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Submission No. <u>46</u>
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Worldwide knowledge and understanding of Australian Indigenous cultures, past and present

 Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
Canberra, ACT, 2600

18 October 2005

Dear Sir/Madam,

RE: Review of Exceptions to New Technological Protection Measures Laws

Please find enclosed the submission by the Australian Institute of Aboriginal and Torres Strait Islander Studies to the above Review.

The introduction of new amendments to the current *Copyright Act* (1968) regarding Technological Protection Measures, as proposed through Australia's obligations under the Australia/United States Free Trade Agreement, will inevitably affect the activities of AIATSIS. To this end, the AIATSIS submission strongly argues for specific exceptions for libraries and archives (and particularly those based at cultural holding institutions) to be considered and prioritised by the Committee. In particular, exceptions for circumvention of access protection measures for the purposes of preservation copying and exceptions for circumvention of access protection measures for the purposes of providing access within the provisions of fair-dealings for libraries and archives. These exceptions are argued as being relevant to *all works* currently covered under the Copyright Act.

AIATSIS appreciates the opportunity to participate in this Review and looks forward to any further discussion on this important matter.

If there are any further questions regarding this submission please don't hesitate to contact either myself, Mr Rod Stroud, Director of the Library on 02 6246 1154, Dr Jane Anderson, Visiting Research Fellow (Intellectual Property) on 02 6246 1115 or Ms Cara Shipp, Digitisation Project Officer, Library on 02 6261 4251.

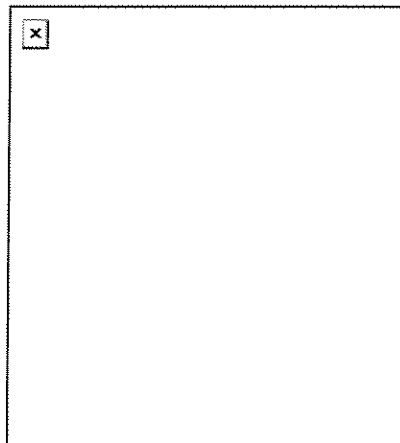
Yours sincerely,

Steve Larkin
Principal
Australian Institute of Aboriginal and Torres Strait Islander Studies

Australian Institute of Aboriginal and Torres Strait Islander Studies

**Submission to the House of Representatives Standing Committee on
Legal and Constitutional Affairs**

**Review of Exceptions to New Technological Protection Measures
Laws**



October 2005

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Executive Summary

The introduction of new amendments to the current *Copyright Act* (1968) regarding TPMs, as proposed through Australia's obligations under the Australia/United States Free Trade Agreement, will inevitably affect the activities of AIATSIS. To this end, the AIATSIS submission strongly argues for specific exceptions for libraries and archives (and particularly those based at cultural holding institutions) to be considered and prioritised by the Committee. In particular, exceptions for circumvention of access protection measures for the purposes of preservation copying and exceptions for circumvention of access protection measures for the purposes of providing access within the provisions of fair-dealings for libraries and archives. These exceptions are argued as being relevant to *all works* currently covered under the Copyright Act.

AIATSIS, like other cultural institutions around Australia, is currently engaged with the digitisation of its collections. Such digitisation is conducted for two primary reasons: for preservation and in order to provide access to the collections by Indigenous and non-Indigenous people. AIATSIS is concerned about the impact of new amendments regarding TPMs as they are likely to impact upon the capacity of AIATSIS to maintain its core functions, as outlined in the AIATSIS Act 1989-2005 and Rules.

The submission addresses: current copyright issues in relation to Indigenous cultural material; the complicated issues of ownership that arise in relation to Indigenous cultural material; concerns for future use and access to material in the digital environment; concerns for the limiting of fair-dealing provisions in relation to TPMs; Indigenous interests in accessing information in digital format with TPMs; and, the need for a regular review of circumvention legislation as it relates to TPMs. This submission offers eleven recommendations for the Committee's consideration.

Recommendations

1. The Committee recognises the complicated relationships of ownership that arise in relation to Indigenous cultural material.
2. The Committee recognises the social and cultural importance of the current copyright exceptions of fair-dealing and provisions relating to libraries and archives.
3. The Committee recognises the need for the additional exceptions for circumvention of access protection measures for the purposes of preservation copying.
4. The Committee recognises the need for the additional exceptions for circumvention of access protection measures for the purposes of providing access within the provisions of fair-dealings for libraries and archives.
5. The public interest in accessing information within reasonable timeframes is balanced against copyright owner's rights and the use of TPMs to protect information.
6. The Committee recognises the importance of the current provisions regarding TPMs for libraries and archives.
7. That due care is exercised in considerations about any proposal for 'limiting' the exceptions in relation to TPMs.
8. The Committee considers, generally, the implications of future uses of materials protected by TPMs.
9. The Committee considers the implications of future uses and resource implications for libraries and archives in acquiring, accessing and disseminating material controlled by TPMs.
10. The Committee considers the difficulty of predicting future technological advancements and therefore the implications of making legislative amendments governing access and use of digital material.
11. The Committee recognises the importance of conducting a regular review of circumvention legislation as it relates to TPMs.

1. Australian Institute of Aboriginal and Torres Strait Islander Studies

1.1 Background

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is an independent Commonwealth Government statutory authority devoted to Aboriginal and Torres Strait Islander studies. It operates under the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*. AIATSIS is Australia's premier institution for information about the cultures and lifestyles of Aboriginal and Torres Strait Islander peoples.

AIATSIS is governed by a Council of nine members, four of whom are elected by the Institute's membership. The remaining five members are appointed, to date, by the Minister of Indigenous Affairs. AIATSIS maintains an expert Membership body, research credentialed Council membership, Research Advisory Committee, staff of researchers, a national research grants program, a national library and archive and the Aboriginal Studies Press.

Since its inception in 1964, and through the revision of its Act in 1989, AIATSIS has had as its mission to provide leadership and excellence in promoting, facilitating and undertaking high quality research in Australian Indigenous studies; to develop, maintain and preserve well documented archives and collections and to maximise access to these, particularly by Indigenous peoples; and, to encourage understanding in the general community (both domestically and internationally) of Aboriginal and Torres Strait Islander societies.

1.2 Core activities and funding

AIATSIS holds the world's most extensive collections of printed, audio and visual materials on Aboriginal and Torres Strait Islander lifestyles and cultures. These now comprise a world class Library and Audiovisual Archive. The collections are a major resource for Indigenous communities. Specialised access services have been developed to respond to demand for material to conduct research into native title and family history. In 2001 AIATSIS commenced its digitisation program which has, as its primary aim, the facilitation of access to and preservation of the Institutes' collections, particularly audio recordings, print materials and photographic images. The significance of the AIATSIS digitisation program was recognised in 2005 when the Federal Government granted more funding for ongoing digitisation of these valuable collections. Importantly, AIATSIS holds both published and unpublished material, and in certain circumstances, this material has further restrictions placed upon it in regards to access. This is in response to the cultural nature of the material, and that some material is of a secret/sacred nature and is therefore not publicly accessible material.

The Research Section of AIATSIS undertakes high quality, multidisciplinary research in areas of relevance to Aboriginal and Torres Strait Islander people. This is achieved by promoting research that has significance across many fields of study as well as by undertaking research that responds to and informs community development and policy formulation in key areas. For the purposes of research and further education, researchers at AIATSIS regularly utilise, and at times create their own, databases of knowledge in

specialised fields. Researchers rely upon their current exceptions within the *Copyright Act* (1968) to access material for the purposes of study and research.

The Institute's publishing arm, Aboriginal Studies Press, facilitates the dissemination and publication of work conducted through AIATSIS as well as publishing authors in many fields of Indigenous studies. Approximately 12 new titles are published annually.

2. Current Copyright Issues

2.1 Indigenous ownership of material

AIATSIS holds published and unpublished material, as well as public domain material. Most of the copyright owners are non-Indigenous people, even though the material is about, depicts and/or documents the lives and cultures of Indigenous people. AIATSIS is engaged in ongoing and pragmatic negotiations with a range of stakeholders about ownership and use of these cultural materials. The contested ownership and control of historical and contemporarily recorded Indigenous cultural knowledge is a constant issue that is mediated at AIATSIS. Simply, the problem manifests itself because Indigenous people and communities have no legal rights in much of the material, meaning that they must constantly negotiate with the copyright owner for future use, reproduction, and in some more extreme instances, access. Factors such as distance and language as much as new legislative restrictions on reproduction and use of copyright material in the digital environment complicate these copyright matters considerably.¹

2.2 Responding to remote users

The capacity for libraries and archives to respond to remote users, Indigenous and non-Indigenous, has generated new copyright challenges. In particular, these are in terms of reproduction and copying. They exist because digital technology has altered the ways in which accessing and communicating material can be achieved and the new rights that are consequently generated (for example in databases). Whilst libraries and archives are not the only organizations effected by changing digital technology and consequently the changing law, questions about how libraries and archives maintain their core functions of making material available to the public without onerous administrative burdens are of key concern. Kenyon and Hudson have recently argued, that in an Australian context, whilst the changes to Australian copyright law brought about through the *Copyright Amendment (Digital Agenda) Act 2000* ('Digital Agenda Act'), provided some scope to exploit digital and communicative technologies, this is countered by administrative limitations such as obtaining licenses from copyright owners.² In situations where copyright owners are difficult to locate or provenance is hard to determine – which is often the case with material relating to Indigenous people – cultural institutions are faced with the choice of infringing copyright or not facilitating digital access. This is an issue of key concern to AIATSIS given that its primary client group is Indigenous people.

¹ Jane Anderson, 2005, 'The Making of Indigenous Knowledge in Intellectual Property Law in Australia' *International Journal of Cultural Property* 12(2).

² Andrew Kenyon and Emily Hudson, 2004 "Copyright, Digitization and Cultural Institutions" 31 *Australian Journal of Communications* 89 at 91.

2.3 Status of Material

In general the Library collection predominately comprises literary works (manuscripts, books, pamphlets, newspaper collections) of which 14% are unpublished. This is in contrast to the Audiovisual Archives collection (films, sound-recordings and photographs) where a majority of the material is unpublished. As the collections at AIATSIS are not all of one kind it takes time to establish the relevant copyright owner (especially through the different funding arrangements and contractual obligations), the relevant duration of copyright according to the transitional provisions in the Copyright Act, and whether there are any other interested parties in the work.

In the context of the Library, over 90% of access requests to the Library Collection are related to a fair-dealing purpose of criticism or review, and/or research and study. In the Audiovisual Archives the requests range from family history purposes through to commercial purposes. The use of fair-dealing in the Audiovisual Archives is minimal since most clients are Indigenous people seeking whole copies of a work for community use, family/cultural history, and resources for teaching their traditions to young community members. Increasingly, our Audiovisual Archives clients are requesting whole collections of materials on a particular language group or place. The resources needed to negotiate the licences and warranties for multiple copyright holders on these requests are demanding.

The current annual expenditure, based solely on personnel costs, for time spent negotiating license fees and/or copyright clearances approximates \$20,000 for the library and for the audiovisual archives approximately \$104,000³. These costs are likely to increase significantly over the following three years with the increasing development of the digitisation project. Given these current costs, AIATSIS has reason to be concerned about the increased expenditure required to manage material equipped with TPMs

Recommendation One: The Committee recognises the complicated relationships of ownership that arise in relation to Indigenous cultural material.

Recommendation Two: The Committee recognises the social and cultural importance of the current copyright exceptions of fair-dealing and those provisions specifically relating to libraries and archives.

³ This is based on a rough estimate of one APS 6 and three APS 5 officers spending two-three days per week on copyright clearances.

3. Technological Protection Measures and Public Access

3.1 Background

There is currently a lengthy international debate about the potential for TPMs to conflict with rationales of public domain and public access to information. This debate is not without its emotive rhetoric on each side. Clearly TPMs have been designed and developed to address a specific problem in relation to securing digital information from unauthorised copying. The development of technologies of copy protection – for instance password protections, serial content management protections, regional codings – reflect the ongoing development of controlling mechanisms suitable for the technology at hand. Importantly this will change over time, as new technology develops so will the kinds of controls that are designed to secure and protect rights in new technologies.

3.2 Current concerns

Key issues that need to be considered in relation to TPMs and the development of any new legislation include:

- a legitimate time frame for the existence of certain TPMs;
- how material can be accessed when the time frame necessitating the protection has expired;
- the capacity for TPMs to be used to the detriment of certain kinds of ‘publics’;
- how to balance the interests of copyright owners with copyright users in the digital domain.

AIATSIS has certain concerns about the extent that TPMs will hinder access to material that is valuable to a specific set of users. Such a concern is an extension of the current reality that Indigenous people are ostensibly ‘users’ of copyright material at AIATSIS not ‘owners’ and therefore have very few rights in relation to material. It is not unforeseeable that as more material gets created, for example in databases, and the ongoing processes of documenting the lives and cultures of Indigenous people and communities, this material will be deposited at AIATSIS complete with the TPMs. Whilst AIATSIS can certainly make policy decisions in relation to the acquisition of such material, it is also the premier national institution holding Indigenous cultural material, and as such has an obligation to acquire and manage valuable material for future Indigenous users, tacitly assuming there are reasonable levels of access for future users.

3.3 Some examples

1. A fifteen year old Word document, a partially completed unpublished PhD on a CD-ROM, cannot be accessed because of password locks. The creator of the document is deceased and left no instructions in relation to the material. AIATSIS acquired it from the family as the material was assessed to be of potential importance to the family that the researcher was working with. The material contains personal details of an Aboriginal family from Dubbo, taken during interview with an elder of this family who has now passed away. Descendents of this family seek access to the work as part of their family history research.

In these circumstances AIATSIS would require the following:

- an exception that allows for the circumvention of access protection measures on literary works for the purposes of preservation copying.
- an exception that allows for the circumvention of access protection measures on literary works for the purposes of providing access within the provisions of fair dealings for libraries and archives.

2. AIATSIS acquires a music file via the web with a time/date lock and the website is no longer available. The creators can't be contacted.

3. A database of community knowledge relating to certain ceremonies is established. The author of the database, the compiler, makes the database password protected. The author stops working with the community and leaves with no forwarding contact details. The details of the passwords remain unknown. AIATSIS acquires a copy of the database but cannot unlock the password protected domains relating to specific information on the more restricted ceremonies. The families whose ceremonies are restricted seek access but cannot unlock the passwords.

In these circumstances AIATSIS would require the following:

- an exception that allows for the circumvention of access protection measures on audio works for the purposes of preservation copying.
- an exception that allows for the circumvention of access protection measures on audio works for the purposes of providing access within the provisions of fair dealings for libraries and archives.
- an exception that allows for the circumvention of access protection measures on digital/electronic works for the purposes of preservation copying.
- an exception that allows for the circumvention of regional coding for the purposes of preservation copying.
- an exception that allows for the circumvention of access protection measures on literary works for the purposes of preservation copying.
- an exception that allows for the circumvention of access protection measures on literary works for the purposes of providing access within the provisions of fair dealings for libraries and archives.

4. A US produced DVD is acquired with regional coding. In 2025, DVD format becomes obsolescent, but even though the digital file is copied onto another medium the regional coding prevents access.

- an exception that allows for the circumvention of regional coding for the purposes of preservation copying.
- an exception that allows for the circumvention of regional coding for the purposes of providing access within the provisions of fair dealings for libraries and archives.

To make this material accessible for preservation purposes, and for user access, AIATSIS would need to utilise two exceptions within the Copyright Act in relation to TPMs. The first would need to allow AIATSIS to circumvent the TPM on literary works for the purposes of preservation copying. The second would need to grant 'users' an exception under fair-dealing to access the material for the purposes of research and or study.

In summary, AIATSIS will need the following exceptions if it is to adequately manage, preserve, store and provide access to material that utilises TPMs.

- an exception that allows for the circumvention of access protection measures on audio works for the purposes of preservation copying.
- an exception that allows for the circumvention of access protection measures on audio works for the purposes of providing access within the provisions of fair dealings for libraries and archives.
- an exception that allows for the circumvention of access protection measures on digital/electronic works for the purposes of preservation copying.
- an exception that allows for the circumvention of regional coding for the purposes of preservation copying.
- an exception that allows for the circumvention of regional coding for the purposes of providing access within the provisions of fair dealings for libraries and archives.
- an exception that allows for the circumvention of access protection measures on literary works for the purposes of preservation copying.
- an exception that allows for the circumvention of access protection measures on literary works for the purposes of providing access within the provisions of fair dealings for libraries and archives.

In calling for these exceptions, AIATSIS is working from the assumption that the current provisions within the Copyright Act relating to Libraries and Archives (Sections 48-53; Sections 110A and 110B) are retained and extended as per submissions made to the *Review on Fair-Use and Other Copyright Exceptions: An Examination of Fair-Use, Fair-Dealing and Other Exceptions in the Digital Age* by the Copyright in Cultural Institutions Group 2005.

Recommendation Three: The Committee recognises the need for the additional exceptions for circumvention of access protection measures for the purposes of preservation copying.

Recommendation Four: The Committee recognises the need for the additional exceptions for circumvention of access protection measures for the purposes of providing access within the provisions of fair-dealings for libraries and archives.

Recommendation Five: The public interest in accessing information within reasonable timeframes is balanced against copyright owner's rights and the use of TPMs to protect information.

Recommendation Six: The Committee recognises the importance of developing exceptions for TPMs that are in keeping with the current copyright provisions for libraries and archives and for users in relation fair-dealing.

4. Libraries, Archives and Fair Dealing

As it currently stands, under the Australian/United States Free Trade Agreement, there are exceptions to liability for circumventing of access measures to libraries for making acquisitions decisions.

Libraries are not currently granted exceptions for:

- dealings with devices that circumvent access measures, or
- dealings with devices that circumvent copyright measures.

Under the current circumstances at AIATSIS these two issues affect access to information by both AIATSIS staff and clients. The need for these kinds of dealings with TPMs will certainly be more pressing in the future, as more material will be created with TPMs that AIATSIS will acquire. In addition, where it is impossible to fully predict the impact of TPMs and broader technological developments in information technology, the need for these kinds of exceptions in dealings for libraries and archives will only increase.

AIATSIS is concerned about any potential limiting of exceptions in relation to TPMs in the sense that they will affect its core functions and its capacity to provide access to valuable cultural material.

Recommendation Seven: That due care is given to considerations about any proposal for 'limiting' the exceptions in relation to TPMs.

5. Cultural Materials, Technology and Future Access

5.1 The challenge of cultural materials

The issues around Indigenous cultural materials are complicated. In coming to terms with these, and in order to make informed and useful policy decisions that cater to a diverse range of stakeholders, AIATSIS has been conducting, in collaboration with the Intellectual Property Research Institute of Australia, a project that explores the contested ownership issues arising around Indigenous cultural material.⁴ Two of the primary dimensions feeding the challenges around this material are that:

- over time, the value of the material changes;
- over time, different kinds of 'publics' are constituted.

It is inevitable that over a period of time, cultural information and material will change in value. It is of course difficult to predict with any real certainty which material will come into new demand and whether it will be in response to changing users and or changing social interests or priorities in relation to particular issues. It is certainly clear, from the perspective of cultural institutions around Australia, that as a compliment to the changing social and historical contexts of Australia, new users of archives and libraries have been constituted. This ultimately means that the 'public' will never be all of one kind, and will ultimately have different types of needs in relation to material within libraries and archives, and the kinds of access required.⁵

As an example, at AIATSIS, Indigenous people started becoming the primary users of the collections, constituting a new Indigenous public in the late 1990s. Currently, approximately 75% of the clientele of the Library are Aboriginal and Torres Strait Islander people – in the 1990s this figure was 1%.⁶ In a period of roughly fourteen years this is a dramatic increase and reflects significant changes over this period in regards to Indigenous affairs. With changing users and new kinds of publics, institutions like AIATSIS need to respond to a variety of stakeholders and interest groups.

AIATSIS requests that the Committee considers these inevitable sociological changes and the consequential effects of new legislation around TPMs on the kinds of rights currently provided to users of copyright material. Any recommendations made in relation to legislating new copyright rights need to recognise that as new copyright owners are constituted so too are new kinds of copyright users.

⁴ Jane Anderson, Second Research Report, *AIA TSIS/IPRIA Intellectual Property and Indigenous Knowledge Project: Access, Ownership and Control of Indigenous Cultural Material*, September 2005, AIATSIS, Canberra.

⁵ Jane Anderson, 2005, 'Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use.' Paper for *Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena* American Library Association and The MacArthur Foundation, Columbia University, New York, May 5-7, 2005.

⁶ Conversation between Emily Hudson and Barbara Lewincamp for *AIA TSIS/IPRIA Intellectual Property and Indigenous Knowledge Project: Access, Ownership and Control of Indigenous Cultural Material*. IPRIA Preliminary Report April 2005. AIATSIS, Canberra.

5.2 Changing technological functions

Technological protection measures coupled with obsolescence of equipment and uncertainty of the lifespan of physical format digital media makes it very hard for AIATSIS to develop long-term strategies for both preservation and access to invaluable Indigenous culture and history. In effect, the Institute's functions and powers to establish and maintain a cultural resource collection consisting of materials relating to Aboriginal and Torres Strait Islander studies, as specified by the *Australian Institute of Aboriginal and Torres Strait Islander Studies Act 1989*, cannot be fully carried out with TPMs preventing long-term access and preservation to digital format material.

The Institute's greatest concern is that it is impossible to anticipate future technological developments with TPMs. AIATSIS considers an ongoing regular review of circumvention legislation for TPMs essential in order to ensure that future legislation does not permanently prevent access to Australian Indigenous cultural heritage.

The AIATSIS Library and Audiovisual Archive hold many CD-ROMs containing invaluable information on Australian Indigenous languages, art and culture. Very few of these CD-ROMs are produced on archival quality gold-plated discs, in fact some have been created on a cheap CD-ROM burner by a small Indigenous organisation or an individual. The data on these physical format digital media is not stable – the aluminium coating oxidises and ultraviolet light can alter the optical qualities of the polycarbonate plastic. These are just some of the problems aside from the more obvious concerns around temperature and humidity.

Long before the CD-ROM disc becomes unreadable, it is likely that the CD-ROM will be replaced by a new medium and that it will not be possible to find a CD-ROM reader. Important Australian Indigenous cultural heritage is at risk without being backed up on a secure Digital Asset Management Systems (DAMS). This is no different than the present acquisition and preservation of physical format paper materials.

It is essential that the AIATSIS Library and Audiovisual Archives can make copies of valuable cultural heritage material and store them in secure, backed-up hard disk storage. These copies would only be used if the CD-ROM, DVD or floppy disk is unable to be accessed – and constitutes a non-infringing copyright action with preservation as the sole reason for copying (provided preservation exceptions are extended to libraries and archives as fair use exceptions).

Recommendation Eight: The Inquiry considers the future use implications of material protected by TPMs.

Recommendation Nine: The Committee considers the future use implications and consequently the resource implications for libraries and archives in acquiring, accessing and disseminating material that utilises TPMs.

Recommendation Ten: The Committee considers the difficulty of predicting future technological advancements and therefore the implications of making legislative amendments governing access and use of digital material.

Recommendation Eleven: The Committee recognises the importance of conducting a regular review of circumvention legislation as it relates to TPMs.