of copy controls are required under the terms of the FTA.

As stated above, the AFC has detailed all forms of TPM circumvention – both copy control and access control and believes that both forms need to be considered in creating exceptions.

6. The AFC's current activities

A summarised list of the current and expected future circumvention activities conducted by the AFC are detailed at Appendix B.

The AFC collects a large range of “works” and “subject matter other than works.”⁴ Of this material, the AFC has identified five categories of “subject matter other than works” that it currently collects which have TPMs which the AFC must circumvent for preservation or access purposes as described under the Act.

These categories of subject matter other than works are:

- **Sound recordings (CDs)**
- **Oral Histories (DAT Tape)**

The NFSA collects sound recordings and oral histories in the form of CDs and DAT tapes in its continuing role of developing, preserving, presenting and making available Australia’s national, audiovisual collection.

Increasingly, audio CDs and audio file recordings are being distributed with copy protections in place.⁵ Professional broadcast equipment, which usually have circumvention technology built in, are used in order to make preservation copies in those cases where the CD is the best copy available. Access copies are also made for private study and research purposes of AFC clients within the NFSA grounds.

Material including field recordings and music master recordings in the Archive's collection may have the copy prohibit enabled. In seeking to create preservation copies, the NFSA would normally circumvent these technologies using professional, commercially available equipment. The AFC is of the view that in most cases the protected recordings would meet the definition of "first copies" under the Act⁶.

⁴ “Subject matter other than works” include Cinema/TV Advertisements; Animation; Documentaries; Feature Films; Newsreels; Home Movies; Silent Films; TV News; Video Games; Oral History Interviews; Commercial, Unpublished and Live Sound Recordings.

⁵ For example, the “Copy Control” system is used on EMI CD releases which includes multi-session information to hide audio tracks and corrupted error-correction codes. Other CDs have been designed to violate the Red Book standards (Red Book is the standard for audio CDs and is named after the set of colour-bound books that contain the technical specifications for all CD and CD-ROM formats) for CDs in order to provide protection. Earlier digital audio formats such as DAT tapes and PCM-701 systems provide an optional "copy prohibit" function which can be set by the user when recording. This prevents copying on machines manufactured for the domestic market, however professional machines have always provided the functionality to override copy protection. For example, domestic DAT recorders are never provided with 44.1kHz sampling frequency on input or output to prevent consumer copying of CDs, whereas professional machines do provide a 44.1kHz function which permits copying of CD standard audio.

⁶ Neither a ‘first record’ nor ‘first copy’ of a film is defined in the *Copyright Act 1968*. It is uncertain whether the terms refer to the “master copy” of a sound recording or film held by an institution, or whether it refers to any print of an unpublished work held by a library or archive.

- **Moving Images (DVDs)**
- **Moving Images (VHS)**
- **Still images (Optical Media)**

Moving images kept on VHS, DVDs and still images kept on optical media are collected by the NFSA in developing, preserving, presenting and making available Australia's national, audiovisual collection. Similarly to audio media, an increasing number of visual media are distributed and made available to the NFSA with some form of TPM in place.

With VHS, a significant number of video manufacturers utilise a TPM technology called Macrovision.⁷ With DVD and other file based video content, a series of more complex digital encryption technologies including CSS (Content-scrambling system) have been developed to prevent copying. A significant proportion of DVD discs also contain region codes, which allow them to be played only in particular areas of the world and not in other areas.

The NFSA owns professional videotape decks – legally obtained in Australia – which incorporate technology that can decode encryption systems such as Macrovision, and other variations of encryption. The NFSA does not develop any of its own circumvention technologies, but purchases technologies that are available on the market. The NFSA has no capability to decrypt copy protected DVD's or files that are delivered to us from outside the organisation, however is capable of viewing DVDs from all regions through multi-region DVD players. While DVD's are not a stable media form and are not suitable for long term archiving, there may be cases where a DVD is the best copy available and does require preservation copying.

The NFSA anticipates a rapid increase in the volume of material delivered as file based content. If the NFSA is to manage this content into the future it must be able to copy and migrate from one technology platform to another to ensure the material is not lost due to technology obsolescence or failed media and to facilitate efficient/space saving storage practices. In order to undertake such copying it must be able to circumvent TPMs preventing access to collection material.

7. Future Activities

The rapid pace and development of digital technology has borne an ever-growing array of media forms in which to produce and distribute content.

The AFC has further identified a range of categories that the NFSA either currently collects but has not yet had to circumvent embedded TPMs or

⁷ Macrovision, used largely in commercial VHS releases, causes a VCR to be unable to record it resulting in a scrambled picture.

has not begun to collect but will do so shortly and which are likely to include some form of TPM.

These categories are:

- Computer Games
- Websites
- Webcasts/streaming media
- Podcasts
- New Media Art/time based art
- Electronic/Digital cinema
- Downloadable audio files and
- Downloadable moving image files.

8. Purposes

As the table at Appendix B indicates, the three purposes for which the NFSA currently circumvents TPMs, and with future audiovisual media, expects to circumvent TPMs, are to:

- Make a preservation copy in cases where the copy is the best available;
- To make an access copy so that the work is available at multiple NFSA sites; and
- To migrate collection items into a digital repository to avoid format obsolescence and to facilitate storage.

With many of the new media classes of material listed above including computer games, podcasts, websites and new media art, preservation is directed at either migrating to a more modern hardware/software platform or by allowing use via an emulation package running on a more modern hardware/software platform.

These uses accord with the rights available for works under the libraries and archives exceptions under the Copyright Act: ss110A-C, or otherwise provided under contractual arrangement.

9. Exception conditions

The AFC notes that the Government is only able to create further other exceptions if these exceptions satisfy all the conditions set out in Article 17.4.7(e)(viii) and (f). These are that the exceptions:

- are confined to acts of circumvention of access control measures
- are limited to activities where the prohibition on circumvention has a credibly demonstrated likely or actual adverse impact on non-infringing uses of copyright material;
- relate only to a particular class of copyright material
- do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs

The AFC will address each of these conditions separately.

- *Exceptions are confined to acts of circumvention of access control measures;*

The AFC has noted the ambiguity found within the AUSFTA regarding the difference between a copy control and an access control and has listed both forms of TPM in Appendix B. The AFC believes it to be anomalous to include copy controls in the definition but to refer to access controls in the text of the agreement.

- *Exceptions are limited to activities where the prohibition on circumvention has a credibly demonstrated likely or actual adverse impact on non-infringing uses of copyright material;*

The AFC believes that without the introduction of specific exceptions relating to activities listed in Appendix B, that the introduction of the AUSFTA TPM liability will impact adversely on the AFC's statutory remit to develop, maintain, preserve and exhibit a national collection.

Since the AUSFTA makes the act of TPM circumvention illegal, the AFC will be required to:

- firstly, vary the terms of our pro forma donation and deposit agreement to specifically include a right to circumvent a TPM in any future deposits or donations;
- secondly, seek a warranty from the copyright owner of an item held by the NFSA that the terms under which they have been granted rights/licences from the underlying rights holders also permits circumvention of any TPMs they've placed on their material. This is likely to increase administrative costs so significantly to be prohibitive in carrying out the AFC's statutory function. In some cases, the AFC may not be able to make the variation where it doesn't have the current contact details for all donors and depositors;

While the AFC needs to maintain an ongoing relationship with the owners of copyrighted material held in and deposited with it, there will be an inevitable increase in expenses involved in fulfilling its statutory remit.

The AFC also notes that without exceptions, there may be cases where the AFC will not be able to break a TPM on an orphaned work – that is those works whose authors are not locatable or not identifiable. As the AFC seeks to uphold/respect the rights of copyright owners whenever it uses and provides access to copyright materials in the NFSA, then without an owner to provide permission, and without a right to break the TPM, many items will not be preserved, maintained or stored adequately.

- *Exceptions relate only to a particular class of copyright material; and*

The AFC believes that the list provided at Appendix B has been confined to specific classes of copyrighted material.

- *do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs*

The AFC does not believe that providing exceptions to the circumvention activities detailed at Appendix B will impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective TPMs.

Appendix A – Section 5 of the Australian Film Commission Act, 1976

i. The functions of the Commission are:

1. to encourage, whether by the provision of financial assistance or otherwise, the making, promotion, distribution and broadcasting of Australian programs; and
2. to promote and distribute any programs; and
3. subject to the approval of the Minister, to provide financial assistance to a State or an authority of a State for the purchase by it of:
 - a. Australian programs that are of an educational nature and of national interest or importance; and
 - b. rights in respect of any such programs; and (d) to encourage, whether by the provision of financial assistance or otherwise, the proper keeping of recordings in archives in Australia; and
4. to encourage, whether by the provision of financial assistance or otherwise, the proper keeping or recordings in archives in Australia; and
5. to develop, maintain and preserve a national collection; and
6. to exhibit, or to make available for exhibition by others, items in the national collection; and
7. to make items in the national collection available to such persons and institutions, and in such manner and subject to such conditions, as the Commission determines.

(1A) In the performance of its functions, the commission shall give special attention to the encouragement of:

- i. the making of experimental programs and programs of a high degree of creativeness; and

the making and appreciation of Australian programs and other programs as an art form.

(1B) The commission must use every endeavour to make the most advantageous use of the national collection in the national interest.

- ii. The functions of the Commission specified in paragraphs (1)(a) and (b) may be performed either within or outside Australia.
- iii. The commission may carry out a matter within the functions specified in paragraph (1)(b) by commissioning a person to undertake that matter.
- iv. The Commission may perform its functions to the extent only that they are not in excess of the functions that may be conferred on the Commission by virtue of any of the legislative powers of the Parliament, and, in particular, may perform its functions:
 - 1. by way of expenditure of moneys that are available for the purposes of the Commission in accordance with an appropriation made by the Parliament;
 - 2. by way of, or in relation to, trade and commerce with other countries, among the States, between Territories or between a Territory and a State;
 - 3. for purposes related to broadcasting services;
 - 4. so far as they relate to the collection of statistics;
 - 5. for purposes related to external affairs; and
 - 6. for purposes in relation to a Territory.