Presentation to LinuxSA

Why the law re: TPM's matters

restoring the imbalance in Australian copyright

Darren Kruse

August 15th 2006

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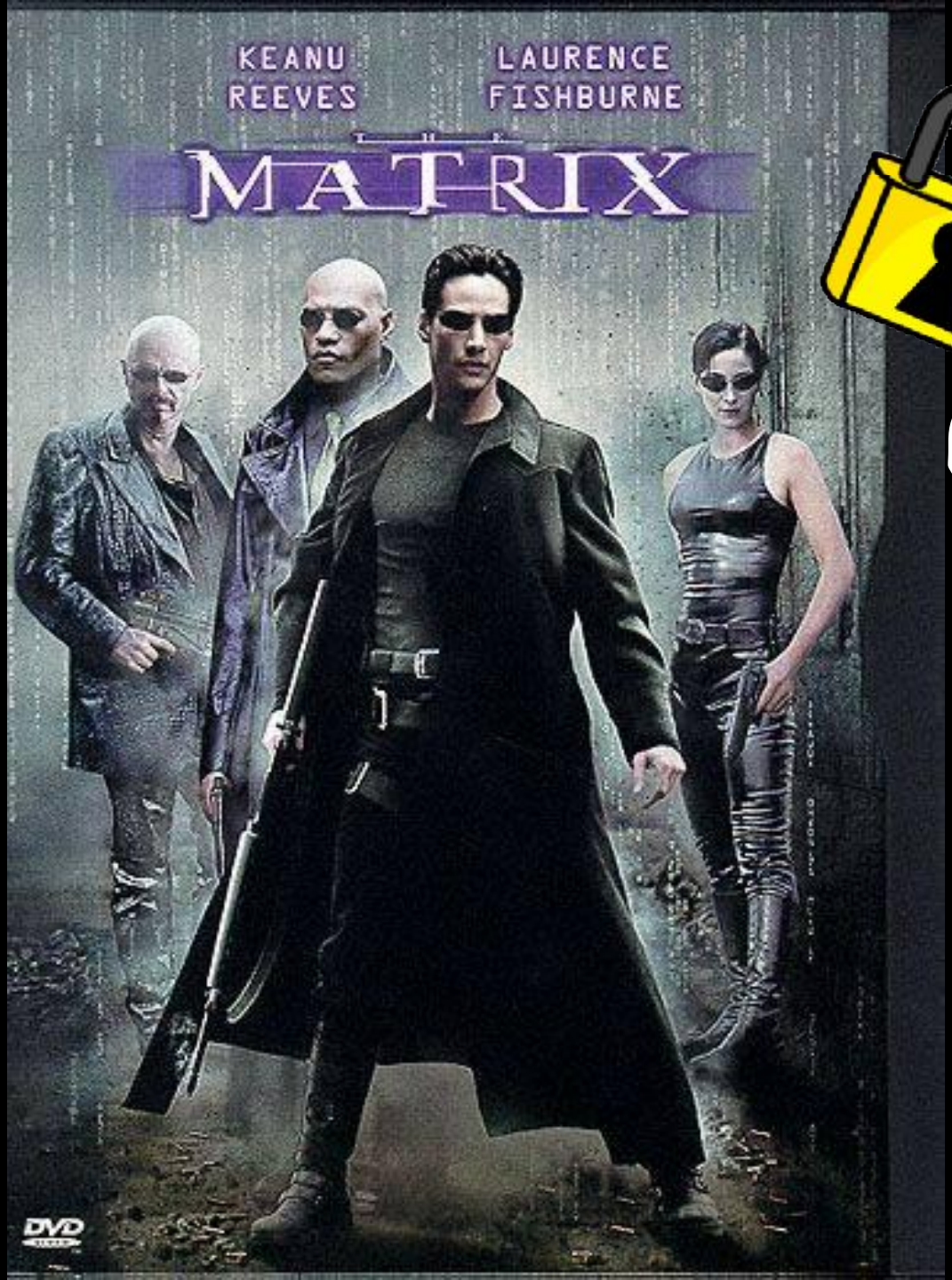
Q1

to what extent should technological protection measures (TPM's) allow copyright owners to circumvent the existing fair dealing exceptions in the Copyright Act ?

What is a TPM ?

A Technological
Protection Measure

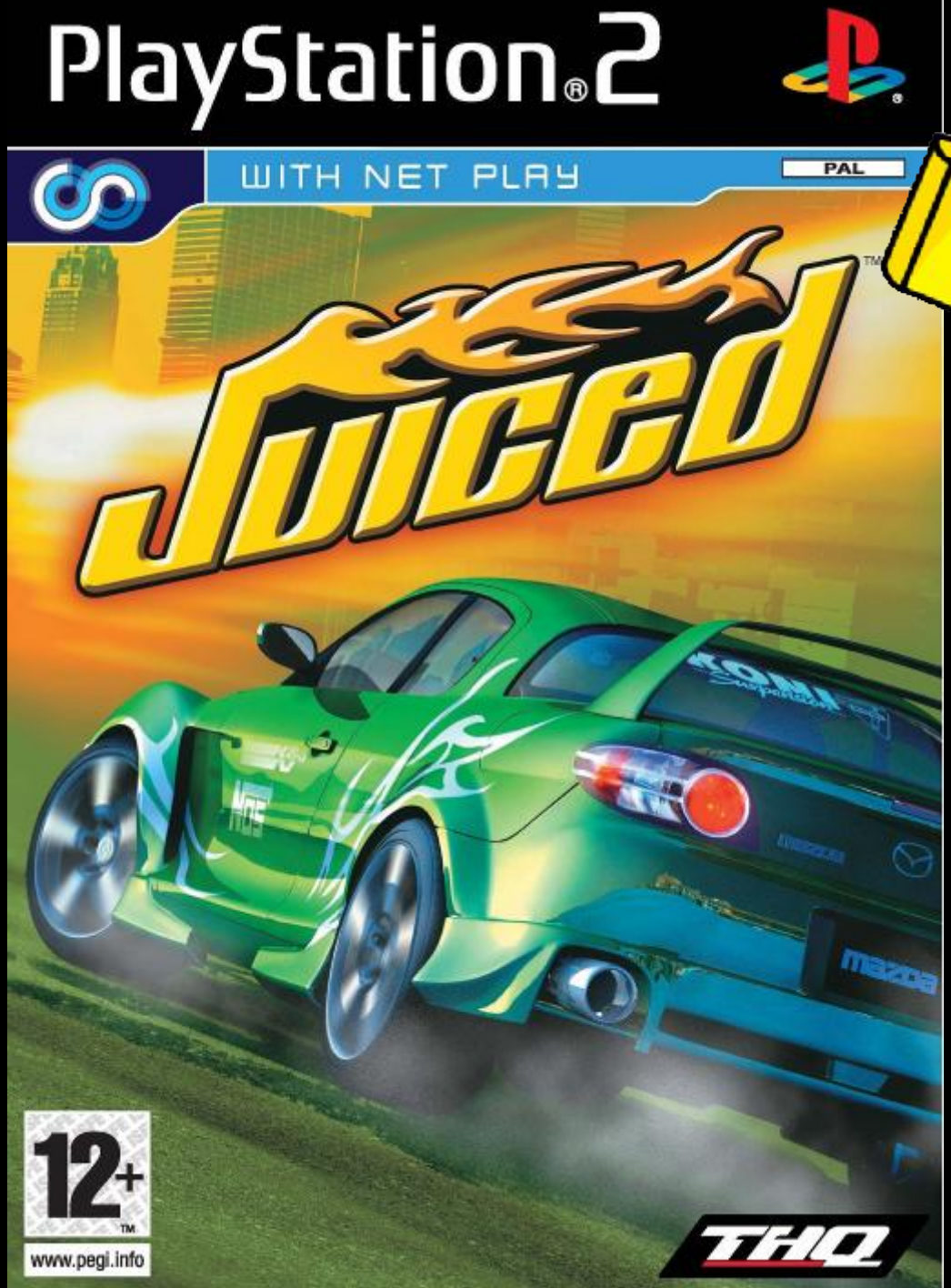
A digital lock
on electronic content



CSS

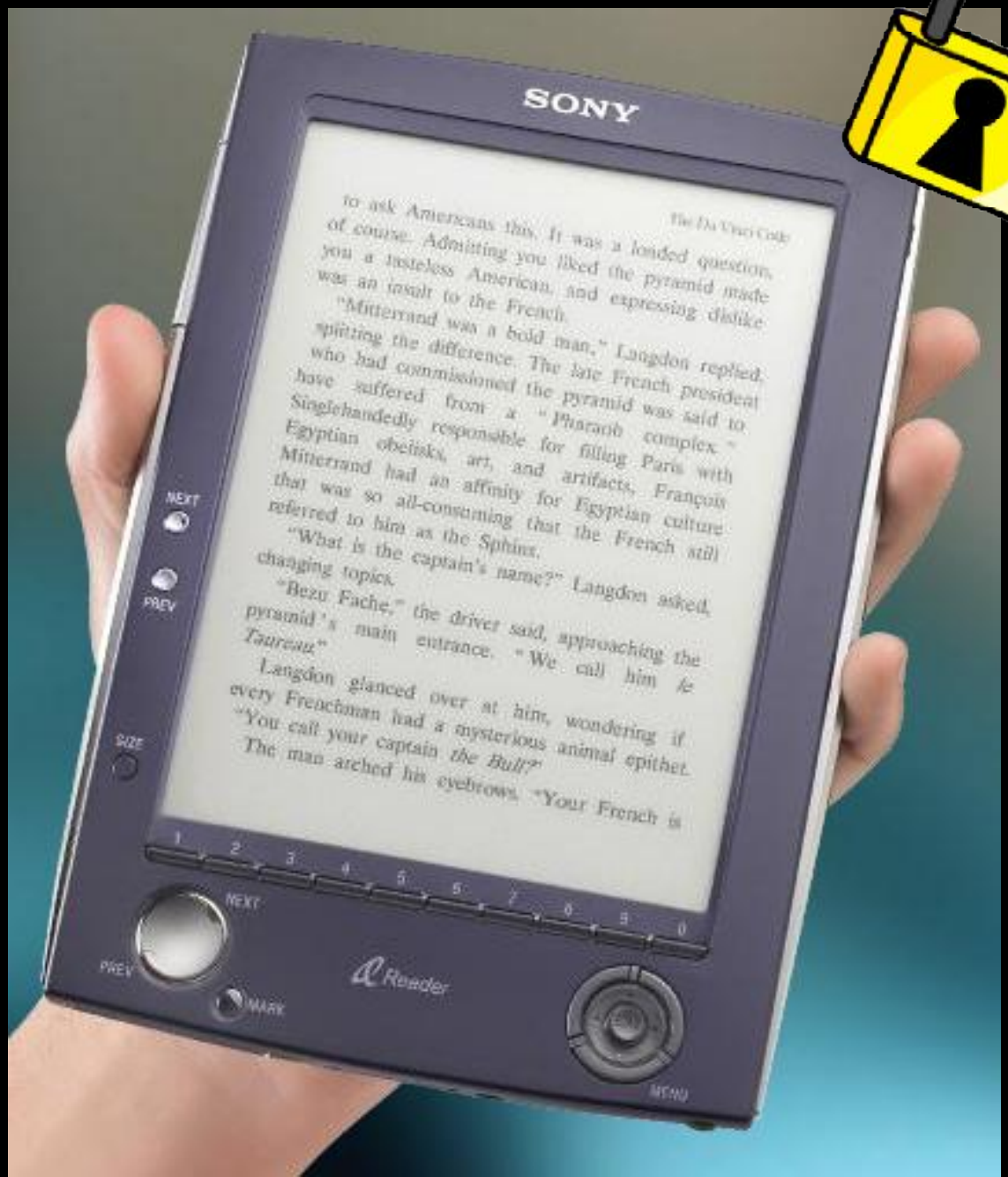
Now Playing
9 of 12
The Journey
Fatboy Slim
Palookaville
3:37
-0:59
MENU

Fairplay



Sony

PS2


SONY
The Da Vinci Code
to ask Americans this. It was a loaded question, of course. Admitting you liked the pyramid made you a tasteless American, and expressing dislike was an insult to the French.
"Mitterrand was a bold man," Langdon replied, spitting the difference. The late French president who had commissioned the pyramid was said to have suffered from a "Pharaoh complex." Singlehandedly responsible for filling Paris with Egyptian obelisks, art, and artifacts, François Mitterrand had an affinity for Egyptian culture that was so all-consuming that the French still referred to him as the Sphinx.
"What is the captain's name?" Langdon asked, changing topics.
"Bezu Fache," the driver said, approaching the pyramid's main entrance. "We call him *le Taureau*."
Langdon glanced over at him, wondering if every Frenchman had a mysterious animal epithet. "You call your captain *the Bull*?"
The man arched his eyebrows. "Your French is
NEXT
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NEXT
PREV
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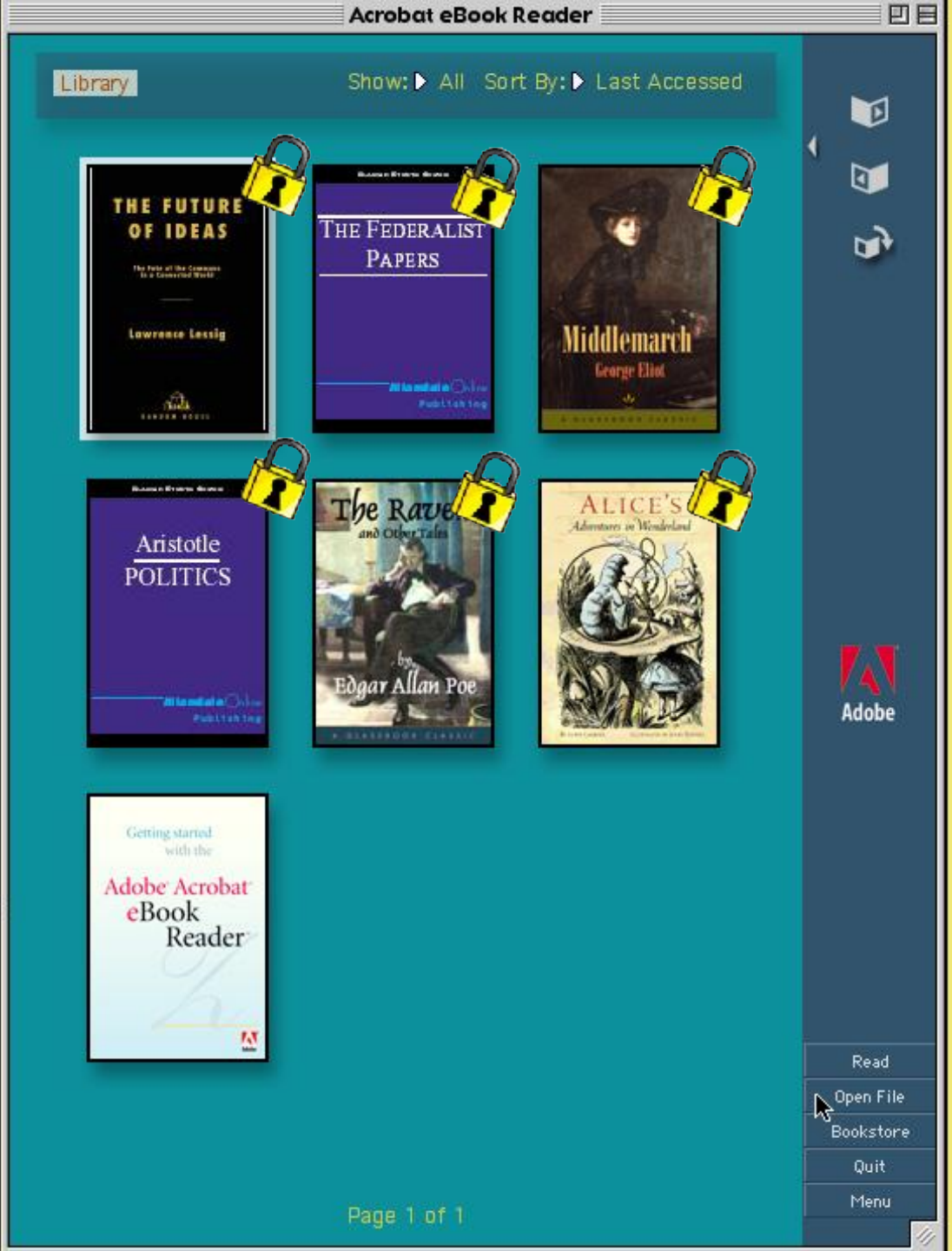
Reader
MENU

BBeB



Acrobat e-book's

Acrobat eBook Reader

CLASSIC ETEXTS SERIES

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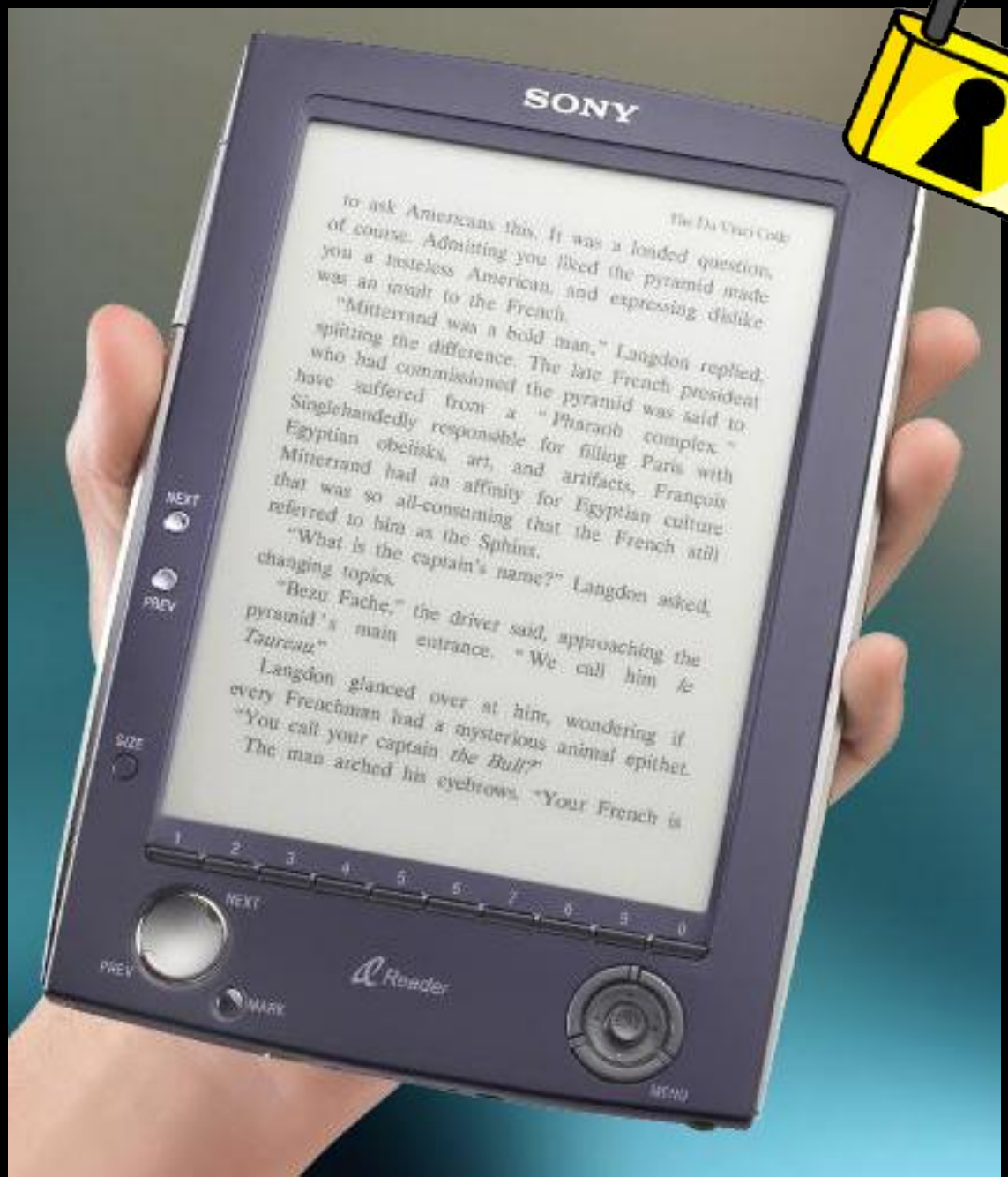
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NEXT
PREV
SIZE
1 2 3 4 5 6 7 8 9 0
NEXT
PREV
MARK
Reader
MENU

BBeB

Flinders Uni Library ~2026

pretty much everything

books

movies

games

music

pictures

software

in the cultural soup

pretty much everything

books

movi

gam

mu

pic

software

in the cultural soup

when mere reading
becomes a “use”

You may need or want to
circumvent
the TPM

circumvent when..

E-books that expire ?

Obsolete hardware ?

Vision impaired ?

Locked to the device ?

Locked to the person ?

circumvent when..

E-book DRM is..

DVD Playback is..

only released for

Coming soon..

Blu-Ray
HD-DVD

+

Vista with
HDCP support

Encryption, downgrading,
key revocation

engadget

The Clicker: HDCP's Shiny Red Button Jul 21st 2005

"DVIMAGIC is placed between your playback device (e.g. computer, cable box, HD-DVD player, etc) and your display device. DVIMAGIC then pretends to be a secure device. Once the DVIMAGIC convinces the playback device to send the signal, it receives the signal, decrypts the signal, and sends a bit-perfect copy of the signal out the other end to your monitor. The result is a pristine restriction-free copy of your content."

illegal

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Copyright Act 2005/2006

- *"technological protection measure"* means a device … that is designed… to prevent or inhibit the infringement of copyright

  … by either or both of

- (a) by ensuring that access to the work … is available solely by use of an access code … with the authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanism.

Copyright Act post FTA

- 17.4(7)(b) Effective technological measure means any technology, … that, in the normal course of its operation, controls access to a protected work..

See the change ?....

from preventing
copying

to preventing access

Why should I care ?

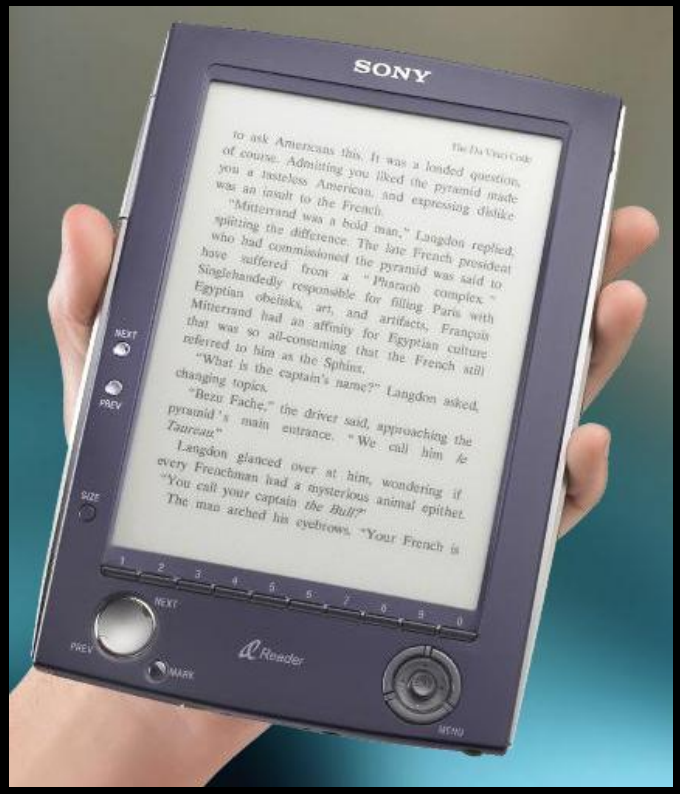
balance

balance

Why should I care ?

Why should LinuxSA
care ?

Content players are either locked hardware or Windows-only



iownmymusic.org

Australian campaign for consumer control of music

iownmydvds.org

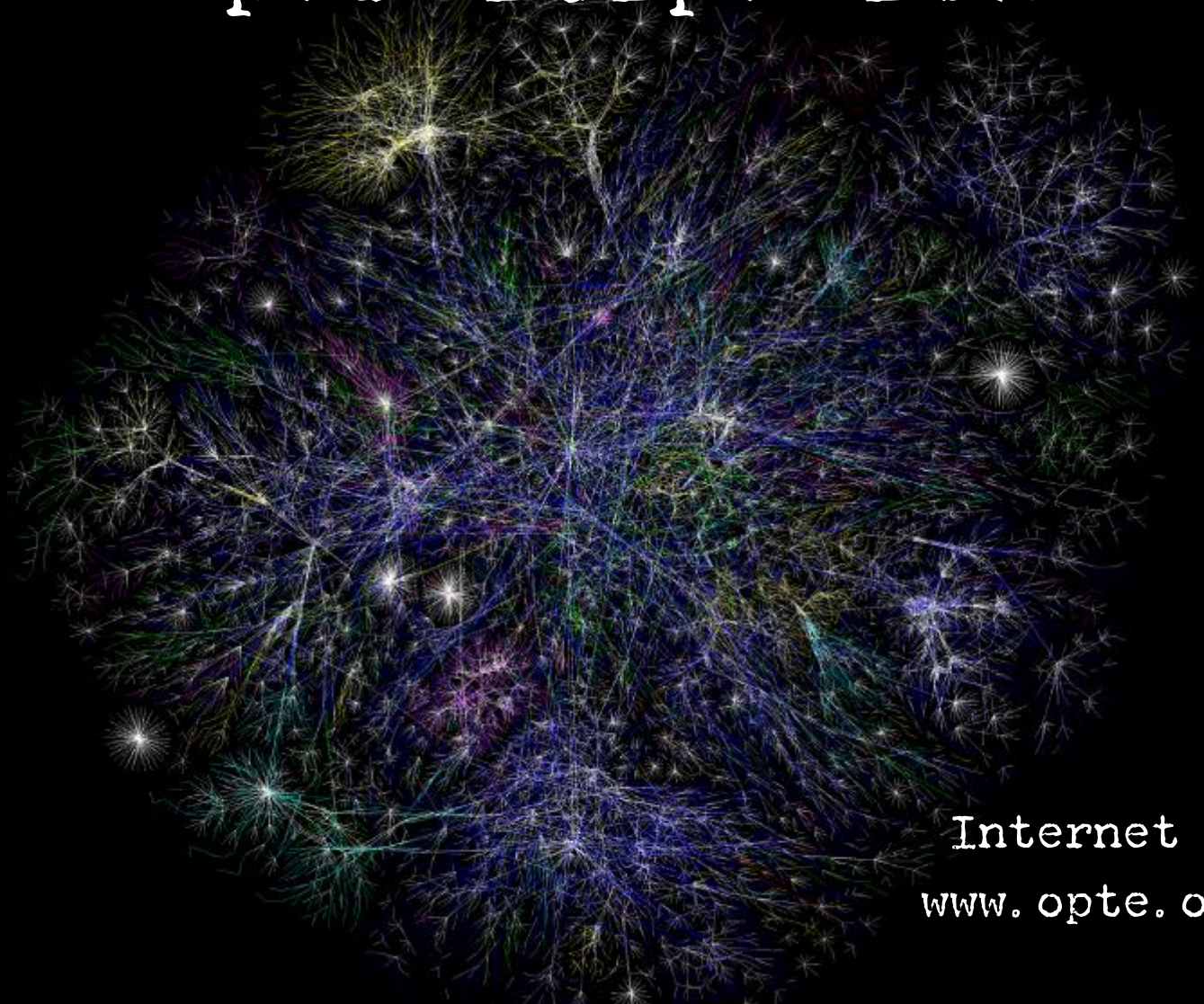
Australian campaign for consumer control of digital video

open content allows :

contributing,
annotating,
critiquing, improving,
improvising, remixing,
mutating, mashing

the cultural soup

interconnected participation



Internet Jan 2005

www.opte.org/maps/

participation

v

passive

consumption

digital feudalism

Fair use

Fair dealing

Fair dealing (big ones)

- s40. research or study
- s41. criticism or review
- s42. reporting news
- s43. judicial proceedings or professional advice
- NEW ! - format shifting

but...

TPM's
undermine
Fair Dealing

"end run around"

if the content is locked up inside a TPM, you can't unlock it

Ever (no sunset clause)

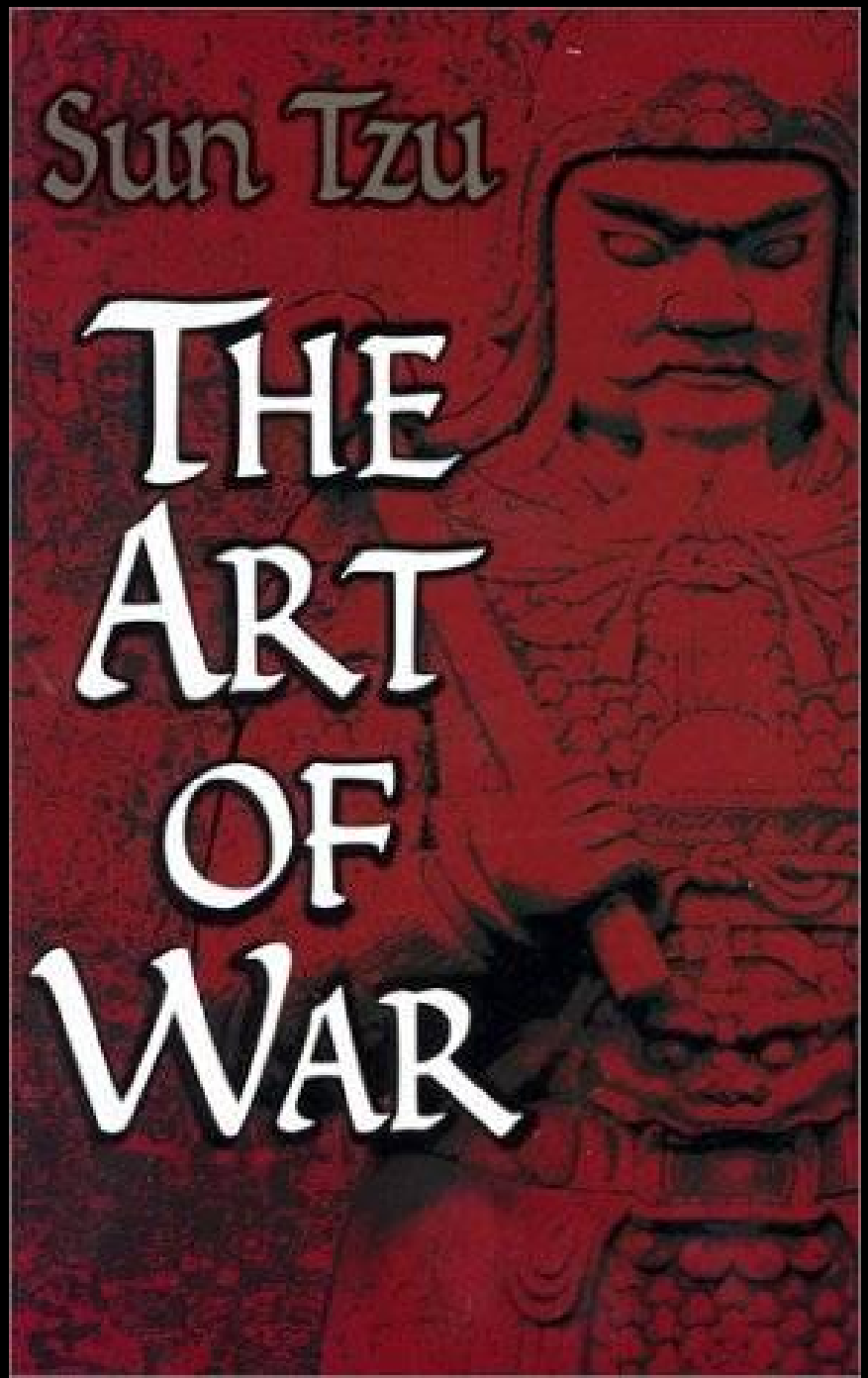
Some minor exceptions

Unlocking : S116A

Limits Importation, manufacture etc. of **circumvention devices** and provision circumvention services

circumvention devices

Unlocking the locks


Sun Tzu
THE ART OF WAR

CSS

Fairplay

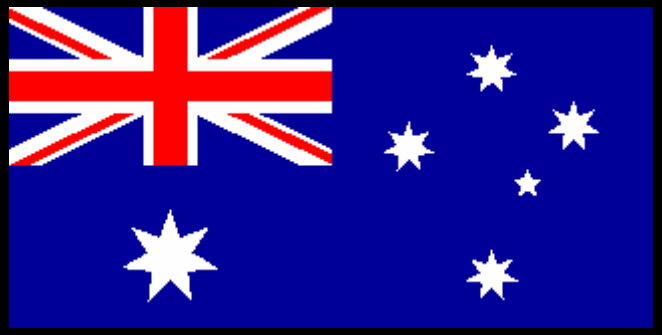
PS2

DeCSS

playfair

modchips

Fair dealing



Fair dealing (big ones)

- s40. research or study
- s41. criticism or review
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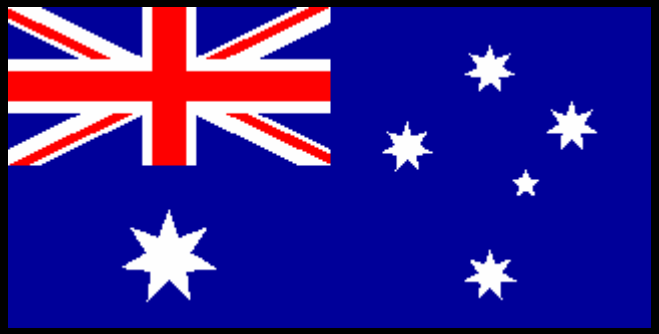
- NEW ! - format shifting

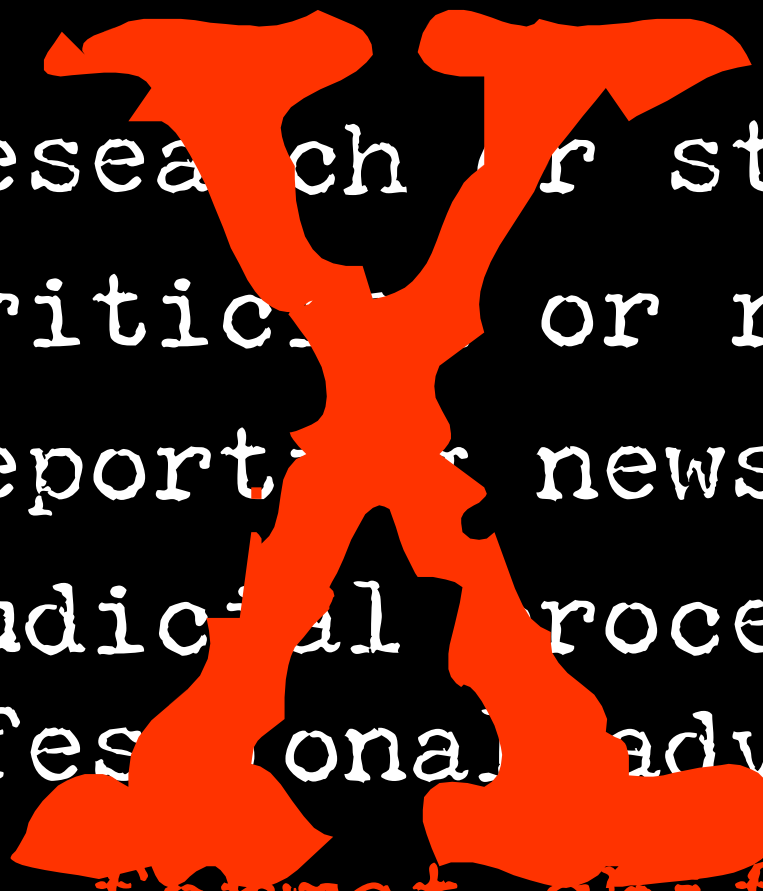
Are there s116A exceptions for Fair dealing ?



NO. .

MIA...

Fair dealing (big ones)



- s40. research or study
- s41. criticism or review
- s42. reporting news
- s43. judicial proceedings or professional advice
- NEW ! - format shifting

CSS

Fairplay

PS2

illegal

DeCSS

playfair

modchips

So,
What are we left with ?

s116A residual exceptions

- Reproducing computer programs:
  - s47D to make interoperable products
  - s47E to correct errors
  - s47F for security testing
- Library's
  - s48A Parliamentary Library
  - s49 , s50 and s51A Library's and archive preservation
- s183 Crown Use
- Part VB Educational Institutions

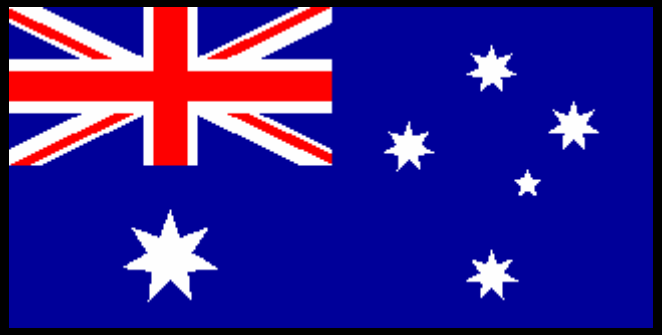
It gets worse ..

NEW FTA exceptions are narrower

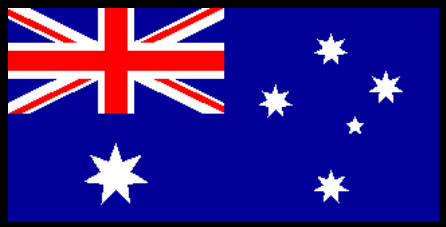
- s116A Library's
  - s48A Parliamentary Library
  - s49 , s50 and s51A Library's and archive preservation

- Aus-US FTA 17.4(7)(e)
  - (vii) (vii) access by a non-profit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, *for the sole purpose of making acquisition decisions*;

Fair dealing



Fair dealing



Fair dealing

Fair dealing

~~Rich, diverse~~
~~cultural soup~~

insipid,
mass-market
broth

Q1

to what extent should technological protection measures (TPM's) allow copyright owners to circumvent the existing fair dealing exceptions in the Copyright Act ?

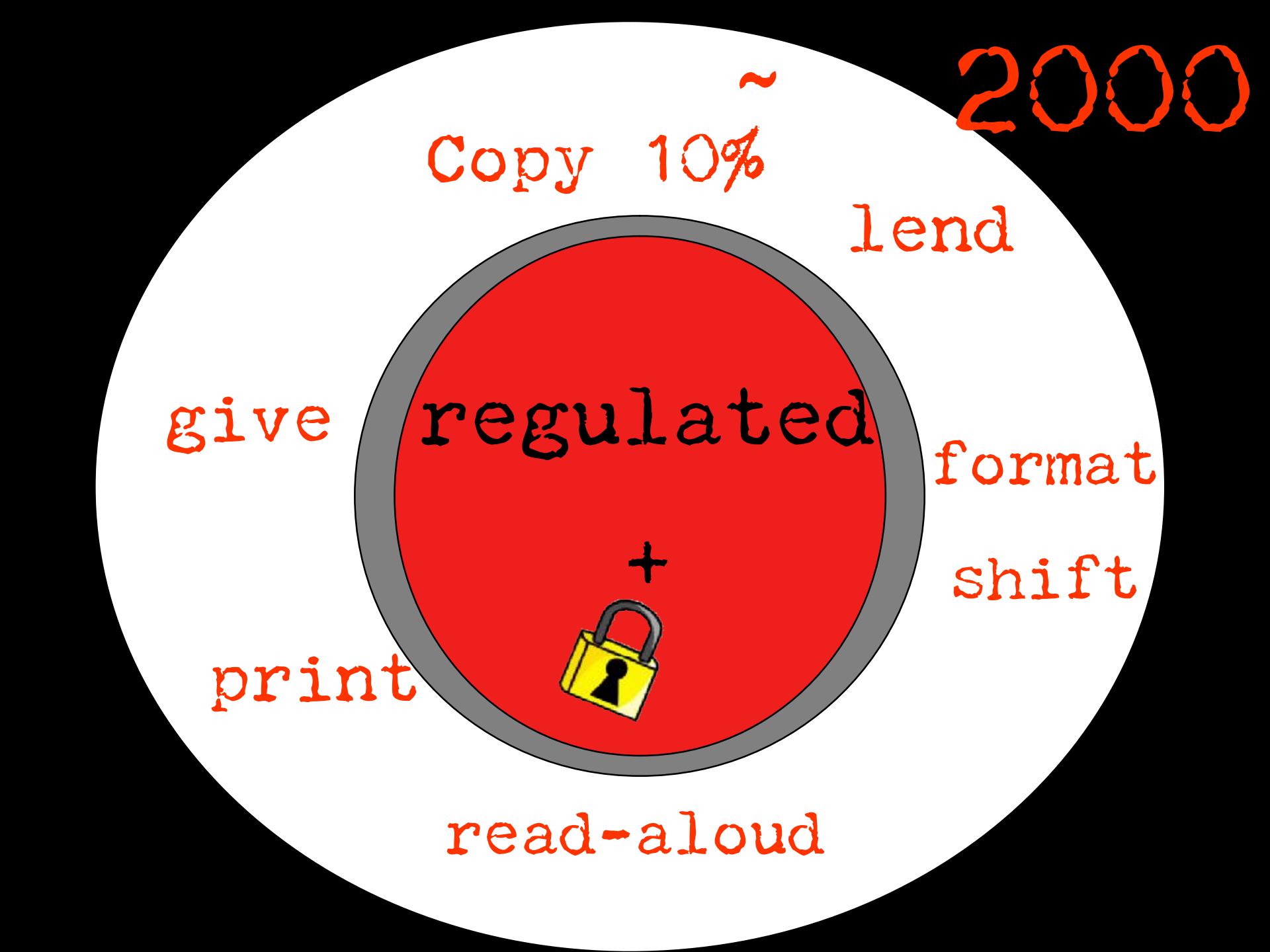
Answer 1

NOT TO THAT EXTENT !

balance

1710

unregulated
uses


2000
Copy 10%
lend
give
regulated
format
+
shift
print
read-aloud

2006

Regulated

+

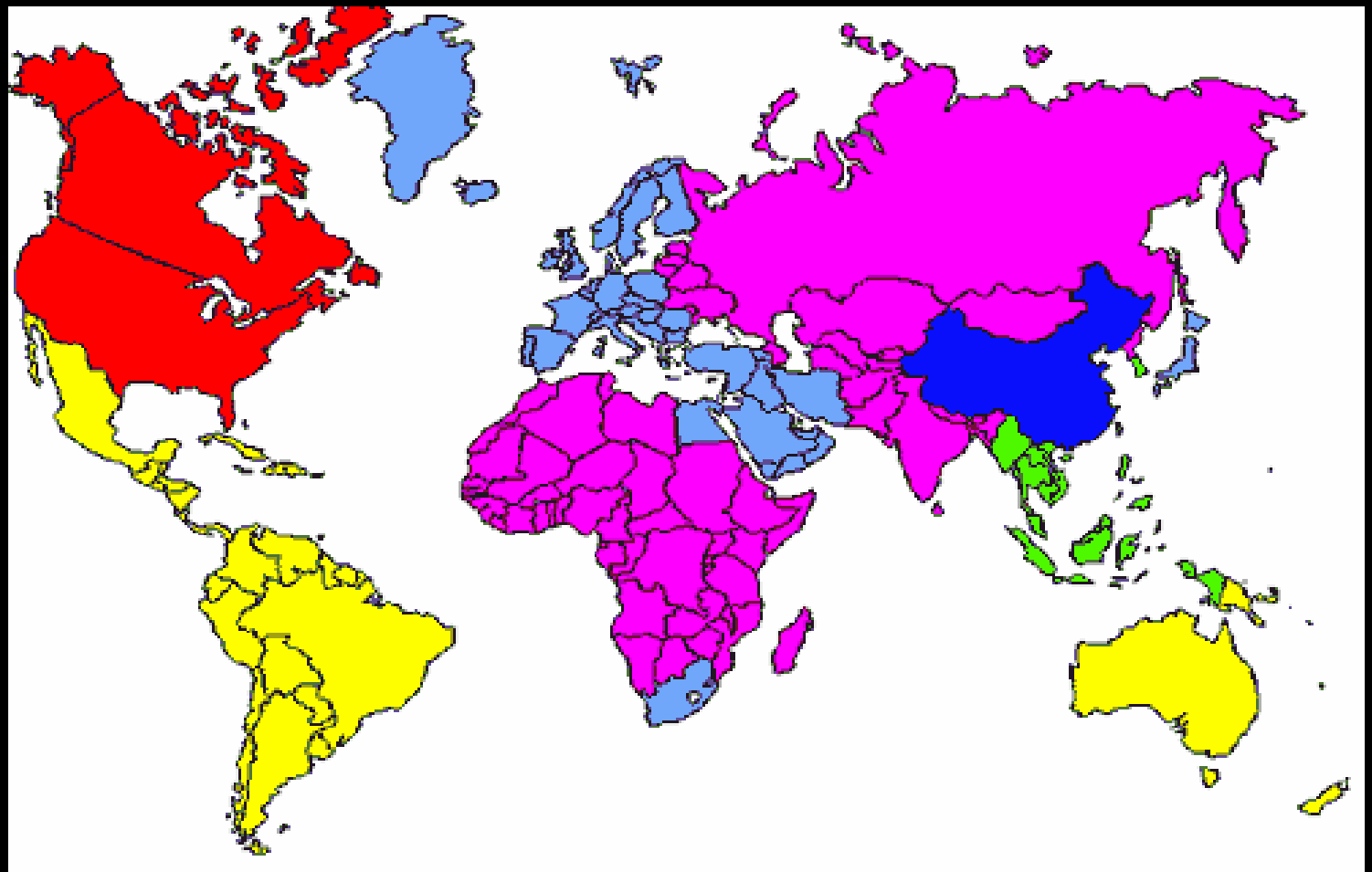
Q2

How should the Australian fair dealing laws and exceptions be adapted to preserve existing fair dealing exceptions in the digital age to avoid unexpected and/or ulterior usages of TPM's ?

unexpected and/or ulterior usages of TPM's

Unintended Consequences

- Market segmentation via Region Coding 'like the Pope's of old'



Market response:

PS2 modchips
(play imported games)

and

“region free”
DVD players
(play imported movies)

Unintended Consequences

- Using copyright to create monopolies in secondary markets for parts

Chamberlain Group, Inc. v. Skylink Technologies, Inc. (2004)

Unintended Consequences

- Using copyright to create monopolies in secondary markets for parts

"Chamberlain's proposed construction would allow copyright owners to prohibit exclusively fair uses even in the absence of any feared foul use."

Other USA abuses of TPM's

- Commercial reasons
- Locking mobile phones to carriers

- NIKON cameras partially encrypting digital images

- Academic chilling
- Secure Digital Music Initiative
  - Public challenge
  -> Academic's team got DMCA C & D

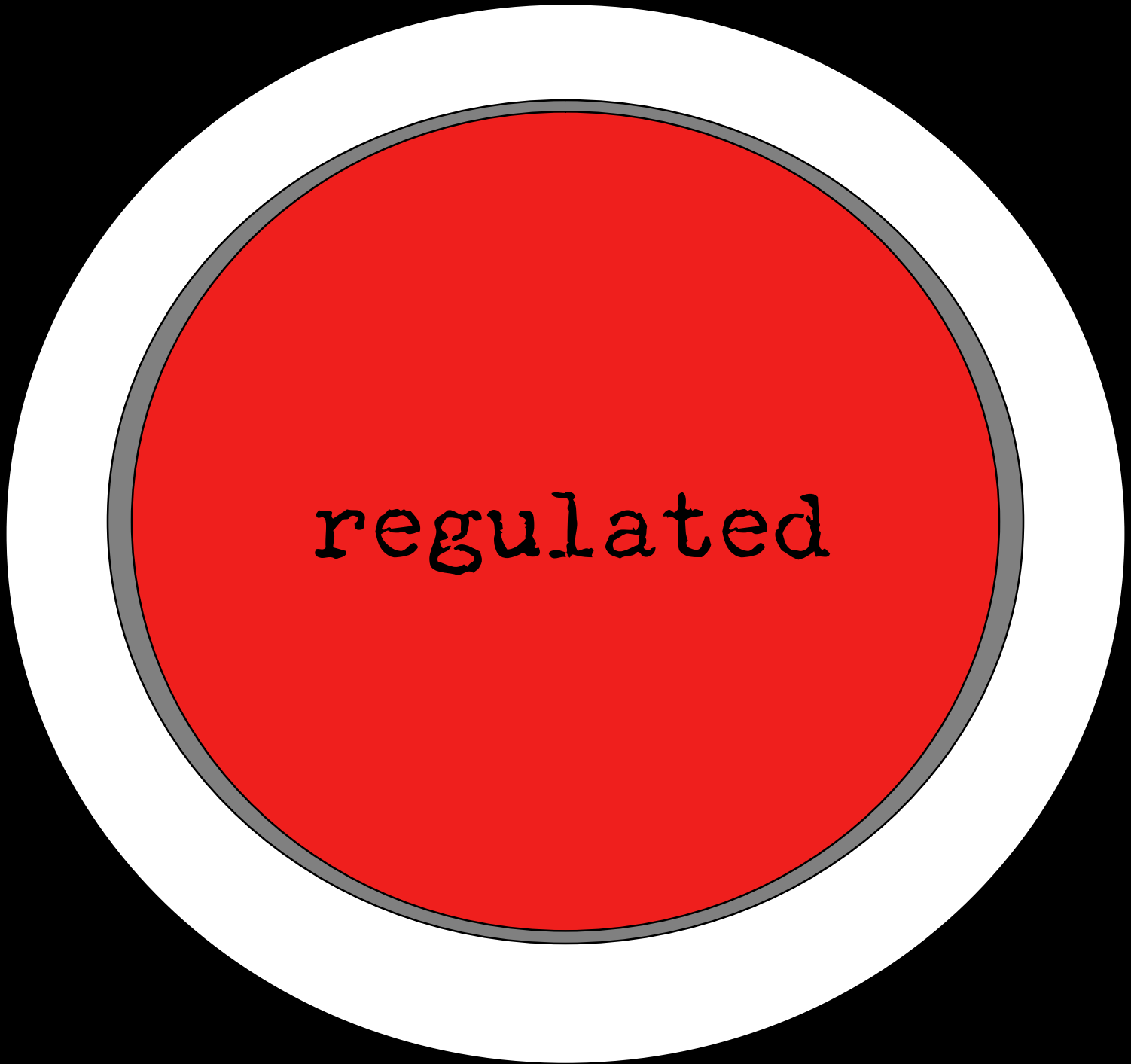
<http://aibopet.com>

“teach your Aibo jazz”

The

impoverished

cultural soup


regulated

Regulated

+

+ ulterior

purposes

This is paracopyright

“übercopyright”

ALL uses extinguished

Q2

How should the Australian fair dealing laws and exceptions be adapted to preserve existing fair dealing exceptions in the digital age to avoid unexpected and/or ulterior usages of TPM's ?

Let’s have an inquiry !

PARLIAMENT of AUSTRALIA
HOUSE of REPRESENTATIVES

Inquiry into technological protection measures (TPM) exceptions

July 2005 commenced

61 (public) submissions

November 2005 ; this paper

March 2006 report

Welcome to law @ the
bleeding edge

November 2005 reform suggestion

- Copyright power can be seen as purposive power

- Ulterior purposes are beyond the incidental use

Kirby's "just terms" limits of copyright

- [The copyright] power is granted in a constitutional and legal setting in which competing legal interests must also be upheld by the law, including, generally, free expression and the normal interest of property owners in the undisturbed enjoyment of their property[114].
-
- [114] Constitution, s 51(xxxi).

November 2005 reform suggestion

I wrote :

"any use of a TPM for a **non-copyright purpose** should result in that TPM ***not*** being characterized as a TPM, and **therefore inoperative** at law."

4 months later…

J

PARLIAMENT *of* AUSTRALIA
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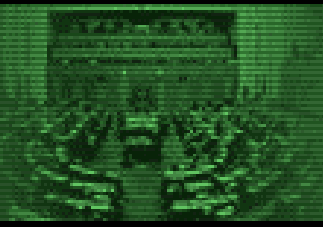


"The Committee recommends .. that the Government should ensure that TPMs are related to copyright protection

rather than

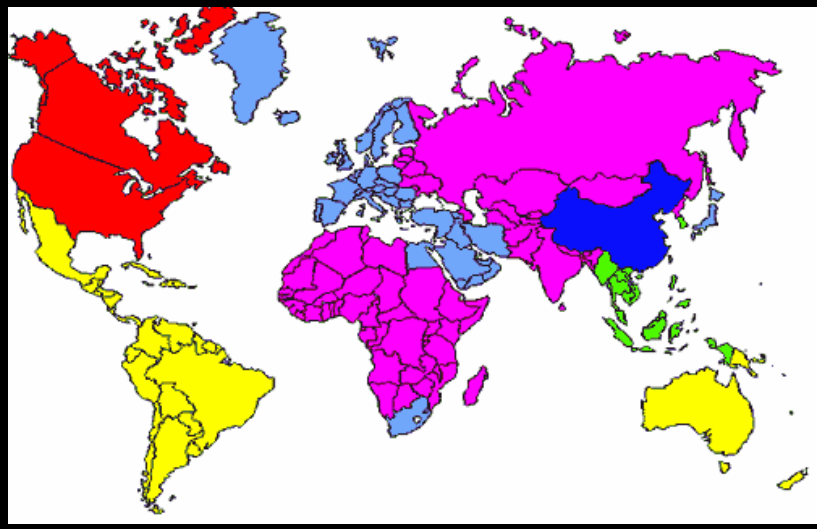
to the restriction of competition in markets for non-copyright goods & services"

November 2005 reform suggestion

- I wrote (re region coding):

"This ulterior motive unrelated to copyright infringement is a significant factor …

Thus any new version of the copyright law should hold this point in mind."



We ask the Parliament in the revision of these laws to clearly tie circumvention offenses to things which assist piracy,

4 months later…

J

PARLIAMENT *of* AUSTRALIA
HOUSE *of* REPRESENTATIVES

- Recommendation 4
- 2.139

The Committee recommends that region coding TPMs be specifically excluded from the definition of 'effective technological measure' in the legislation implementing the Australia-United States Free Trade Agreement.

November 2005 reform suggestion

I wrote (against) :

"A tight fisted, begrudging acknowledgement of every tiny permitted use"

Argued for

"A broad, constitutionally grounded exception"

4 months later…

J

PARLIAMENT *of* AUSTRALIA
HOUSE *of* REPRESENTATIVES

Inquiry into technological protection measures (TPM) exceptions

March 2006 report

"And *what* a report it is. It has a list of 37 recommendations"

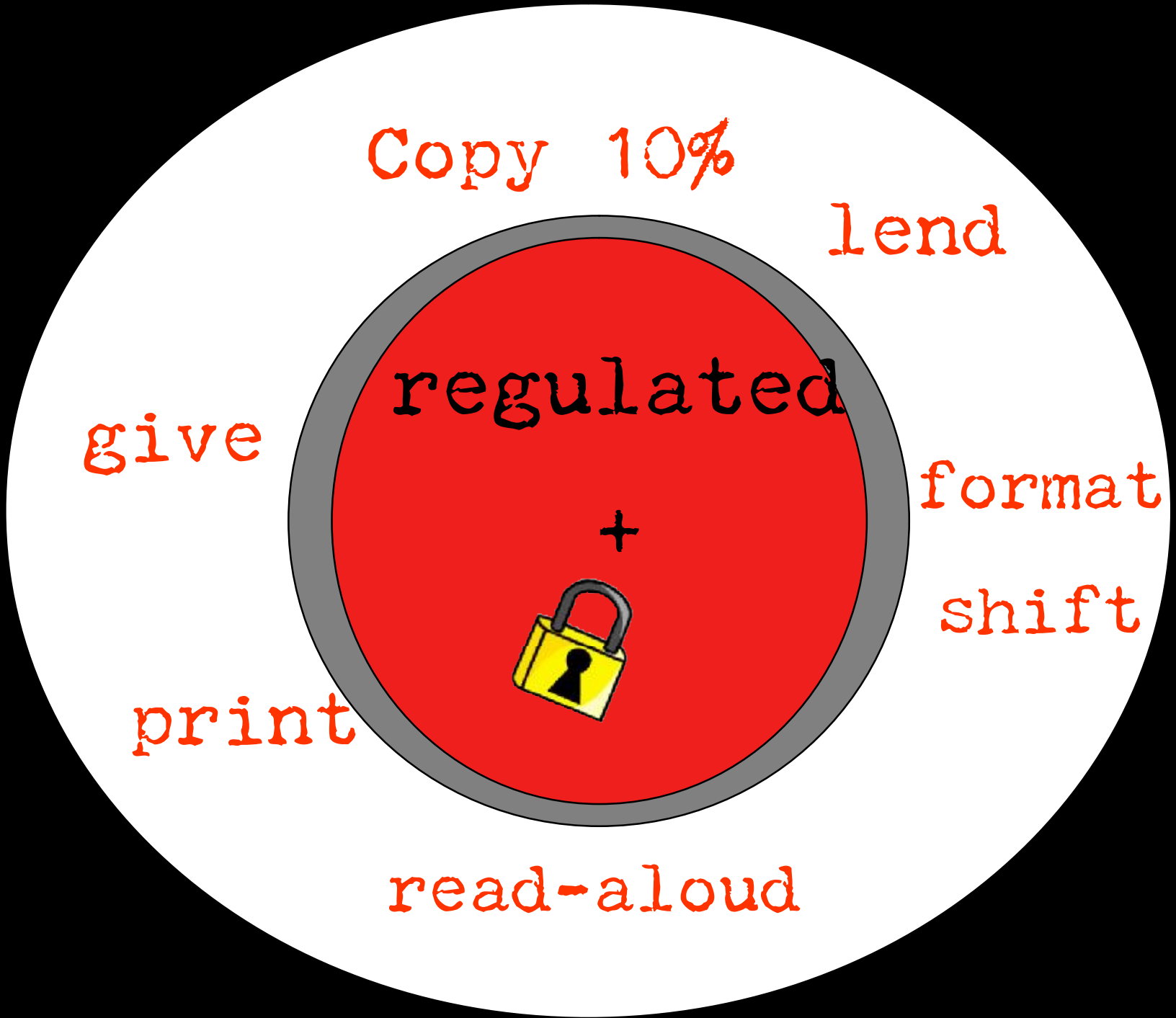
Kim Weatherall's blog March 2nd 2006

Regulated

+

+ ulterior

purposes


Copy 10%
lend
regulated
give
format
+
shift
print
read-aloud

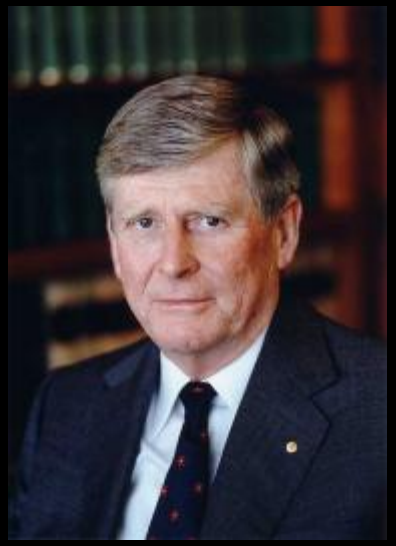
the challenge

recommendations only

“this unanimous report puts the ball squarely in the government's court.

Two arms of government have now spoken”

Kim Weatherall’s blog March 2nd 2006



Gleeson CJ

McHugh

Gummow

Kirby

Sony v Stevens
HCA 2005

Hayne

Unanimous

6 : 0

Heydon

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HOUSE *of* REPRESENTATIVES

Inquiry into technological protection measures (TPM) exceptions

37 recommendations

"Both have affirmed that copyright law must be balanced"

Kim Weatherall's blog March 2nd 2006

the challenge

realpolitik

37 recommendations

4 months to go..

OzDMCA timetable

- draft legislation out ~ end of August
- 3 week period for comment on the legislation
- introduction and passing of legislation by the end of the Aug-Dec sittings

What to do ?

Regulated

+

+ ulterior

purposes

CSS

Fairplay

PS2

illegal

DeCSS

playfair

modchips

be informed..

www.linux.org.au/law/

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IP in the land of Oz (and more)

Kim Weatherall
Law Lecturer

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weatherall.blogspot.com

sign the petitions

Thank you

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Stanford Law School

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