

**Session 5: Implementation and use
of limitations and exceptions:
contracts, technological protection
measures and other practical issues.**

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IMPLEMENTATION AND USE OF LIMITATIONS & EXCEPTIONS: CONTRACTS, TECHNOLOGICAL PROTECTION MEASURES & OTHER PRACTICAL ISSUES

LAM CHUNG NIAN

APEC - IPEG
WORKSHOP ON COPYRIGHT
EXCEPTIONS AND LIMITATIONS



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SINGAPORE | CHINA | MIDDLE EAST
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Limitations & Exceptions



- **Limitations**
 - Limits scope of protection
- **Exceptions**
 - Immunity from infringement
- **Compulsory or non-voluntary licences**
- **Berne Convention Study Group (1964)**
 - obvious that all forms of exploiting a work which have, or are likely to acquire, considerable economic or practical importance must in principle be reserved to the authors. Exceptions that might restrict the possibilities open to the authors in these respects are unacceptable.
 - must not be forgotten that national legislations already contain a series of exceptions in favour of various public and cultural interests and that it would be vain to suppose that States would be ready at this stage to do away with these exceptions to any appreciable extent.

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Overview



- Introduction
- L&Es in the Context of TPM & DRM
- Singapore's Approach

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L&Es and the Berne Convention



- **Berne Convention for the Protection of Literary and Artistic Works (1967)**
- **Limitations**
 - Eg. Art 2(8)
- **Exceptions**
 - Eg. Art 10(2)
- **Three Step Test: Article 9(2)**
 - It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works
 - in **certain special cases**
 - provided that **such reproduction does not conflict with a normal exploitation of the work** and
 - **does not unreasonably prejudice the legitimate interests of the author**

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TRIPS



- **Article 13**
 - Members shall confine limitations or exceptions to exclusive rights to
 - certain special cases
 - which do not conflict with a normal exploitation of the work and
 - do not unreasonably prejudice the legitimate interests of the right holder.
- **Public interest considerations**
 - Art 7
 - Art 8

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Rights Management Information



- **WCT Art 12**
 - Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:
 - to remove or alter any electronic rights management information without authority;
 - to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.”
- **WPPT Art 19**
 - Same obligations prescribed in respect of the rights of performers and producers of phonograms (sound recordings)

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Technological Measures



- **WIPO Copyright Treaty (WCT), Art 11**
 - “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.”
- **WIPO Performances and Phonograms Treaty (WPPT), Art 18:**
 - Same obligations prescribed in respect of the rights of performers and producers of phonograms (sound recordings)

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L&Es: The Digital Agenda



- **WCT Art 1(4)**
 - Incorporates Berne Arts 1 - 21
- **WCT, Article 10(1) and WPPT, Article 16**
 - Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty
 - in **certain special cases**
 - that do **not conflict with a normal exploitation** of the work and
 - **do not unreasonably prejudice the legitimate interests of the author.**

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L&Es: The Digital Agenda



- **WCT, Art 10 agreed statement**
 - Contracting Parties may
 - “carry forward and appropriately extend” into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention.
 - devise new exceptions and limitations that are appropriate in the digital network environment.
- **xf Art 10(2) agreed statement**
 - It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

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Breach of Contract vs Copyright Infringement?



- **Nature of breach to be examined**
 - Breach of contractual promises in a license agreement condition vs breach of conditions of licence
 - Covenant:
 - promise to act or not act in a particular way (“Licensee agrees that it will not X”)
 - Condition:
 - precondition that must be fulfilled before a party delivers a benefit (“Provided that Licensee does not A, then Licensor will allow Licensee to B”).

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L&Es – Practical Problems



- **End-user licences regulating use of copyright material**
 - Licence terms prohibit or curtail rights of users
 - Is the breach of a licence term:
 - A breach of copyright?
 - A breach of contract?
- **MDY Industries LLC vs. Blizzard Entertainment, Inc.,**
 - MDY sued Blizzard for threats against MDY’s “Glider” software
 - Blizzard countersued:
 - end-users’ use of Glider was violation of the EULA
 - MDY authorised end-user copyright infringement

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Breach of Contract vs Copyright Infringement?



- **Breached condition must have a nexus to the licensor’s exclusive copyright rights**
 - Eg copying, selling, and creation of derivative works.
 - All licensors would otherwise draft every license provision to say that it is an essential condition of the license
 - Failure to pay the license fee would always be deemed to have the required nexus for copyright infringement action.
- **MDY not liable for authorising infringement**
 - Blizzard license prohibitions against using bots phrased as covenants (“You agree that you will not...create or use cheats, bots, ‘mods,’ and/or hacks...”), not as conditions to using WoW;
 - Glider users’ violations of the license terms did not implicate any exclusive copyright rights, for example copying WoW or creating altered versions of it.
 - Might be liable for circumventing TPMs

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TPMs & RMIs vs L&Es

- **May provide rights owners 2nd layer of rights**
 - Rights co-existing with copyright?
- **Limitations on access**
 - TPMs and RMIs make it difficult for users to access content outside permitted platforms
 - Impose physical/practical limitations on use of material even within L&E framework
 - Circumvention will require high degree of technical skills/cost
- **May create market distortions**

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Singapore's Copyright Regime

- **Common law based legal system**
- **IP laws largely statutory**
 - Drawn from UK and Australian statutes
 - Continuing reception of case-law
- **Free trade agreements**
 - Treaty-plus protection: USFTA
- **Copyright Act (Cap 63, 2006 Rev Ed)**
 - Based largely on the Australian Copyright Act
 - English common law based jurisdiction
- **Full implementation of the Digital Agenda requirements**
 - Circumvention of Technological Protection Measures
 - Protection of Rights Management Information

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Singapore

- **Member of Berne, TRIPS, WCT, WPPT**
- **National agenda**
 - Establish Singapore as Asia's Innovation Capital – *a hub for innovation and enterprise, and a location of choice for commercialisation, even for ideas not invented here*. Economic Strategies Committee Report (2010)
 - New IP Hub Masterplan announced March 2012
 - develop a vibrant marketplace for IP transaction and commercialisation, and
 - build world-class IP capabilities and infrastructure.
- **Singapore IP laws have evolved considerably**
 - Convention accession
 - Free trade agreements, US-SFTA (signed), EU-Singapore (ongoing)
- **Singapore's IP regime generally well-regarded**
 - Consistently ranked amongst the best in the world by the World Economic Forum and the IMD.

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Copyright L&E Framework in Singapore

- **Limitations on exclusive rights**
 - Comparatives with rights protection frameworks in other jurisdictions
 - Eg. no protection of public performance rights for sound recordings
- **Exhaustion of Rights principles are strongly embraced**
 - Legitimate parallel imports permitted
 - Consent of the copyright owner to making of an article overseas:
 - the person entitled to the copyright in respect of its application to the making of an article of that description in the country where the article was made; or
 - if there is no person so entitled, the person entitled to the copyright in respect of that application in Singapore.
 - Extends also to accessories to imported articles (Section 40A)

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Copyright L&E Framework in Singapore



- **Fair Dealings**
 - Defence to copyright infringement
 - Previously, available only for specified categories of dealings (cf the UK and Australian approach)
 - Copyright Act recently amended to include US style “fair use” concepts as additional basis for fair dealing defence
 - purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
 - amount and substantiality of the part copied taken in relation to the whole work or adaptation;
 - effect of the dealing upon the potential market for, or value of, the work or adaptation;
 - possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price

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Copyright L&E Framework in Singapore



- **Avoidance provisions (Sections 39, 39A, 39B only)**
 - it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act; and
 - any such term or condition shall, insofar as it purports to prohibit or restrict the act, be void.

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Copyright L&E Framework in Singapore



- **Contractual Limitations**
 - Avoidance of certain contractual provisions primarily in relation software licences:
 - Making of backup copies of computer programs (Section 39(1))
 - Copy created as an essential step in the utilisation of the computer program or compilation in conjunction with a machine and that it is used in no other manner (Section 39(2))
 - Decompilation for creating an independent computer program which can interoperate (Section 39A)
 - Observing, studying or testing the functioning of the computer program in order to determine the ideas and principles which underlie any element of the computer program (Section 39B)

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L&Es for TPM Protection



- **Limitations**
 - Applies where “a technological measure is applied to a copy of a work or other subject-matter ... **in connection with the exercise of the copyright**, or to a copy of a performance by or with the authorisation of the performer of the performance **in connection with the exercise of any right in the performance**” (Section 261C)
 - TPM comprised in “technology, device, or component” quare “products or services”
- **Compare:**
 - US CA, § 1201(a)(2) formulation: “controls access”
 - But see also US DMCA, § 1201(c)(1): “Nothing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, under this title.”

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L&Es for TPM Protection



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

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L&Es for TPM Protection



- **Copyright (Excluded Works) Orders**
 - Minister for Law may exclude any legitimate and authorized use of specified copyright material and performances or specified classes of copyright material and performances from the prohibition against circumvention which it may hinder (Section 261D(2))
 - Dealing does not amount to an infringement of copyright therein or an unauthorised use thereof (as the case may be) and has been or is likely to be adversely impaired or affected as a result of the operation of the TPMs.
 - Subject to review and public consultation (next due 2012)

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L&Es for TPM Protection



- **Exceptions (Section 261D)**
 - Access to a copyright work not otherwise available to certain libraries, archives or institutions, for the sole purpose of determining whether to acquire a copy of the work.
 - Identifying and disabling a technological measure that is capable of collecting or disseminating personally identifying information
 - Achieving interoperability of an independently created computer program with another computer program
 - Certain forms of research on encryption technology
 - Preventing access by minors to material on the Internet
 - Testing, investigating, or correcting a security flaw or vulnerability of a computer, computer system or computer network
 - Law enforcement, intelligence, national defence, essential security or other similar purpose

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L&Es for TPM Protection



- **Examples**
 - Computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete
 - Computer programs and video games distributed in obsolete formats that have become obsolete
 - Access controls on e-books preventing read-aloud function or screen readers
 - college or university's film or media studies department making compilations of portions of audiovisual works for educational use in the classroom by film or media studies professors.
 - Testing, investigating, or correcting security flaws or vulnerabilities created by TPMs controlling access to lawfully purchased sound recordings and audiovisual works distributed in compact disc format
- **Quare:**
 - Review framework too piecemeal and "reactionary"?

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L&Es for RMIs

- RMIs only applies to electronic RMI and not to non-electronic ones.
 - is attached to or embodied in a copy of a work or other subject-matter in which copyright subsists or a recording of a performance; or
 - appears in connection with the communication or making available to the public of a copy of a work or other subject-matter or a recording of a performance.
- Xf US CA § 1202
 - any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work

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Policy Vigilance

- **Creative Technology Ltd v. Aztech Systems Pte Ltd [1996] SGCA 71**
 - Aztech's act of running Creative's driver, and decompilation infringed Creative's of reproduction and the right of adaptation.
 - Statutory defence of lawful owner of software being allowed to make a copy/adaptation only where such copy or adaptation "created as an essential step in the utilisation of the program" in the machine and not for any other purpose such as the creation of a compatible product.
 - Aztech's copy was not made as an essential step in the utilisation of the program -- statutory defence not available.
 - Not able to claim defence of fair dealing because it was not private study
 - Led to legislative amendment permitting broader scope of permissible reverse engineering of computer programmes for certain specific purposes and also fair dealing provisions

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Policy Vigilance

- **Creative Technology Ltd v. Aztech Systems Pte Ltd [1996] SGCA 71**
 - Parties manufactured sound cards used as an "add-on" board
 - Creative argued its copyright in driver software was infringed when the respondent unlawfully copied and loaded it into a personal computer's random access memory for the purpose of effecting disassembly.
 - Aztech denied disassembling the firmware but admitted the copying of the software, but argued that it was a fair dealing for the purpose of research or private study.
 - Aztech also contended that it, being the lawful owner of the software program, was entitled to use the program for any reasonable purpose, including the purpose of investigating how it interacted with the sound card.

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Policy Vigilance

- **MDA regulations on Cross-Carriage Requirements**
 - Pay TV operators entering into bidding wars with content providers
 - MDA announced policy to require pay TV operators to permit other pay TV operators to cross-carry exclusive content
 - Public consultations:
 - Interference with exclusivity of copyright owners' freedom of contract? vs
 - Mere "cross-carriage" arrangement?
 - Pay-TV providers have to allow their exclusive content to be carried on a rival provider's network, if the latter's customers wanted to watch this content.
 - The content must be cross-carried in its entirety and in an unmodified and unedited form and subject to the same subscription requirements.

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The Role of the Courts

- **RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd and others** [2010] SGCA 43
 - RecordTV operated an Internet-based service that allowed its registered users to request the recording of free-to-air broadcasts in Singapore.
 - Broadcasts were recorded on RecordTV's iDVR, which functioned like a traditional digital video recorder, and the recording was made at RecordTV's premises
 - Registered Users operated the iDVR system remotely from home or elsewhere via a web browser.
 - MediaCorp alleged that the use of the iDVR infringed its copyright in the MediaCorp shows.
 - In response, RecordTV sued MediaCorp for groundless threats of copyright infringement.
 - MediaCorp in turn filed a counterclaim for copyright infringement

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The Role of the Courts

- CA drew parallels between a traditional VCR operation and the operation of the iDVR
- RecordTV not making copies of the Mediacorp shows; instead, it was the registered users who were requesting the recording of these shows using the iDVR.
- As the shows were only recorded at the private request of the individual registered user, and streamed only to the registered user's computer upon their request, the registered users would not constitute the 'relevant public'
- iDVR represented a significant technological improvement over existing recording methods. It did no more than made it more convenient for registered users to enjoy the MediaCorp shows, an activity which they were already entitled to partake in.

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The Role of the Courts

- **Held:**
 - "Where statute was not clear as to the ambit of an existing copyright owner's rights, unless the statutory words clearly reflected the legislative policy on the extent of the rights to be conferred on the copyright owner, the courts should not be quick to interpret the statutory words expansively if doing so might stifle technological advances which were in the public's interest."
 - The Court of Appeal took the view that RecordTV's iDVR service represented a significant technological improvement over existing recording methods.
 - Already provisions in the Copyright Act allowing for time-shifting in domestic settings
 - RecordTV did no more than make it more convenient for Registered Users to enjoy TV programmes in a manner they were already entitled to do so

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Conclusions

- **Continuing need to ensure that technology does not out-pace public interest balances in the copyright system**
- **Contractual limitations, TPM and DRM technologies may impose real limits on exercise of limitations and access to material**
- **Acceptance that L&E framework needs to evolve but more needs to be done for clarity**
- **Practical approaches in the meantime:**
 - Appropriate scoping of statutory frameworks
 - Creating appropriate statutory exclusions (vs freedom of contract)
 - Statutory review regimes – do they afford timely remedies?
 - Continuing role of the courts and legislature

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Copyright L&Es in Singapore



- **Continuing need to balance interests**

- “We are aware of concerns both by the industry and our need to be an IP Hub with tremendous value for our creative producers, our young talent, and at the same time, we are also aware of the concerns on the other side where people are very concerned about how any rules or regulations could impact on a whole variety of areas. So we are very mindful, which is why we are doing a review. When eventually the review committee comes to a conclusion, we will have that in Parliament.” – Law Minister Mr K Shanmugam, 6 March 2012

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Thank You



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**Presentation by
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Canada

The Case for Flexibility in Implementing TPM Protection

michael geist

canada research chair in internet and e-commerce law

university of ottawa, faculty of law

Bottom Line

- WIPO Internet Treaties very flexible
- Countries have taken advantage of that flexibility with wide range of exceptions and limitations

WIPO Flexibility

Plain Language

“adequate legal protection and effective legal remedies against the circumvention of effective technological measures”

Legislative History

- Anti-circumvention rules developed over two year period from 1994 - 96
- No reference in early preparatory meetings which started in 1989
- Four preparatory meetings + Diplomatic conference
- Extensive records and minutes on all of these meetings

Legislative History - 4th prep meeting (Dec 1994)

- U.S. raises protection for copy protection systems
- No specific language proposed
- Emphasis on trafficking in circumvention devices
- Need to protect lawful uses discussed
- Chair notes no agreement - floats prospect of general provision on circumvention and leave to countries to implement

Legislative History - 5th prep meeting (Sept 1995)

- Still no specific language
- U.S. stresses urgency of addressing the issue
- Other countries express concern:
 - Republic of Korea fears interference with normal exploitation of a work
- Business raises concern as well - electronics industry on implications for fair use and innovation

Legislative History - 6th prep meeting (Feb 1996)

- Specific language proposed:
 - U.S. proposes provision on trafficking in devices
 - Brazil & Argentina propose provisions on trafficking and circumvention of copy controls (no access controls)
- Delegation responses:
 - Republic of Korea seeks mandatory exceptions
 - Denmark favours general principle with flexible implementation
 - Thailand opposes any TPM protection
 - China seeks further study
- Chair's summary notes lack of consensus

Legislative History - 7th prep meeting (May 1996)

- Specific language proposed:
 - EU adds proposal on trafficking in devices (but adds a knowledge requirement)
- Delegation responses:
 - Canada says it cannot support any proposal
 - Singapore says it goes too far and interferes with legit uses
 - Thailand says it goes too far and would create confusion
 - Republic of Korea concerned about harm to public interest
 - China expresses doubt that it fits within copyright
 - Ghana fears impact on developing world and should be reconsidered
 - Nigeria concerned about vagueness of language
 - Brazil, Egypt says need further clarification
- No recommendations or conclusions

Legislative History - Diplomatic Conference (Dec 1996)

- “Basic proposal”:
 - Targets trafficking + effective remedies
- Delegation response:
 - Ghana demands provision be dropped
 - Canada not acceptable
 - Republic of Korea concerned about lawful uses
 - Singapore concerned about high standard of liability
 - Australia, Norway, Germany, Jamaica all call for narrowing the provision
 - South Africa proposes general language on acts of circumvention (no trafficking)
 - Only three delegations support - U.S., Hungary, Columbia

Legislative History - Plenary Conference (Dec 1996)

- Delegation response:
 - Israel says Basic Proposal is “over broad”
 - Singapore says it interferes with bona fide uses of technology
 - Indonesia calls for more study
 - India warns on impact on fair use
 - Republic of Korea warns on overbroad impact
- No unqualified endorsements of Basic Proposal

So what happens...

“adequate legal protection and effective legal remedies against the circumvention of effective technological measures”

Implementations

Economy Implementations - U.S.

- Several bills tried to implement
 - *Digital Copyright Clarification and Technology Education Act (1997)*
 - No ban on devices, accounted for fair use
 - *Digital Millennium Copyright Act (1998)*
 - Access and copy controls, devices
 - Acknowledge that it goes beyond WIPO requirements
 - Triennial review of new exceptions: added jailbreaking cellphones and DVD circumvention in 2010

Economy Implementations - Canada

- Four bills have tried to implement
 - Bill C-60 (2005)
 - Linked circumvention to infringement
 - No ban on devices
 - Bill C-61 (2008), Bill C-32 (2010), Bill C-11 (2011)
 - DMCA-style approach
 - Copy and access controls, devices
 - Actual damages for personal circumvention (no criminal or statutory damages)

Economy Implementations - Canada

- Exceptions
 - law enforcement
 - reverse engineering
 - privacy
 - perceptual disabilities
 - Security testing
 - Encryption research
 - Broadcaster recordings
 - cellphone jailbreaking
- Regulatory power to add new exceptions

Economy Implementations - Additional Exceptions

- Link Circumvention to Infringement
 - New Zealand
 - Switzerland
 - India
 - Canada (2005 bill)
- Non-infringing Uses
 - Finland
 - Italy
 - Lithuania (personal use rights)
 - Norway (private use for playback)

Economy Implementations - Additional Exceptions

- Digital Archiving (Czech Republic)
- Limit to works subject to copyright protection (Germany)
- Positive right of access (Greece)
- Teaching purposes (Slovenia)
- Court cases and government documents (Sweden)
- Decree access (Netherlands)
- Tribunal review (Denmark)

Economy Implementations - Limited Implementation

- Argentina (self-executing)
- Belarus (no devices, access controls)
- Indonesia (no implementation)
- Philippines (no implementation)
- Romania (no acts of circumvention)
- Turkey (no trafficking, limited access controls)
- Ukraine (proof of “intentional” circumvention)

Conclusion

- WIPO Internet treaties are intentionally flexible
- Need for flexibility continues - ACTA, economy implementations
- Compromise is possible that will address consumer concerns & allow for WIPO implementation
- Broad range of exceptions and limited scope compliant with the treaty

@mgeist

Presentation by
Mr. Rodrigo Bulnes A.
Member of CRUZ & CIA Abogados
Business Software Alliance (BSA)
representative in Chile
Chile

Implementation of Limitations & Exceptions over Software TPMs in CHILE

Rodrigo Bulnes A.
April 3, 2012

**Is the Chilean Copyright Law achieving
the software Reverse Engineering duty
included in the FTA with USA ?**

Ley 17.336

Art. 71 Ñ (b)

[free translation]

The reverse engineering activities **over** a lawfully obtained copy of a **computer program** carried out **for the sole purpose of achieve software interoperability** **OR** for research and development purposes. Such obtained information should not be used to **produce or commercialize** a similar computer program witch attempt against the current law or for any other action that infringe the copyright.

CRUZ & CIA

abogados

Law 17.336

English

Art. 71 Ñ (b) **The reverse engineering activities over** a lawfully obtained copy of a **computer program** carried out **for the sole purpose of achieve software interoperability** **OR** for research and development purposes. Such obtained information should not be used to produce or commercialize a similar computer program witch attempt against the current law or for any other action that infringe the copyright.

Castellano

Art. 71 Ñ (b) “Las actividades de **ingeniería inversa sobre** una copia obtenida legalmente de **un programa computacional** que se realicen **con el único propósito de lograr la compatibilidad operativa entre programas computacionales** **O** para fines **de investigación y desarrollo**. La información así obtenida no podrá utilizarse para producir o comercializar un programa computacional similar que atente contra la presente ley o para cualquier otro acto que infrinja los derechos de autor.”

CRUZ & CIA

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FTA - Chapter VII . “Intellectual Property”

Article 17.7. “Obligations Common to Copyright and Related Rights”

“5. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, and producers of phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, protected by copyright and related rights:

(d) Each Party... may establish exemptions and limitations... to address the following situations and activities...

(ii) no infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to that person, **for the sole purpose of achieving interoperability of an independently created computer program with other programs;**(21)

Foot note (21) **Such activity occurring in the course of research and development is not excluded from this exception.”**

“Article 17.7.5. In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors, performers, and producers of phonograms in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, protected by copyright and related rights:

(d) Each Party... may establish exemptions and limitations to address the following situations and activities...

(ii) no infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to that person, **for the sole purpose of achieving interoperability** of an independently created computer program with other programs;(21)

(21) Such activity occurring in the course of research and development is not excluded from this exception.”

“Artículo 17.7.5. Con el fin de otorgar protección jurídica adecuada y recursos jurídicos efectivos contra la acción de eludir las medidas tecnológicas efectivas que sean utilizadas por los autores, artistas intérpretes o ejecutantes y productores de fonogramas en relación con el ejercicio de sus derechos y que respecto de sus obras, interpretaciones o ejecuciones y fonogramas protegidos por los derechos de autor y derechos conexos, restrinjan actos no autorizados:”

(d) Cada Parte... podrá establecer excepciones y limitaciones para abordar las siguientes situaciones y actividades..

(ii) las actividades no infractoras de ingeniería inversa respecto a una copia obtenida legalmente de un programa de computación, realizada de buena fe en lo referente a elementos específicos de ese programa de computación, que no estén fácilmente disponibles para esa persona, **con el único propósito de lograr la compatibilidad operativa** de un programa de computación creado independientemente con otros programas;(21)

(21) El hecho de que esa actividad se produzca como parte de actividades de investigación y desarrollo no la exime de esta excepción.”

FTA - Chapter VII

17.7. 5.

(d)

(ii). **No infringing reverse engineering activities** with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to that person, **for the sole purpose of achieving interoperability of an independently created computer program with other programs;**(21)

(21) **Such activity occurring in the course of research and development is not excluded from this exception."**

USA DMCA

Sec. 17 U.S.C. § 1201 (f)

Allows software reverse engineering **for the sole purpose** of identifying and analyzing those elements of the program that are necessary **to achieve interoperability.**

Limitation; The information acquired through reverse engineering **may be made available to others** solely for the purpose of enabling interoperability of an computer program with other programs.

EU Computer Programs Directive

Article 6;

Allows reverse engineering for the purposes of interoperability.

Prohibits;

- (a) RI for the purposes of creating a competing product.
- (b) the public release of information obtained through reverse engineering of software.

Doubts about the Chilean Case/law:

- 1º If “someone” **in Chile** make a public release of **R&D** results **over software TPMs** different than those necessary for interoperability, **VIOLATE** the **Chilean Copyright Law**?
- 2º Is **Article 71 Ñ (b)** of **Law 17.336** fulfilling **FTA** between USA/Chile?

Art. 71 Ñ (b)

The reverse engineering activities over a lawfully obtained copy of a computer program carried out for the sole purpose of achieve software interoperability or for research and development purposes. Such obtained information should not be used to produce or commercialize a similar computer program witch attempt against the current law or for any other action that infringe the copyright.

Art. 71 Ñ (b)

The reverse engineering activities, **included those for research and development purposes**, over a lawfully obtained copy of a computer program carried out for the sole purpose of achieve software interoperability[]. Such obtained information should not be used to produce or commercialize a similar computer program witch attempt against the current law or for any other action that infringe the copyright.

Thanks a lot

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CRUZ & CIA
abogados