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The Parliament of the Commonwealth of Australia

# Review of technological protection measures exceptions

House of Representatives  
Standing Committee on Legal and Constitutional Affairs

February 2006  
Canberra

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## Foreword

Copyright is all about balancing competing interests – in particular, balancing the legitimate expectations of copyright owners that there should be appropriate copyright protection for material and the expectations of copyright users that there should be public access to material for legitimate public benefit reasons. Australia's system of copyright law is regarded as one of the fairest in the world, providing significant protections to copyright owners while allowing access to copyright material for specific purposes. Australia also has a well-established system of statutory licensing under which copyright owners are financially compensated for specific use of their material.

In the digital age, ever-increasing amounts of material are available in an expanding number of formats. The DVD player, home PC, MP3 music player, mobile phone, game platform and pay-TV system are features of many Australian homes. The need of copyright owners to protect their work in the digital context has seen the development of a range of technological protection measures (TPMs). These are recognised and protected by Australian domestic copyright law and, with the signing of the Australia-United States Free Trade Agreement (AUSFTA), Australia has given further undertakings to protect these TPMs from circumvention.

While the AUSFTA sets out for seven specific areas where circumvention of TPMs will be permitted, this Committee has been given the task of assessing whether any further exemptions should be considered by the Australian Government. The Committee was pleased to receive submissions from a wide range of groups and individuals on this quite technical subject and wishes to place on record its thanks to all who assisted the Committee in its deliberations. The Committee hopes that its findings will be of assistance to the Government as it works towards implementation of this component of the AUSFTA in the next 12 months.

I would like to thank all members of the Committee who gave of their time and expertise so generously in examining the issues raised during this inquiry. Many of the issues were highly technical and complex in nature, and Members applied themselves assiduously to understanding the issues raised. I would also like to thank the Committee Secretariat and Ms Kirsti Haipola from the Attorney-General's Department for their invaluable assistance during the course of the inquiry.

Hon Peter Slipper MP  
Chairman



# Membership of the Committee

Chair            The Hon Peter Slipper MP

Deputy Chair   Mr John Murphy MP

Members        Mr Michael Ferguson MP  
(from 09/02/2006)

Mrs Kay Hull MP

The Hon Duncan Kerr SC MP

Mr Daryl Melham MP

Ms Sophie Panopoulos MP

Ms Nicola Roxon MP

Mr Patrick Secker MP

Mr David Tollner MP

Mr Malcolm Turnbull MP  
(to 09/02/2006)

## Committee Secretariat

Secretary	Ms Joanne Towner
Inquiry Secretary	Dr Nicholas Horne
Adviser	Ms Kirsti Haipola
Administrative Officer	Ms Kate Tremble



## Terms of reference

Chapter 17 of the Australia-United States Free Trade Agreement deals with intellectual property rights. Article 17.4 stipulates the parties' obligations in relation to copyright.

Article 17.4.7 requires the Parties to create a liability scheme for certain activities relating to the circumvention of 'effective technological measures'. The Parties may introduce exceptions in the liability scheme as specified in Article 17.4.7(e)(i) to (vii) or pursuant to Article 17.4.7(e)(viii).

The Committee is to review whether Australia should include in the liability scheme any exceptions based on Article 17.4.7(e)(viii), in addition to the specific exceptions in Article 17.4.7(e)(i) to (vii). The Committee must ensure any proposed exception complies with Article 17.4.7(e)(viii) and 17.4.7(f).

Particular activities which the Committee may examine for this purpose include:

- (a) the activities of libraries, archives and other cultural institutions
- (b) the activities of educational and research institutions
- (c) the use of databases by researchers (in particular those contemplated by recommendation 28.3 of the Australian Law Reform Commission Report on Gene Patenting)
- (d) activities conducted by, or on behalf of, people with disabilities
- (e) the activities of open source software developers, and
- (f) activities conducted in relation to regional coding of digital technologies.

(Referred by the Attorney-General 19 July 2005)



## List of abbreviations

ADA/ ALCC	Australian Digital Alliance Australian Libraries' Copyright Committee
AFACT	Australian Federation Against Copyright Theft
AFC	Australian Film Commission
AGD	Attorney-General's Department
AGLIN	Australian Government Libraries Information Network
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
ARIA	Australian Record Industry Association
ATO	Australian Tax Office
AUSFTA	Australia-United States Free Trade Agreement
AVCC	Australian Vice-Chancellors' Committee
AVSDA	Australian Visual Software Distributors Association Ltd
BSAA	Business Software Association of Australia
CAG	Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education Training and Youth Affairs
CAL	Copyright Agency Limited

CD	Compact Disc
CSS	Content Scrambling System
DCITA	Department of Communications, Information Technology and the Arts
DEST	Department of Education, Science and Training
DFAT	Department of Foreign Affairs and Trade
DMCA	Digital Millennium Copyright Act (US)
DPS	Parliament of Australia, Department of Parliamentary Services
DVD	Digital Versatile Disc
EFA	Electronic Frontiers Australia
ETM	Effective Technological Measure
FLAG	Flexible Learning Advisory Group
IEAA	Interactive Entertainment Association of Australia
IIPA	International Intellectual Property Alliance
IPC	Intellectual Property Committee, Business Law Section, Law Council of Australia
JSCOT	Joint Standing Committee on Treaties
NGA	National Gallery of Australia
NLA	National Library of Australia
OFLC	Office of Film and Literature Classification
OSIA	Open Source Industry Australia Ltd
QPL	Parliament of Queensland, Parliamentary Library
RPC	Region Playback Control
SISA	Supporters of Interoperable Systems in Australia
STCG	States and Territories Copyright Group

TAFE	TAFE Libraries Australia
TPM	Technological Protection Measure
USCO	United States Copyright Office
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty





## List of recommendations

### 2 Overview: technological protection measures, copyright in Australia, the Australia-United States Free Trade Agreement, regulation in the United States, and region coding

#### Recommendation 1 (paragraph 2.21)

The Committee recommends that the balance between copyright owners and copyright users achieved by the *Copyright Act* 1968 should be maintained upon implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement.

#### Recommendation 2 (paragraph 2.61)

The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the definition of technological protection measure/effective technological measure clearly require a direct link between access control and copyright protection.

#### Recommendation 3 (paragraph 2.75)

The Committee recommends that, in the legislation implementing the Australia-United States Free Trade Agreement, the Government ensure that access control measures should be related to the protection of copyright, rather than to the restriction of competition in markets for non-copyright goods and services.

#### Recommendation 4 (paragraph 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.

Should the government include region coding TPMs within the definition of 'effective technological measure', the Committee recommends that exceptions proposed for region coding TPM circumvention under Article 17.4.7(e)(viii) be granted wherever the criteria for further exceptions under Article 17.4.7(e)(viii) are met.

### 3 The specified exceptions and the criteria for further exceptions

#### Recommendation 5 (paragraph 3.19)

The Committee recommends that, in the implementing legislation, Article 17.4.7(e)(vi) of the Australia-United States Free Trade Agreement should be interpreted so as to permit exceptions to liability for TPM circumvention for the government activities identified by the Australian Tax Office and the Office of Film and Literature Classification at paragraphs 3.10 – 3.14 of this report.

#### Recommendation 6 (paragraph 3.32)

The Committee recommends that the exceptions specified in Article 17.4.7(e)(i), (iv) and (v) of the Australia-United States Free Trade Agreement should be interpreted in the implementing legislation so as to permit exceptions to liability for the following TPM circumventions:

- Circumvention for reverse engineering of software for interoperability purposes;
- Circumvention for software installed involuntarily or without acceptance, or where the user has no awareness a TPM or no reasonable control over the presence of a TPM;
- Circumvention for security testing of software; and
- Circumvention for individual privacy online

examined at paragraphs 3.22 – 3.30 of this report.

**Recommendation 7 (paragraph 3.34)**

The Committee recommends that the form in the implementing legislation of the exceptions specified in Article 17.4.7(e)(i) – (vii) of the Australia-United States Free Trade Agreement should not narrow their scope, as delineated by the Agreement text, in any way.

**Recommendation 8 (paragraph 3.66)**

The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.55 – 3.64 of this report, to the 'particular class of works, performances, or phonograms' criterion in Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.

**Recommendation 9 (paragraph 3.98)**

The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.87 – 3.96 of this report, to the credibly demonstrated actual or likely adverse impact criterion in Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.

**Recommendation 10 (paragraph 3.116)**

The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.109 – 3.114 of this report, to the non-impairment of legal protection or legal remedies criterion in Article 17.4.7(f) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.

**Recommendation 11 (paragraph 3.125)**

The Committee recommends that, as far as is possible within the confines of giving effect to the Australia-United States Free Trade Agreement, the implementing legislation should clarify the term 'manufactures' in Article 17.4.7(a)(ii) in order to permit the non-commercial creation of circumvention devices for the purpose of utilising exceptions permitted under Article 17.4.7(e)(v), (vii) and (viii).

**Recommendation 12 (paragraph 3.131)**

The Committee recommends that the Government devise a workable and adequate solution to the flaw in Article 17.4.7 of the Australia-United States Free Trade Agreement identified at paragraphs 3.117 – 3.119 of this report, for example a statutory licensing system or some other approval regime, to enable the proper exercise of exceptions under Article 17.4.7(e)(v), (vii) and (viii).

The Committee also recommends that the solution devised by the Government should be distinct from those identified at paragraphs 3.122 – 3.129 of this report.

#### 4 Exceptions proposed to the Committee

##### Recommendation 13 (paragraph 4.4)

The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the Government maintain the existing permitted purposes and exceptions in the *Copyright Act 1968*.

##### Recommendation 14 (paragraph 4.15)

The Committee recommends that the proposed exception to liability for TPM circumvention for the investigation of copyright infringement of licensed computer programs examined at paragraphs 4.7 – 4.14 of this report be included as a permitted exception in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

This exception should only be available upon the order of a court where the court is satisfied that there are reasonable grounds for the investigation.

##### Recommendation 15 (paragraph 4.43)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- Making back-up copies of computer programs;
- The reproduction or adaptation of computer programs for interoperability between computer programs;
- The reproduction or adaptation of computer programs for correcting errors in computer programs; and
- Interoperability between computer programs and data

examined at paragraphs 4.16 – 4.42 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

##### Recommendation 16 (paragraph 4.51)

The Committee recommends that the Government monitor the potential adverse impact of threats of legal action being made against legitimate researchers in Australia conducting research into encryption, access, copy control measures, and other issues relating to computer security.

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**Recommendation 17 (paragraph 4.66)**

The Committee recommends that the Government monitor the potential adverse impact in Australia of compilations of lists of websites being blocked by commercial filtering software.

**Recommendation 18 (paragraph 4.74)**

The Committee recommends that, should the tinkering, decompilation and exploitation of 'abandonware' become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

The Committee would also support any moves to render the use of 'orphaned' works non-infringing under the *Copyright Act 1968*.

**Recommendation 19 (paragraph 4.89)**

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- The provision of copyright material to members of Parliament; and
- The use of copyright material for the services of the Crown

examined at paragraphs 4.75 – 4.86 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

**Recommendation 20 (paragraph 4.90)**

The Committee recommends that the Government ensure that the exception permitted for the use of copyright material for the services of the Crown integrates smoothly with the scope of the exception in Article 17.4.7(e)(vi) of the Australia-United States Free Trade Agreement, and that the coverage provided by both exceptions is sufficient for the full range of government activity.

**Recommendation 21 (paragraph 4.99)**

The Committee recommends that, if any activities for assisting students with disabilities outside of Part VB of the *Copyright Act 1968* become non-infringing in future and satisfy Article 17.4.7(e)(viii) and (f) of the Australia-United States Free Trade Agreement, the Government investigate the appropriateness of introducing a corresponding TPM circumvention exception for these activities.

**Recommendation 22 (paragraph 4.107)**

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- The reproduction and communication of copyright material by educational and other institutions; and
- Those with a print disability and for the reproduction and communication of copyright material by institutions assisting those with a print disability

examined at paragraphs 4.91 – 4.105 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

**Recommendation 23 (paragraph 4.109)**

The Committee recommends that the Government examine the issue of the classification of devices used as accessibility aids by or for those with a print disability with a view to exempting such devices from the TPM liability scheme.

**Recommendation 24 (paragraph 4.111)**

The Committee recommends that, pending the outcome of its fair dealing review, the Government examine the adequacy of s.40 of the *Copyright Act* 1968 as a mechanism for those with a print disability and consider implementing a provision specifically allowing for the reproduction and communication of copyright material for private use by those with a print disability.

**Recommendation 25 (paragraph 4.144)**

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- The reproduction and communication of copyright material by libraries, archives and cultural institutions for research and study purposes;
- The reproduction and communication of copyright material by libraries, archives and cultural institutions for other libraries, archives and cultural institutions; and
- The reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes

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examined at paragraphs 4.126 – 4.143 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

**Recommendation 26 (paragraph 4.152)**

The Committee recommends that, in advance of the implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement, the Government consult with the National Gallery of Australia and any other relevant institutions to identify an appropriate exception for TPM circumvention for the temporary reproduction of digital material for exhibition and preservation purposes.

**Recommendation 27 (paragraph 4.169)**

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- Fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice; and
- The inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes

examined at paragraphs 4.157 – 4.168 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

**Recommendation 28 (paragraph 4.190)**

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- Access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided; and
- Access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product

examined at paragraphs 4.175 – 4.188 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

**Recommendation 29 (paragraph 4.198)**

The Committee recommends that, should the act of making back-up copies of copyright material other than computer programs become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

The Committee would also support any moves to render the making of back-up copies of copyright material other than computer programs non-infringing under the *Copyright Act 1968*.

**Recommendation 30 (paragraph 4.204)**

The Committee recommends that, should the format shifting of copyright material become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

The Committee would also support any moves to render the format shifting of copyright material non-infringing under the *Copyright Act 1968*.

**Recommendation 31 (paragraph 4.212)**

The Committee recommends that, should the reproduction and communication of 'orphaned' copyright material become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

**Recommendation 32 (paragraph 4.217)**

The Committee recommends that the Government develop an exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement to allow for circumvention of TPMs for access to mixed works consisting of both copyright material and non-copyright material where the amount of non-copyright material in the work is substantial.

**Recommendation 33 (paragraph 4.239)**

The Committee recommends that the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement should nullify any agreements purporting to exclude or limit the application of permitted exceptions under the liability scheme.



## 5 Future reviews

### Recommendation 34 (paragraph 5.27)

The Committee recommends that future administrative reviews required under Article 17.4.7(e)(viii) be conducted by the Attorney-General's Department.

### Recommendation 35 (paragraph 5.37)

The Committee recommends that the Attorney-General consider *ad hoc* requests for exceptions under the TPM liability scheme according to a statutorily defined process.

### Recommendation 36 (paragraph 5.41)

The Committee recommends that existing and proposed exceptions be reviewed every four years through a statutorily defined, public administrative review conducted by the Attorney-General's Department.

### Recommendation 37 (paragraph 5.47)

The Committee recommends that any exceptions to the liability regime under Article 17.4.7(e)(viii) should be promulgated as subordinate legislation, rather than through amendments to the *Copyright Act 1968*.



## Introduction

### Background to the inquiry

- 1.1 The Australia-United States Free Trade Agreement (AUSFTA) came into force on 1 January 2005. Chapter 17 of the AUSFTA deals with intellectual property rights, and in particular requires that parties to the agreement create a liability scheme for certain activities relating to the circumvention of 'effective technological measures' (ETMs).<sup>1</sup> A number of exceptions to that liability scheme are already set out in the Agreement, and there is provision for a party to introduce other exceptions to the liability scheme under specific circumstances.<sup>2</sup> The Committee has been asked to examine whether additional exceptions are warranted and, if so, to ensure that any proposed exceptions are within the parameters set by the AUSFTA.
- 1.2 In conducting its inquiry, the Committee was conscious of the limited nature of the reference. The Committee was not asked to examine the merits or otherwise of the AUSFTA, and nor was it asked to consider wider copyright issues. However, the Committee was also aware that the issue of additional exceptions to the liability scheme applying to circumvention of technological protection measures (TPMs) needed to be examined within Australia's current domestic copyright

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1 Australian copyright law uses the term technological protection measure (TPM), while the AUSFTA uses the expression 'effective technological measure' (ETM). For ease of reference, the Committee has elected to use the acronym TPM throughout the report, although ETM is also used where necessary.

2 i.e. in compliance with Articles 17.4.7(e)(viii) and (f) of the AUSFTA.

framework. It came as no surprise to the Committee that many submissions raised issues wider than the specific technical matters detailed in the Committee's Terms of Reference.

- 1.3 The Committee was also conscious that the Attorney-General's Department (AGD) was conducting, concurrently with the Committee's inquiry, a review of fair dealing and other possible exceptions under the *Copyright Act 1968*, and was also working on translating the already specified exceptions to TPM circumvention liability contained in the AUSFTA into proposals for legislative amendment. While the Committee has not sought to examine the same issues as the Department, it has made some comment on issues in an effort to assist the policy formulation process and reflect the concerns placed before it.

## The Committee's inquiry and report

### Referral of the inquiry

- 1.4 On 19 July 2005 the Attorney-General, the Hon Philip Ruddock MP, sought the Committee's agreement to review technological protection measures exceptions. The Committee agreed to that request on 9 August 2005. The Attorney-General agreed to a request by the Committee that the reporting date be extended until the end of February 2006.

### Conduct of the inquiry

- 1.5 The inquiry was advertised in *The Australian* on 24 August 2005 and letters were sent to approximately 100 organisations and individuals with a possible interest in this matter. Submissions were requested by 7 October 2005, but extensions were granted to allow the High Court decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment*<sup>3</sup> (hereafter referred to as *Stevens v Sony*), released on 6 October, to be taken into account. The Committee received 64 submissions, 15 supplementary submissions and 11 exhibits. Details are at Appendices A and C to this report.

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3 *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, [2005] HCA 58, 6 October 2005. This decision is available electronically at: <http://www.austlii.edu.au/au/cases/cth/HCA/2005/58.html>.

- 1.6 Public hearings were held in Sydney (14 November 2005), Melbourne (15 November 2005) and Canberra (28 November and 5 December 2005). Details of witnesses are at Appendix B.
- 1.7 The Committee appreciated both the quantity and quality of input from a wide range of groups and individuals on what is a quite technical and complex issue.

## The Committee's approach

- 1.8 A number of submissions provided the Committee with advice as to its role and the way in which it should undertake its inquiry. These ranged from suggestions that the Committee focus exclusively on the question of whether any additional exceptions to circumvention prohibitions are warranted at the present moment, to suggestions that the Committee consider a wide range of issues associated with technological protection measures and copyright more generally. Ultimately, a number of practical issues affected the way in which the Committee undertook its inquiry.
- 1.9 In terms of the implementation of the AUSFTA, there are still 10 months or so remaining before Australia is required to have completed its implementation of the Agreement. Consultations, policy development and policy approval relevant to the implementation process have not yet been completed. The legislation implementing Australia's obligations under Article 17.4.7 and establishing the liability scheme does not yet exist, and there is little information on what the particulars of this legislation might be.<sup>4</sup> This means of course that the eventual legislative form of the exceptions to TPM circumvention liability set out in Article 17.4.7(e)(i) – (vii) is also unknown. In addition, there are a number of definitional issues that remain to be settled, including, crucially, exactly what will be covered by the term 'effective technological measure'. This lack of context and high degree of uncertainty on important points has significantly complicated the work of the Committee, particularly its central task of assessing additional proposed exceptions to the liability scheme.
- 1.10 Some of the difficulties facing the Committee in conducting the inquiry were recognised in a submission from the US-based International Intellectual Property Alliance (IIPA):

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4 The Government has indicated that it 'will be proposing amendments to the Copyright Act to implement Australia's obligations under Article 17.4.7': Attorney-General's Department, *Submission No. 52*, p. 7.

- First, the prohibition on the act of circumventing access controls has not been enacted yet, so the committee is in the dark about the exact scope of the provision for which it has been asked to recommend exceptions
- Second, the terms of reference do not advise the committee about whether the statute is expected to contain an exception in any of the seven specified areas in which the FTA authorizes the recognition of a permanent exception to the prohibition
- Third, it seems to be the intention of the government to bring the new prohibition into force simultaneously with any exceptions that might be enacted, including any that might be based on this committee's recommendations. Thus the committee will have to base its recommendations upon its prediction about the impact of the new prohibition, rather than upon any actual experience with it.<sup>5</sup>

1.11 After considering the views expressed in the submissions and in light of the practical difficulties outlined above, the Committee decided to err on the side of caution. In the absence of detailed information on the legislative form of the new regime, the Committee decided to consider all requests put to it for exceptions, including those currently permitted under the *Copyright Act 1968* and those that may be covered by the exceptions already contained in the AUSFTA. Although the Attorney-General's Department indicated during the course of the inquiry that it supports maintaining the existing exceptions in the Act under the new regime,<sup>6</sup> this may not ultimately prove to be the case. The Committee strongly supports the maintenance of the existing exceptions in the Act under the new scheme, and has, for the purposes of comprehensiveness, made reference in this report to the existing exceptions. Proposed exceptions put to the Committee are dealt with in Chapters 3 and 4.

1.12 It is also important to note that, as Article 17.4.7 has not yet been passed into Australian law, no party is currently able to identify an **actual** adverse impact due to the liability scheme in order to justify further exceptions under Article 17.4.7(e)(viii). The Committee has therefore only been able to consider **likely** adverse impacts that might occur. The adverse impact requirement is examined in Chapter 3.

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5 IIPA, *Submission No. 10*, p. 3. The IIPA went on to make a number of suggestions as to how the Committee should proceed.

6 Mr Peter Treyde, *Transcript of Evidence*, 5 December 2005, p. 33.

- 1.13 In light of its practical difficulties, the Committee also came to the view that it was not in a position to develop prescriptive, detailed formulations of key definitions or criteria or to draft technical recommendations on the text of proposed exceptions. The approach suggested in one submission on this point struck the Committee as sensible:

[The Committee can] make recommendations about the process for determining exceptions, both now and in the future, and the way the exceptions should be dealt with... and identify, from an Australian policy perspective, what activities, which may be impacted by technological protection measures, must be allowed...<sup>7</sup>

- 1.14 It is more appropriate that the Government, particularly given the time and processes remaining before implementation, consider the conclusions and recommendations of this report and use the technical expertise at its disposal to develop authoritative formulations and acceptable exceptions in appropriate legislative terms where required.
- 1.15 Given the requirements in Article 17.4.7 regarding a regular review mechanism, the Committee was very conscious of the fact that this was but the first of many examinations of this issue. While the format of future reviews is not within the Committee's Terms of Reference, many of the submissions raised this issue. The Committee has therefore made some comment on how the review process might operate in the future.

## The report

- 1.16 Chapter 2 provides an overview of the nature of TPMs and related issues, copyright regulation in Australia, the interpretation of Article 17.4.7 and its differences with the *Copyright Act 1968*, and the regulatory framework in the United States. The issue of region coding is also discussed in this Chapter.
- 1.17 Chapter 3 addresses the exceptions to liability specified in Article 17.4.7(e)(i) – (vii) and the criteria for further exceptions under Article 17.4.7(e)(viii). The lack of a device exception for Article 17.4.7(e)(viii) under Article 17.4.7(e)(f) is also considered in this Chapter.
- 1.18 Chapter 4 examines the specific requests for additional exceptions to liability under Article 17.4.7(e)(viii) and considers whether these

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<sup>7</sup> Ms Kimberlee Weatherall, *Submission No. 38*, p. 4.

exceptions are warranted. The issue of the exclusion or limitation of permitted exceptions by agreement is also considered in this Chapter.

- 1.19 The final chapter examines the possible format of the future review process required under the AUSFTA.



## Overview: technological protection measures, copyright in Australia, the Australia-United States Free Trade Agreement, regulation in the United States, and region coding

- 2.1 This Chapter provides an overview of the following:
- The nature of technological protection measures (TPMs) and related issues;
  - Copyright regulation in Australia;
  - Article 17.4.7 of the Australia-United States Free Trade Agreement (AUSFTA): interpretation and differences with the *Copyright Act* 1968; and
  - The regulatory framework in the United States.
- 2.2 The Chapter also examines an issue which gained particular prominence during the course of the inquiry: region coding of digital versatile discs (DVDs) and computer games.

## The nature of technological protection measures and related issues

### TPM basics

- 2.3 In general terms, TPMs are software, components and other devices that copyright owners use to protect copyright material. Examples of TPMs include encryption of software, passwords, and access codes. While copyright owners seek to protect their work from unauthorised access and use by means of TPMs, TPMs can also be disabled or circumvented through a range of means, including the use of computer programs or devices such as microchips. TPMs are a valid response by copyright owners seeking to protect their intellectual property from infringement.
- 2.4 There are two main types of TPMs: access control TPMs and copyright protection TPMs. Access control TPMs allow the copyright owner to control access to the copyrighted material – for example, password protections, file permissions, and encryption. Copyright protection measures are designed to control activities such as reproduction of copyright material, for example by limiting the number of copies that a consumer might make of an item. One of the main differences between the two types of TPM is that an access control TPM will block access generally, while a copyright protection TPM will operate at the point where there is an attempt to do an act protected by the copyright, for example make a copy of the material. In its 1999 advisory report on the Copyright Amendment (Digital Agenda) Bill 1999, the then House of Representatives Standing Committee on Legal and Constitutional affairs observed that:
- Copy control measures are more closely allied with copyright, and the infringement of copyright, than access control measures. Access control measures seek to prevent all access to copyright material, not only that access which is unlawful.<sup>1</sup>
- 2.5 In practice, many current TPMs contain both access and copy control elements. The decision of copyright holders to combine or ‘bundle’ such elements into the one TPM can result in difficulty when determining the exact nature and purpose of a TPM containing both
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1 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, November 1999, p. 60.

elements. While advocates of stronger protection for copyright owners have argued that, in relation to the AUSFTA, the precise nature of a given TPM is irrelevant and that all access TPMs require protection under the Agreement, the Committee is not convinced that this issue is quite as straightforward as some would suggest. For this reason, the Committee sought advice on the interpretation of the AUSFTA and examined the policy intent of the Australian Government in negotiating the copyright section of the Agreement. This issue is discussed further at paragraphs 2.36 to 2.52 below.

## TPMs under the *Copyright Act 1968*

2.6 Under the *Copyright Act 1968*, a TPM is currently defined as being:

a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to **prevent or inhibit the infringement of copyright** in a work or other subject-matter by either or both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanisms.<sup>2</sup> (emphasis added)

2.7 During the course of the Committee's inquiry, the High Court handed down its decision in the case of *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (*Stevens v Sony*).<sup>3</sup> This case illustrates some of the issues surrounding the definition of TPM and the question of the appropriate levels of statutory protection to be afforded to TPMs. Central to the case was the question of what exactly constitutes a TPM under the *Copyright Act 1968*.

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2 *Copyright Act 1968*, s. 10.

3 The decision is available on-line at:  
<http://www.austlii.edu.au/au/cases/cth/HCA/2005/58.html>.

### *Stevens v Sony*

2.8 The case reached the High Court on appeal from the full Federal Court; the appeal was allowed in favour of the applicant (Stevens). The facts of the case concerned an alleged infringement of copyright due to the circumvention of an access TPM on Sony PlayStation game consoles. The TPM in question did not prevent the copying of PlayStation games but did prevent the playing of infringing copies of PlayStation games. At the time of the case it was not an infringement of copyright to play an infringing copy of a game (although it was of course a copyright infringement to make an unauthorised copy of a game). The High Court found that the TPM access device used by Sony in the consoles did not actually constitute a TPM within the definition of the *Copyright Act 1968*, as it did not prevent copyright infringement *per se* but prevented access only after infringement had already occurred.<sup>4</sup>

2.9 The Court also clearly indicated that the definition of TPM in the Act should not be construed too broadly:

in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it.<sup>5</sup>

2.10 Kirby J noted that one possible effect of an expansive interpretation of the TPM definition would be a broad access control which would allow 'the achievement of economic ends additional to, but different from, those ordinarily protected by copyright law'.<sup>6</sup> Kirby J also stated that:

If the present case is taken as an illustration, Sony's interpretation would permit the effective enforcement, through a technological measure, of the division of global markets designated by Sony. It would have the effect of imposing, at least potentially, differential price structures in those separate markets. In short, it would give Sony broader powers over pricing of its products in its self-designated markets than the Copyright Act in Australia would ordinarily allow.<sup>7</sup>

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4 See para. 46 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

5 See para. 47 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

6 Para. 211.

7 Para. 211.

2.11 The decision of the High Court was based on copyright law as it existed at the time the alleged offences occurred (i.e. March 2001).<sup>8</sup> Subsequent amendments to the *Copyright Act 1968*, including those contained in the *US Free Trade Agreement Implementation Act 2004*, were not applied to the final decision. The Court nevertheless recognised the future impact of the AUSFTA on this area of Australian copyright law:

In the Australian context, the inevitability of further legislation on the protection of technology with TPMs was made clear by reference to the provisions of, and some legislation already enacted for, the Australia-United States Free Trade Agreement. Provisions in that Agreement, and likely future legislation, impinge upon the subject matters of this appeal. Almost certainly they will require the attention of the Australian Parliament in the foreseeable future.<sup>9</sup>

2.12 The Committee notes that the *Stevens v Sony* decision has policy implications for the Government in terms of implementing Article 17.4.7. On the one hand, the decision will be superseded to some degree due to the broad definition of ‘effective technological measure’ (ETM) that is required by Article 17.4.7 of the AUSFTA. On the other hand, the High Court has clearly flagged its concerns regarding a broad construction of TPMs. One academic has observed that:

The Federal Government... is in a right pickle. The Government has to adopt a broad definition of technological protection measures and narrow exceptions as part of the Australia-United States Free Trade Agreement 2004. However, the Federal Government will also have to comply with the High Court’s demands that any future laws on technological protection measures be drafted with precision and clarity. The government will also need to take into account wider policy concerns that there are not inadvertent detrimental impacts for competition, access to information, and fundamental freedoms.<sup>10</sup>

2.13 The definition of ETM specified in Article 17.4.7 of the AUSFTA is considered below at paragraphs 2.51 – 2.61 below.

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8 Para. 10

9 Para. 223 per Kirby J.

10 Dr Matthew Rimmer, *The High Court rejects ‘übercopyright’ in Stevens v Sony*, p. 7.

## The protection afforded to TPMs by anti-circumvention laws – copyright or ‘übercopyright’?

2.14 The logical extension of TPMs, as reflected by the existence of anti-circumvention laws, is to reduce the potential for TPMs themselves to be disabled, circumvented, or removed. However, it has been argued that anti-circumvention laws often go beyond the basic premise of protecting copyright. From this perspective, anti-circumvention laws have been dubbed ‘paracopyright’ or ‘übercopyright’. One submission to the inquiry contended that:

Three factors take anti-circumvention laws beyond simple ‘copyright enforcement’:

1. In practice, technological measures may not just prevent copyright infringement, but many other, non-infringing uses of digital material...
2. Copyright owners have used technology for commercial purposes well beyond, and even unrelated to those provided by copyright law. For example, technological measures have been used to enforce geographical segmentation of markets, or ensure control over a technological platform;
3. Anti-circumvention laws ban certain technologies. As a result, these laws may impact on – and inhibit – both innovation, and competition in technology markets.<sup>11</sup>

## Copyright regulation in Australia

### The regulatory environment

2.15 Australian copyright law reflects not only domestic policy considerations but also Australia’s obligations under a range of international agreements including the AUSFTA. The nature of copyright protection in the digital age can be somewhat daunting, made up as it is by highly technical concepts and terms that are difficult for the non-specialist.

2.16 Under current Australian copyright law copyright owners have significant rights, including the right to copy, publish, communicate

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<sup>11</sup> Ms Kimberlee Weatherall, *Submission No. 38*, pp. 8-9.

and publicly perform their copyright material. However, the rights of copyright holders have always been balanced against the need of the public to have access to copyright material. Consequently, the *Copyright Act 1968* contains a number of exceptions to the suite of rules regarding infringement of copyright.

- 2.17 A number of submissions likened copyright protection to placing a fence around goods, the fence, in the digital environment, being a TPM, and circumvention of the TPM being ‘no different to taking the bolt cutters to the security fence, breaking in and stealing the goods’.<sup>12</sup> This analogy is limited, however, and does not acknowledge the balancing of rights between copyright holders and users. As one submission observed:

Copyright cannot be understood in... simplistic, property-based terms. The statutory monopoly delivered to owners under the Copyright Act 1968 has always been subject to limitations and exceptions... which are intended to operate as a limitation on the rights of copyright owners to control use of their works. Those exceptions are central to the so-called ‘copyright balance’: the balance between the rights of copyright owners and users which the legislature has deemed appropriate.<sup>13</sup>

- 2.18 The analogy was also clarified in these terms:

If you are in the United Kingdom and seeking to exercise property rights over a property that you have a full private title over but across which there is a traditional pathway known as a footpath, if you were to place an impenetrable barrier across that footpath denying the right of entry of all United Kingdom residents to transgress, you would be required to remove that barrier because you had inappropriately allowed your rights to interfere with someone else’s rights. That is exactly the case we are dealing with at the moment only it is a much stronger case in that we are not dealing here... with a conflict between statutory rights of property and traditional rights of access; we are instead dealing with statutory rights throughout.<sup>14</sup>

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12 Copyright Agency Limited (CAL), *Submission No. 16*, Introduction, p. 1.

13 Flexible Learning Advisory Group (FLAG), *Submission No. 34*, p. 2.

14 Dr Evan Arthur, *Transcript of Evidence*, 5 December 2005, p. 13.

2.19 A number of submissions to the inquiry argued that the provisions of the AUSFTA will significantly alter the balance between copyright holders and users by extending the copyright holder's ability to restrict access to copyright works for non-infringing uses. The Department of Education, Science and Training (DEST), for example, submitted that the AUSFTA 'will shift the existing balance significantly in favour of copyright owners, and against institutional and other users'.<sup>15</sup> A contrary view was put by the Business Software Association of Australia (BSAA):

Most of the provisions with regard to strengthening the copyright law have been in relation to enforcement. I am not sure that that necessarily affects the balance of rights as between users and owners. It is merely intended to assist in enforcement of the existing rights.<sup>16</sup>

2.20 The Committee is strongly supportive of the balance struck by the *Copyright Act 1968* between copyright holders and users of copyright material.

### Recommendation 1

**2.21 The Committee recommends that the balance between copyright owners and copyright users achieved by the *Copyright Act 1968* should be maintained upon implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement.**

## Recent developments

### The 1996 WIPO treaties and the *Copyright Amendment (Digital Agenda) Act 2000*

2.22 In 1996 two treaties were agreed to by a number of countries, including Australia, at the World Intellectual Property Organisation (WIPO) Diplomatic Conference – the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).<sup>17</sup> Both treaties require countries to provide adequate legal protection and effective legal remedies against ETMs.<sup>18</sup> Australia is

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15 DEST, Submission No 48, p. 2.

16 Mr Maurice Gonsalves, *Transcript of Evidence*, 14 November 2005, p. 30.

17 The WPPT and the WCT are collectively known as the WIPO Internet Treaties. See AGD, *Submission No. 52*, p. 2.

18 Article 11 of the WCT and Article 18 of the WPPT.



currently in the process of acceding to the WCT. The Attorney-General's Department (AGD) noted that 'as is the case with most multilateral treaties, the obligations in the WIPO Internet Treaty are broadly stated and give some flexibility for implementation at a national level'.<sup>19</sup>

2.23 Partly to meet Australia's WIPO obligations, the *Copyright Amendment (Digital Agenda) Act 2000* made a number of amendments to the *Copyright Act 1968* by introducing a regime for protection against circumvention of technological measures protecting copyright material. In his second reading speech, the then Attorney-General noted that the proposed reforms:

update Australia's copyright standards to meet the challenges posed by rapid developments in communications technology, in particular the huge expansion of the Internet. This extraordinary pace of development threatens the delicate balance which has existed between the rights of copyright owners and the rights of copyright users. The central aim of the bill, therefore, is to ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment.<sup>20</sup>

2.24 The then Attorney-General made it clear that while the amendments improved protection for industries that publish or distribute material electronically, there were also complementary exceptions to that right, replicating as far as possible 'the balance that has been struck in the print environment between the rights of owners of copyright and the rights of users'.<sup>21</sup>

2.25 The level of protection provided by the *Copyright Amendment (Digital Agenda) Act 2000* was not seen as adequate by all copyright owners. For some it was 'perceived as providing less security to rightsholders than that contained in comparable overseas jurisdictions' and was 'a

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19 AGD, *Submission No. 52*, p. 3.

20 Hon Daryl Williams MP, Attorney-General, *House of Representatives Hansard*, 2 September 1999, p. 9748.

21 Hon Daryl Williams MP, Attorney-General, *House of Representatives Hansard*, 2 September 1999, p. 9748.

key reason for the slow development of a digital publishing industry in Australia'.<sup>22</sup>

2.26 Countering this view, others argued that in implementing digital agenda laws, Australia

did a good job. It adopted the approach that it should put these new laws in place in a way that is about enforcing copyright but with balancing provisions and exceptions to recognise that these locks and new ways of protecting things could take away the rights of general, ordinary people who have rights under copyright as well.<sup>23</sup>

2.27 A review of the amendments contained in the *Copyright Amendment (Digital Agenda) Act* 2000 commenced in April 2003. The law firm of Phillips Fox conducted the review at the request of the Attorney-General and reported to Government in February 2004. During the course of the review the Government negotiated and subsequently signed the AUSFTA. Phillips Fox noted that:

In some areas, the copyright provisions of the Free Trade Agreement supersede the recommendations made in the Phillips Fox report. Where relevant the Phillips Fox report is being used to inform the Government's implementation of the Free Trade Agreement obligations.

Following the implementation of the Free Trade Agreement obligations, the Government will conclude its broader review of the Digital Agenda reforms.<sup>24</sup>

2.28 The Phillips Fox review recommended that the *Copyright Act* 1968 be amended to expand the definition of 'permitted purpose' to include 'fair dealing and access to a legitimately acquired non-pirated product', and that the supply or use of a circumvention device or service be allowed for any use or exception allowed under the Act.<sup>25</sup> The Government is currently considering its response to this and other recommendations of the review.

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22 CAL, *Submission No. 16*, para. 14.

23 Mr Jamie Wodetzki, *Transcript of Evidence*, 15 November 2005, p. 1.

24 For further details see:

<http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/RWP59973CB8E5C96506CA2570660014DE7E> (accessed 19/12/2005).

25 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, recommendation 17.

## Review of the *Copyright Act 1968* – fair dealing provisions

- 2.29 As noted in Chapter 1, the task of this Committee was to consider if additional exceptions to access TPMs are warranted, beyond those already specified in the AUSFTA. The inquiry was not focused on broader copyright issues. Concurrent with the Committee's inquiry, the AGD has been examining whether the current 'fair dealing' exceptions<sup>26</sup> contained in the *Copyright Act 1968* are adequate, and whether a new general exception based on 'fair dealing' or new specific exceptions might be appropriate.
- 2.30 Following receipt of public submissions an options paper was developed and further consultations held. As at December 2005 the AGD was working on options for consideration by the Attorney-General.<sup>27</sup>
- 2.31 Media reports have indicated that the government may seek to legalise format (or space) shifting (e.g. purchasing a CD and copying it on to an MP3 player) and time shifting (e.g. recording a radio or television program for listening or watching at a later time) by including them under 'fair dealing' provisions in the *Copyright Act 1968*.<sup>28</sup> The Attorney-General has been quoted as saying 'We should not treat everyday Australians who want to use technology to enjoy copyright material they have obtained legally as infringers where this does not cause harm to our copyright industries'.<sup>29</sup>
- 2.32 It has been argued that such changes would more closely resemble the United States' open-ended defence of fair dealing, and would 'counter the effects of the extension of copyright protection and... correct the legal anomaly of time shifting and space shifting that is currently absent'.<sup>30</sup> However, should such an extension to fair dealing eventuate in Australia, the ability of users to take advantage of those exceptions might well be limited depending on whether access TPMs

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26 These are currently confined to four purposes: research of study; criticism or review; reporting of news; and professional advice given by a legal practitioner, patent attorney or trade marks attorney. (see: AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 11.)

27 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 37.

28 See for example, *Herald Sun*, 28 December 2005, p. 9, 'Video, iPod cheats come in from cold'; *Adelaide Advertiser*, 28 December 2005, p. 2, 'You will no longer be CD, tape pirate'.

29 *Adelaide Advertiser*, 28 December 2005, p. 2.

30 Joint Standing Committee on Treaties, quoted in AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, p. 17.

placed on material can be legally circumvented. In the United States, the Digital Millennium Copyright Act of 1998 (DMCA) does not permit users to interfere with access control TPMs to exercise a fair use.<sup>31</sup>

- 2.33 As both format shifting and time shifting are currently infringing uses, it is not within the ability of this Committee to recommend an exception for such purposes at this time, although it would support such a proposal in future. This issue is discussed further in Chapter 4.

## Current liabilities and exceptions relating to TPMs and circumvention

- 2.34 Current copyright law in Australia does not prohibit the act of circumventing a TPM, regardless of whether that TPM controls access to or protects copyright material. Rather, the *Copyright Act 1968* provides for civil actions by copyright owners and prosecutions for criminal offences where a person makes, sells, imports, markets, distributes or otherwise deals in a circumvention device. However:

to be liable under a civil action for any of the above, the person must have known, or be reasonably expected to have known, that the device or service in question would be used to circumvent or facilitate the circumvention of the TPM. The requisite level of intent in criminal proceedings is knowledge or recklessness.<sup>32</sup>

- 2.35 Under the *Copyright Act 1968* also, 'exceptions to liability for both civil actions and criminal proceedings are available if the circumvention device is to be used for a 'permitted purpose', subject to compliance with strict procedural requirements'. The permitted purposes are:

- Reproducing computer programs to make interoperable products (s47D)
- Reproducing computer programs to correct errors (s47E)
- Reproducing computer programs for security testing (s47F)
- Copying by Parliamentary libraries for members of Parliament (s48A)
- Reproducing and communicating works by libraries and archives for users (s49)

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31 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, pp.23-24.

32 AGD, *Submission No. 52*, p. 4.

- Reproducing and communicating works by libraries and archives for other libraries and archives (s50)
- Reproducing and communicating works for preservation and other purposes (s51A)
- Use of copyright material for the services of the Crown (s183)
- Reproducing and communicating works etc by education and other institutions (Part VB).<sup>33</sup>

## **Article 17.4.7 of the AUSFTA: interpretation and differences with the *Copyright Act 1968***

### **Interpretation of Article 17.4.7**

2.36 The Committee was very conscious throughout its investigation that it was not the purpose of the inquiry to re-examine the arguments for and against the AUSFTA. The Committee took as its starting point the fact that Australia is committed to the provisions in Article 17.4.7 and that these provisions must be given effect in Australian law. As a first step to understanding the provisions of Article 17.4.7 in the Agreement, therefore, the Committee considered the Government's policy intent in negotiating the agreed text of Article 17.4.7.

### **The Government's policy intent**

2.37 The Committee sought to clarify the intent of the Government in its negotiation of the intellectual property provisions of the AUSFTA by examining public comments by Ministers and officials during and after the negotiation process.

### **Ministerial statements**

2.38 In his second reading speech on the US Free Trade Agreement Implementation Bill 2004, the Minister for Trade, the Hon Mark Vaile MP, made the following statements in regard to amendments to the *Copyright Act 1968* proposed in the Bill:

it is important to be clear that these amendments do not represent the wholesale adoption of the US intellectual

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33 AGD, *Submission No. 52*, p. 4.

property regime. We have not stepped back from best practice elements of Australia's copyright regime – but we have strengthened protection in certain circumstances – providing a platform for Australia to attract and incubate greater creativity and innovation.<sup>34</sup>

#### Review by parliamentary committees

- 2.39 Prior to the initial implementation of the AUSFTA, two parliamentary inquiries were held into the many and varied provisions of the draft Agreement. The Joint Standing Committee on Treaties (JSCOT) tabled its report on 23 June 2004.<sup>35</sup> The second inquiry, by the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, resulted in the release of an interim report on 24 June 2004 and a final report on 5 August 2005.<sup>36</sup>
- 2.40 Intellectual property rights, including effective TPMs, were among the many issues examined by both Committees. In evidence to the Senate Committee, officials from the Department of Foreign Affairs and Trade (DFAT) stressed that, under the AUSFTA, Australia retains the ability to create appropriate exceptions to suit its own circumstances:

The anti-circumvention provisions ... include a list of specific exceptions that we can take advantage of and a mechanism for us to make further exceptions that we consider to be appropriate for the Australian circumstances. ...

[While] it is correct to characterise it as having strength in copyright in the FTA... we have also been very careful to ensure that we maintain the ability to put in place exceptions where we regard those to be appropriate to the Australian circumstances.

...the point that I would like to make in relation to all of these issues is that the provisions are designed to assist copyright owners to enforce their copyright and target piracy, not to

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34 Hon Mark Vaile MP, *House of Representatives Hansard*, 23 June 2004, p. 31218.

35 JSCOT, *Report 61: The Australia-United States Free Trade Agreement*. This report is available at: <http://www.aph.gov.au/house/committee/jsct/usafra/report.htm>.

36 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America. The interim and final reports can be accessed at: [http://www.aph.gov.au/senate/committee/freetrade\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/freetrade_ctte/index.htm).

stop people from doing legitimate things with legitimate copyright material.<sup>37</sup>

- 2.41 In response to concerns raised regarding TPMs, JSCOT recommended that steps be taken to:

ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition.<sup>38</sup>

- 2.42 The Senate Select Committee also expressed concern that the:

AUSFTA goes too far. TPM circumvention may be done for legitimate, non-infringing purposes, not simply piracy. A ban on TPM circumvention, while possibly assisting to curb some piracy, may also prevent many legitimate uses.<sup>39</sup>

- 2.43 It is plain from the above and other public comments during the examination of the AUSFTA that the Government had a clear intention of permitting exceptions to circumvention liability for non-infringing purposes. As one submission to this Committee's inquiry observed:

The indications from the government negotiators are that the language was understood broadly at the time of the negotiations.<sup>40</sup>

- 2.44 The Committee also agrees with further comment from this submission that 'the AUSFTA is not a statute, but a treaty which should be interpreted, and implemented, in accordance with Australian public policy'.<sup>41</sup> The Committee has taken notice of the stated policy objectives of the Government when assessing requests for exceptions in Chapter 4.

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37 Ms Harmer quoted in Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, pp. 87-88.

38 JSCOT, *Report 61: The Australia-United States Free Trade Agreement*, p. 241.

39 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, p. 90.

40 Ms Kimberlee Weatherall, *Submission No. 38*, p. 18.

41 Ms Kimberlee Weatherall, *Submission No. 38*, p. 18.

### The text of Article 17.4.7

- 2.45 The language of Article 17.4.7 does not lend itself to a clear and immediate understanding of the details of the TPM circumvention liability scheme contained therein. As acknowledged by the AGD, the Committee needed to ‘interpret treaty language that is complex’.<sup>42</sup>
- 2.46 Supporters of Interoperable Systems in Australia (SISA) remarked that:
- the key point is that all the interpretation of this language, in effect, becomes a very academic exercise and one at which people are probably torturing the meaning of language to arrive at the conclusion that they want to arrive at. Given that scenario, the best way to approach this is to accept that these words could mean anything. They are all quickly cobbled together in many respects and the subject of different levels of debate. The ultimate goal should be to look at what is a good policy outcome and what the language of these provisions allows for.<sup>43</sup>
- 2.47 While officers of the AGD did not feel that it was appropriate to provide the Committee with legal advice as to the meaning of the various provisions of Article 17.4.7, they did make a number of general observations about interpretation of treaty text generally. According to article 31(1) of the Vienna Convention of the Law of Treaties, a treaty is:
- to be interpreted in good faith; the treaty’s terms are to be given their ordinary meaning; the meaning is not to be established in isolation from the context of those terms; and account is to be taken of the object and purpose of the treaty.<sup>44</sup>
- 2.48 The Committee has had recourse to this principle of the Vienna Convention in its consideration of the criteria for exceptions under Article 17.4.7(e)(viii) in Chapter 3. The Committee’s attention was also drawn to the important role of the introductory paragraph, or chapeau, to Article 17.4.7 in providing the essential context for the interpretation of the provisions, and, in particular, the reference to ETMs. As the AGD explained:

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42 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 23.

43 Mr Jamie Wodetzki, *Transcript of Evidence*, 15 November 2005, pp. 6-7.

44 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, pp. 23-24.



There are two elements in this text from the chapeau which are joined by the conjunctive 'and'. The first is that an ETM is to be used in connection with the exercise of a copyright holder's rights. The second is that an ETM is to restrict unauthorised acts in respect of the copyright holder's works, performances or phonograms. ...The broader context of the chapeau may support a reading that restricts rights to those comprising copyright. Article 17.4 deals only with rights comprising copyright, as I have mentioned. In addition, the definition of an ETM refers to technology that protects any copyright, not that protects any right.

In relation to the second element... unauthorised acts may be taken to mean acts in relation to copyright which are not authorised by the copyright holder or by law.<sup>45</sup>

- 2.49 Others were of a similar view. The Intellectual Property Committee of the Law Council of Australia (IPC) noted that it is important to assess the:

extent to which primary liability should require a nexus to exist between the protection of a technological measure and an exercise of a right attached to copyright. This is relevant to the separate matter of drafting and judicial interpretation of what access controls will comprise an 'effective technological protection measure' as required by FTA article 17.4.7(b).<sup>46</sup>

- 2.50 The Committee also notes the existence of a significant flaw in Article 17.4.7 – namely, that any party with an exception permitted under Article 17.4.7(e)(v), (vii) and (viii) will not be able to use the corresponding exceptions to liability for the manufacturing or trafficking or dealing in circumvention devices or services. This issue is discussed in detail in Chapter 3.

#### The definition of ETM

- 2.51 Under Article 17.4.7 of the AUSFTA an ETM is defined as:

any technology, device, or component that, in the normal course of its operation, **controls access to a protected work,**

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45 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, pp. 25-26.

46 IPC, *Submission No. 15*, p. 5.

performance, phonogram, or other protected subject matter, or **protects any copyright**.<sup>47</sup> (emphasis added)

2.52 The term 'access' is not defined in the AUSFTA.

## Differences between Article 17.4.7 and the *Copyright Act 1968*

2.53 There are three main differences between Article 17.4.7 and the relevant areas of the *Copyright Act 1968*. These are:

- The definition of TPM in the Act and the definition of ETM in Article 17.4.7;
- Liability regarding the provision of circumvention devices and the act of circumvention; and
- The scope of the specified exceptions in Article 17.4.7(e)(i) – (vii) and the scope of the permitted purposes in the Act.

### TPM and ETM

2.54 Although it might seem so at first glance, the difference between the definition of TPM in the *Copyright Act 1968* (see paragraphs 2.6 – 2.12 above) and the definition of ETM in Article 17.4.7 is not merely one of semantics. Unlike the statutory definition of TPM, the AUSFTA definition of ETM is not limited to devices that 'prevent or inhibit the infringement of copyright', but also includes devices that 'controls access' to protected copyright material. This raises clear implications for the current definition of TPM in the *Copyright Act 1968* upon implementation of Article 17.4.7. The US-based International Intellectual Property Alliance (IIPA) noted that:

the current definition of 'technological protection measure' in s10 of the Copyright Act does not appear to be coextensive with the definition of 'effective technological measure' provided in Art. 17.4.7b of the AUSFTA. A change to this definition may be needed if Australia's new prohibition is to meet its FTA obligations. Simply put, Australia does not currently protect a broad enough category of access controls to be able to comply simply by prohibiting circumvention of those access controls.<sup>48</sup>

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47 Australia-United States Free Trade Agreement, Article 17.4.7 (b).

48 IIPA, *Submission No. 10*, p. 3.

2.55 The AGD, as part of its implementation of the AUSFTA, will no doubt consider how to best implement the definition of ETM in Article 17.4.7 into Australian law. The Committee notes that, should the definition of an ETM in the AUSFTA be formulated in conjunction with the chapeau (see paragraph 2.48 above), the difference between the two definitions may well not be as significant as first appears. In terms of this Committee's inquiry, however, the lack of a final definition of TPM/ETM in the implementing legislation has given rise to uncertainty and concern as to what may or may not come within the scope of the term, and hence what may or may not require an exception from the liability scheme. Professor Brian Fitzgerald stated that:

If the definition of a TPM is to move from 'prevent or inhibit copyright infringement' to 'controls access' meaning 'controls use' then we have not only legislated an access right in our copyright law but we have also legislated a far reaching right to control and define consumer use.<sup>49</sup>

2.56 DEST submitted that the definition of a TPM is an 'issue of overwhelming importance',<sup>50</sup> and contended that the final definition of TPM should confine the term to preventing copyright infringement:

In DEST's view there are strong arguments to confine the concept of a TPM to measures or mechanisms that protect copyright from being infringed, and not to allow the concept to be broadened to cover devices that serve extraneous purposes, such as regional playback control, controlling after-markets for computer accessories or otherwise inhibiting competition.<sup>51</sup>

2.57 In its submission, the Australian Digital Alliance/Australian Libraries Copyright Committee (ADA/ALCC) also raised the issue of 'unintentional TPMs' – devices that act as TPMs but were not intended to so act by the author:

For example, devices that act as 'TPMs' as a result of technological advancement or obsolescence. Such devices

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49 Professor Brian Fitzgerald, *Submission No. 29.1*, p.5.

50 DEST, *Submission No. 48*, p. 17.

51 DEST, *Submission No. 48*, p. 17.

may for example constitute software or hardware that effectively prevents access to a protected work, and may indeed prevent all access to that software or hardware. It is assumed that such devices are not ‘effective TPMs’ as they are not used ‘by authors in connection with the exercise of their rights’ as required by the WCT, and thus exceptions to circumvention of such devices are not required to be sought in the course of this review.

If this is not the case, the ADA and ALCC necessarily submit that an exception is required which exempts circumvention of devices that effectively act as ‘TPMs’ but do so only by reason of technological obsolescence.<sup>52</sup>

- 2.58 Professor Brian Fitzgerald and Mr Nicolas Suzor proposed a draft definition for ETM that restricts the application of access control over copyright material once access has been lawfully obtained, and also introduces an element of consumer welfare protection with reference to the *Trade Practices Act 1974*.<sup>53</sup>
- 2.59 While the Committee is not in a position to endorse any one proposed definition, the Committee does believe that the concerns detailed above indicate the types of issues that the AGD will need to address in settling the key definition of TPM/ETM in the implementing legislation. Much will rest on the way in which this crucial term is defined.
- 2.60 The Committee is of the view that, for access control TPMs to be granted protection from circumvention in Australian domestic legislation, there should be a direct link between the access control TPM and the protection of copyright.

## Recommendation 2

- 2.61 **The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the definition of technological protection measure/effective technological measure clearly require a direct link between access control and copyright protection.**

52 ADA/ALCC, *Submission No. 49*, p. 23.

53 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29.2*, p. 1.

## Provision of circumvention devices and the act of circumvention

2.62 Currently, the *Copyright Act 1968* stipulates that the provision of a circumvention device is illegal, but the **use** of such a device – the act of circumvention – is not. While the term ‘circumvention’ itself is not defined in the Act, a ‘circumvention device’ is defined to be:

a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of a technological protection measure.<sup>54</sup>

2.63 Under article 17.4.7, however, both the provision of a circumvention devices or service **and** the act of circumvention, will be prohibited. As the AGD noted:

the agreement provides liability for the **act** of circumventing effective technological measures that control access, **in addition** to the sale and dealing of devices and services that circumvent effective technological measures.<sup>55</sup> (emphasis added)

2.64 The terms ‘circumvention device’ or ‘circumvention service’ are not used in Article 17.4.7 let alone defined, although the Article requires that liability and remedies be provided in respect of such devices.<sup>56</sup> Specifically, liability will attach where a person:

- Knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or
- Manufactures, imports, distributes, offers to the public, provides or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
  - ⇒ (A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
  - ⇒ (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

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54 *Copyright Act 1968*, section 10.

55 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 23.

56 AGD, *Submission No. 52*, p. 8.

⇒ (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.<sup>57</sup>

2.65 While the exact nature of this liability under Article 17.4.7 of the AUSFTA is still uncertain, each party to the AUSFTA will be required to:

provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage of financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.<sup>58</sup>

### Scope of the exceptions specified in Article 17.4.7(e)(i) – (vii) and the scope of the permitted purposes in the Act

2.66 The scope of the particular exceptions specified in Article 17.4.7(e)(i) – (vii) is narrow in comparison to the range of permitted purposes currently available in the *Copyright Act 1968*. The AGD noted that:

the exceptions to both the sale and dealing of circumvention devices and services and acts of circumvention are more narrowly confined than those currently existing in the *Copyright Act*.<sup>59</sup>

2.67 The specified exceptions in Article 17.4.7(e)(i) – (vii) are set out and discussed further in Chapter 3.

## The regulatory framework in the United States

### Relevant US legislation

2.68 The Committee notes that Article 17.4.7 broadly replicates some of the content of section 1201 of the US Copyright Act 1976, as amended by the Digital Millennium Copyright Act of 1998 (DMCA).

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57 AUSFTA, Article 17.4.7 (a) (i) and (ii).

58 Article 17.4.7 (a).

59 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 23.

2.69 Enacted in 1998, the DMCA was part of the US implementation of the WIPO Internet Treaties and amended the US copyright legislation. In also contains additional provisions addressing a number of copyright issues including the prescription of liability for TPM circumvention. The provisions of the DMCA have not been without their domestic critics within the US, including at the parliamentary level. The US Congressional Committee on Energy and Commerce is currently examining fair dealing and its effects on consumers and industry. In commenting on the operations of the DMCA, one member of this Committee stated that:

The Digital Millennium Copyright Act (DMCA)... created civil and criminal penalties for 'circumventing' encryption and other technology designed to prevent tampering or 'hacking' into copyrighted material. But it can also prevent fair use. I believe the affects of the DMCA to lock out consumers from the proper and fair use of material is a perverse result of the law.<sup>60</sup>

2.70 The Chairman of this US Committee also expressed his concern that 'some attempts to protect content may overstep reasonable boundaries and limit consumers' legal options'.<sup>61</sup> The Chairman went on to state that:

It boils down to this: I believe that when I buy a music album or movie, it should be mine once I leave the store...Does it mean I have unlimited rights? Of course not. But the law should not restrict my fair-use right to use my own property.

Current law provides that I am liable for anything I do that amounts to infringement, but current law also prevents me from making legal use of content that is technologically 'locked', even if I have the key. This doesn't seem to make sense. In defending this conflict, some say that fair use leads

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60 Congressman Cliff Stearns (R-Florida), Member, Committee on Energy and Commerce, 16 November 2005. Text available at: <http://energycommerce.house.gov/108/Hearings/11162005hearing1716/hearing.htm> (accessed 10/01/2006).

61 Congressman Joe Barton (R-Texas), Chairman, US House of Representatives Committee on Energy and Commerce, 16 November 2005. Text available at: <http://energycommerce.house.gov/108/Hearings/11162005hearing1716/hearing.htm> (accessed 10/01/2006).

to piracy, or that it is piracy. No, it isn't. By definition, 'fair-use' is a use that DOES NOT infringe on owners' rights.<sup>62</sup>

2.71 The Committee's attention was also drawn to US case law that has indicated that, even within the operation of the DMCA:

if the uses that an access control prevents are not related to the exclusive rights of copyright, then the access control is not one that the regime can recognise or protect.<sup>63</sup>

2.72 This has been most apparent in cases where access controls have been used to prevent competition in the area of non-copyright goods and services – for example:

- Printer ink cartridges (Lexmark v static controls Corp);
- Automatic garage doors (Chamberlain Group v Skylink Technologies); and
- Computer equipment repair (Storage Tech v Custom Hardware).<sup>64</sup>

2.73 The Committee agrees with the view of the IPC here:

this dichotomous treatment in US to the issue of primary circumvention liability and connection to copyright reflects sound public policy. Liability for circumvention should not provide incentive for the use of access controls for the collateral reason of restricting competition in markets for non-copyright goods and services.<sup>65</sup>

2.74 The Committee believes it would be inequitable if, in translating the AUSFTA into domestic legislation, copyright owners be given greater protection than exists in the US through extension of the liability scheme to protect access TPMs which are not related to protection of copyright, but may in fact restrict competition.

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62 Congressman Joe Barton (R-Texas), Chairman, US House of Representatives Committee on Energy and Commerce, 16 November 2005. Text available at: <http://energycommerce.house.gov/108/Hearings/11162005hearing1716/hearing.htm>; accessed 10/01/2006.

63 IPC, *Submission No. 15*, p. 6. See also Ms Kimberlee Weatherall, *Submission No. 38*, p. 10.

64 See for example, IPC, *Submission No. 15*, p. 6; Open Source Industry Association Ltd, *Submission No. 17*, para. 6.2; Mr Andrew Lang, *Submission No. 8*, pp. 2-3.

65 IPC, *Submission No. 15*, p. 6.



### Recommendation 3

- 2.75 **The Committee recommends that, in the legislation implementing the Australia-United States Free Trade Agreement, the Government ensure that access control measures should be related to the protection of copyright, rather than to the restriction of competition in markets for non-copyright goods and services.**

### The US rule making process

- 2.76 The Committee was urged in a number of submissions to examine the US process for considering exceptions to its liability scheme.
- 2.77 The DMCA requires that a regular rule making process be conducted for determining whether there should be exceptions to circumvention liability. An inquiry is held by the Register of Copyrights every three years involving public submissions and hearings. Following the inquiry, the Register of Copyrights makes recommendations to the Librarian of Congress. The Librarian of Congress, based on those recommendations, then issues determinations through the United States Copyright Office (USCO) specifying exemptions to circumvention liability, which last for a three year period. The exemptions expire at the end of that period and the Librarian is required to make a new determination on potential new exemptions. There have been two rule making processes so far, in 2000 and 2003, and a third is currently underway.<sup>66</sup>
- 2.78 These rule making operations were criticised in evidence to the inquiry including on the grounds of fairness, complexity, accessibility and the standards of proof required.<sup>67</sup> The Special Broadcasting Service Corporation (SBS) noted that

the approach taken by the US Copyright Office has been overly narrow, technical and unsympathetic to the genuine practical concerns of users. In particular, the Copyright

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<sup>66</sup> Australian Copyright Council (ACC), *Submission No. 7*, p. 3. See also 'Copyright Office: Exemption to Prohibition on Circumvention of Copyright protection Systems for Access Control Technologies', in Library of Congress, *Federal Register*, Vol 68, No. 211, October 31, 2003, pp. 62011ff.

<sup>67</sup> Electronic Frontiers Australia, *Submission No. 36.1*, p. 4; also Ms Kimberlee Weatherall, *Transcript of Evidence*, 15 November 2005, p. 25.

Office has required a very high standard of evidence of harm to *justify* an exception to be proven by users, while accepting largely hypothetical evidence of harm to oppose an exception from copyright owners.<sup>68</sup>

- 2.79 The Committee notes that in the first (2000) round of rule making, two exceptions were granted. In the second (2003) round, those two exceptions (with some modifications) were again accepted, and a further two were included.<sup>69</sup> The extensive list of exemptions rejected by the USCO illustrates the range of exceptions sought but ultimately rejected by the USCO against the very specific criteria they use.
- 2.80 A number of submissions contended that the Committee should adopt the approach of the USCO in its deliberations.<sup>70</sup> Other submissions, however, argued that the role of the Committee is not analogous to that of the USCO, and that the Committee is not under the same constraints as the USCO.<sup>71</sup> The Committee considers these matters, along with specific elements of the USCO rule making process, further in Chapter 3.

## Region coding

- 2.81 The Terms of Reference for the Committee's inquiry noted six particular areas of activity that the Committee could consider in assessing further exceptions to circumvention liability under Article 17.4.7(e)(viii). One of these was region coding of digital technologies. Perhaps not surprisingly, region coding emerged as a prominent issue in the inquiry, and it is also illustrative of the some of the issues surrounding combined TPMs and the level of protection that should be extended to access TPMs.
- 2.82 Regional coding was raised as a concern by a wide range of groups which submitted evidence to the inquiry – educational institutions, broadcasters, libraries and archives, cultural institutions and members of the general public. Much of the evidence focused on region coding of DVDs, although region coding of electronic games was also raised. As the circumstances and rationale for region coding

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68 SBS, *Submission No. 37*, section 4.

69 See [www.copyright.gov/1201/docs/librarian\\_statement\\_01.html](http://www.copyright.gov/1201/docs/librarian_statement_01.html)

70 See for example IIPA, *Submission No. 10*; ARIA, *Submission No. 32*.

71 See for example Ms Kimberlee Weatherall, *Submission No. 38*, p. 14.

is somewhat different in each of these media they are dealt with separately in the following sections.

## Region coding of electronic games

- 2.83 Piracy of computer and video games is a significant problem in Australia. In 2004 the Australian interactive entertainment industry generated sales of \$787 million. According to a study by the Allen Consulting Group, game piracy in Australia costs the industry around \$100 million in lost sales (or approximately 19% of all sales) per annum.<sup>72</sup>

## Rationale for region coding of electronic games

- 2.84 The Interactive Entertainment Association of Australia (IEAA) informed the Committee of the various types of TPMs used by the games industry to protect their copyright material. There is a form of region coding included in the various TPMs used for console games. The IEAA advised that the format of games consoles and games CD-ROMs are set to comply with international television standards (NTSC, used primarily in North America, Japan and South East Asia; and PAL, used in parts of Europe and Australia).<sup>73</sup> With advances in technology, this distinction is becoming less important and the 'introduction of HDTV (high-definition television) over the next few ...[years]... will see this issue disappear'.<sup>74</sup> This suggests that this form of region coding used in electronic games will no longer be necessary once the technology has overcome the NTSC/PAL distinction.
- 2.85 The Committee was informed that handheld electronic game devices that do not plug into televisions (i.e. non-console games) do not have region coding.<sup>75</sup> Parallel importation of games is permitted in Australia, and console games imported from other PAL countries can be imported and played on Australian consoles.<sup>76</sup>

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72 Quoted in IEAA, *Submission No. 43*, pp. 15-16; see also IEAA, *Exhibit No. 2*.

73 A third TV format, SECAM, is used in some parts of Europe, including France and Russia.

74 IEAA, *Submission No. 43.1*, p. 1.

75 IEAA, *Exhibit No. 2*.

76 IEAA, *Submission No. 43.1*, p. 4.

- 2.86 In addition to the technical television standard requirements for console games, the IEAA contended that region coding is used for other reasons, including:
- Assisting in the classification of games;
  - The matching of content to the cultural tastes of particular markets; and
  - Facilitating compliance with licensing agreements for third party intellectual property used in games.<sup>77</sup>

- 2.87 The IEAA also argued that the class of consumers who purchase legitimate game console media overseas but are unable to play them on return to Australia is extremely small:

The only class of consumers who may be affected in this regard would be those who have travelled to a region which uses the NTSC television standards. As games consoles are coded in relation to the television standard used in the territory, there will be some limited impact for purchases made in these territories. The IEAA notes that there is also nothing to prevent consumers from purchasing hardware from jurisdictions to enable the discs to be played.<sup>78</sup>

- 2.88 The IEAA noted that:

the majority of people who install mod chips do so to by-pass the 'legitimate product' embedded codes, to enable pirated discs to be played on the console. The IEAA is not aware of any significant percentage of mod chip users who do so to bypass purely the secondary 'territory' embedded codes.<sup>79</sup>

- 2.89 The Committee notes concerns expressed elsewhere by the Australian Competition and Consumer Commission (ACCC):

the main concern of RPC[regional playback control], as distinguished from playback control, is to prevent parallel importation of competing software, not to prevent infringement as alleged by Sony.<sup>80</sup>

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77 IEAA, *Exhibit No. 2*.

78 IEAA, *Submission No. 43*, p. 12. The status of such machines under the new liability scheme is not clear. See discussion of multi-region DVD players at paragraphs 2.128 – 2.136 below.

79 IEAA, *Submission No. 43*, p. 6.

80 ACCC, *Submission to Digital Agenda Review*, October 2003, para. 4.

2.90 The Committee also notes that international factors may also affect the use of such region coding rather than domestic factors. The IEAA stated that:

The access controls used by companies in the Australian games industry are created by their overseas parent companies to suit the international market, not just Australia. The Australian companies cannot dictate the type of technology used to protect IP rights.<sup>81</sup>

### Combined electronic game TPMs

2.91 The IEAA submission went into considerable detail about the various types of TPMs used by the industry and the interaction between media and game consoles.<sup>82</sup> The IEAA stated that ‘Access controls used to enforce region coding are tightly coupled with additional and inseparable access controls that distinguish genuine from pirated games’, but did not detail how important the region coding aspect was as part of the suite of TPMs deployed to protect its products.<sup>83</sup>

2.92 Indeed, the IEAA referred to ‘secondary ‘territory’ embedded codes’,<sup>84</sup> there was also some indication that that the region coding component *per se* is not necessarily integral to establishing the legitimacy of the disc. Regarding the automated verification process that takes place between the game console and the media, the IEAA stated that:

The majority of questions asked of the disc are designed to identify its legitimacy. There are some questions which also ‘question’ the disc in relation to the territory for which it was manufactured.<sup>85</sup>

2.93 The clear implication here is that the region coding element is not identical with legitimacy verification, but involves a separate authentication sequence.

2.94 The IEAA contended that it would not be practically possible to formulate an exception regarding region coding that was limited

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81 IEAA, *Exhibit No. 2*.

82 IEAA, *Submission No. 43*, pp. 5-6.

83 IEAA, *Exhibit No. 2*, p. 2.

84 IEAA, *Submission No. 43*, pp. 5-6.

85 IEAA, *Submission No. 43*, pp. 5, 6.

‘purely to region coding elements of the TPM’.<sup>86</sup> The IEAA indicated elsewhere, however, that it is a myth that ‘there is only one type of TPM used by the games industry’, and that there are different TPMs ‘used for different products/distribution platforms’.<sup>87</sup> Further, the IEAA stated that ‘it is not possible to identify *the* TPM used by the games industry.’<sup>88</sup> If this level of technical variation is possible with TPMs, then the Committee is not convinced that it is impossible to isolate the region coding element, or that doing so would inevitably render all other elements of console TPMs ineffective. The position that it is practically impossible to isolate the region coding element of TPMs is also inconsistent with the IEAA’s statement cited above implying that the automated verification process has two distinct elements – legitimacy verification and territory (i.e. region) verification.

### Conclusion regarding electronic game region coding

- 2.95 While the Committee does support the protection of console game TPMs that are genuinely designed to prevent piracy and other infringing acts, there seems to be little substance to the argument that the region coding element of TPMs must be combined with other types of TPMs. There is doubt also as to whether the region coding element of console game TPMs is purely for television standard compliance, or whether, as stated by the ACCC, there is a significant element of market control involved.
- 2.96 The Committee recognises that regional differentiation for non-console games does not exist and accepts the statement by IEAA that ‘the only purpose of non-console TPMs is to control legitimate access and prevent piracy’.<sup>89</sup>

### Region coding of DVDs

- 2.97 The region coding system for DVDs is based on 8 international regions. Individual DVDs are coded for use in one region or, in some cases, two regions, and DVD players themselves are generally set to play DVDs from a single region. Thus both the DVD and the player restrict the ability of the consumer to play DVDs from regions outside of his/her own. For example, a DVD player set to Region 4 will not
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86 IEAA, *Submission No. 43*, p. 13.

87 IEAA, *Submission No. 43.1*, pp. 1, 2.

88 IEAA, *Submission No. 43.1*, p. 2.

89 IEAA, *Submission No. 43.1*, p. 7.

play a DVD coded for Region 1. This region coding – or Regional Playback Control (RPC) – is part of the DVD Content Scrambling System (CSS) used by all DVD manufacturers.

2.98 The regions are as follows:

- Region 1: United States, Canada and US Territories
- Region 2: United Kingdom, Europe, Japan, South Africa and Middle East
- Region 3: Southeast and East Asia
- Region 4: Australia, New Zealand, Pacific Islands, Central and South America
- Region 5: Former Soviet Union, Indian sub-continent, Africa, North Korea and Mongolia
- Region 6: China
- Region 7: Reserved for future use
- Region 8: International territories (cruise ships, aircraft etc)<sup>90</sup>

2.99 It is important to note that Region 0 (or ‘region free’) coded machines are widely available in Australia. Such machines will play DVDs from any region.

2.100 Region coding is much less of an issue from the US perspective given that the US produces much of the material that consumers wish to access, and the size of its market means that most material will be released there.<sup>91</sup> This is a quite different situation to Australia.

2.101 The Committee notes that requests for exemptions relating to region coding were made in both the 2000 and 2003 USCO rule making processes. On both occasions these requests were rejected by the USCO. Noting that ‘region coding of audiovisual works on DVDs serves legitimate purposes as an access control’, the USCO concluded that the prohibition on circumvention of regional coding had only a minor adverse impact on non-infringing use ‘because there are

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90 Gilchrist, S, and Strasser, S, Full Federal Court rules that PlayStation ‘mod-chipping’ infringes copyright law’, in New South Wales Society for computers and the Law Journal, September 2003 (accessed online at [www.nswscl.org.au/journal/53/GilchristStrass.html](http://www.nswscl.org.au/journal/53/GilchristStrass.html) as at 23/08/2005).

91 It is interesting to note that the USCO in its 2003 Rulemaking indicated that it had ‘received more comments on this proposed exception than any other’ (see USCO, Recommendation of the Register of copyrights, October 27, 2003, p. 124.)

numerous options available to individuals seeking access to this foreign content'.<sup>92</sup>

### Rationale for region coding of DVDs

2.102 The Australian Visual Software Distributors Association Ltd (AVSDA) submitted that:

TPMs are part of the strategies copyright owners use to control piracy and manage their rights, including who can lawfully access film products and in what territories those products can be sold.

[R]egional coding protects the windows based release system of film from theatrical release through its life cycle to DVD, pay TV, internet and free-to-air.<sup>93</sup>

2.103 AVSDA also stated that region coding is 'a key weapon in fighting piracy through the easy identification of pirated product as well as non-classified films'.<sup>94</sup>

2.104 The Committee has no doubt that film piracy is a significant issue facing the film and television industry. Film industry estimates put the cost of movie piracy in Australia in excess of \$400 million in lost potential revenue in 2004. The industry estimates that illegal distribution of unauthorized copies of movies rose from 4% of the legitimate market in 2000 to around 10% in 2004. Pirated optical discs seized by customs in 2004 numbered approximately 40,000 in 2004, up from 14,000 in 2003. Physical seizure of unauthorised copies of films has risen from 61,550 in 2003 to 148,937 in 2004.<sup>95</sup>

2.105 Region coding was described as 'a simple, effective device for Police and Customs officials to identify and seize infringing copies of films entering Australia and/or distributed for sale in Australia'.<sup>96</sup> Given that TPM circumvention of a region coded DVD will occur within Australia after importation, however, it is not clear to the Committee how this circumvention could endanger the ability of Police and Customs to identify non-legitimate DVDs at the border. Surely the presence and integrity of a TPM at this critical juncture cannot be affected by an action that takes place much later.

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92 USCO, quoted in IIPA, *Submission No. 10*, p. 10.

93 Mr Simon Bush, *Transcript of Evidence*, 14 November 2005, p. 20.

94 AVSDA, *Submission No. 25*, p. 4.

95 AFACT, *Submission No. 39*, pp. 15-16.

96 AVSDA, *Submission No. 25*, p. 3.



2.106 The Committee also received evidence from the Australian Federation Against Copyright Theft (AFACT) that, over the past year, '80 per cent of the discs being seized in police raids are manufactured in Australia and they are DVD-R copies, in other words, burnt locally'.<sup>97</sup> It would appear from this evidence that there is some question over whether the presence of a region coding is an effective tool against copying of DVDs once in Australia. It may well be that legitimate copies of DVDs, regionally coded for Australia, are as likely as non-region coded DVDs to be the 'master' used for subsequent copying within the country.

2.107 One submission questioned the necessity of region coding on DVDs that are traded between countries with effective copyright regimes, and suggested that, for infringing material, seizure of itself should be sufficient:

This does not explain why the TPMs in DVDs prevents [*sic*] the use of DVDs sold in countries with strong copyright laws (including the USA) in Australian DVD players. It is also unclear why seizure at point of entry into Australia would not be a sufficient mechanism to address piracy of DVDs from countries with weaker copyright laws or laxer enforcement of those laws.

The primary effect of region coding in respect of Zone 1 DVDs (USA) is that price competition between Australian and US retailers and wholesalers is prevented. This either is, or should be, a serious breach of the *Trade Practices Act*.<sup>98</sup>

2.108 AFACT argued strongly against any diminution of protection of region coding TPMs, seeing it as 'vitaly important that the copyright owner has the necessary control over access to their works, in order to protect their copyright. In this context, access control and copyright protection are synonymous'.<sup>99</sup> AFACT contended that:

A TPM which operates to prevent the unauthorised copying, communication, or redistribution of a film made available to a consumer in a particular format... protects copyright. However, it is also designed to prevent **unauthorised** access -

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97 Ms Adrienne Pecotic, *Transcript of Evidence*, 14 November 2005, p. 39.

98 Mr Alex Andrews, *Submission No. 23*, p. 1.

99 AFACT, *Submission No. 39*, p. 5.

a fundamental prerequisite to the protection of copyright. A TPM which prevents access (such as...a DVD which contains regional coding) also protects copyright – as any breach of the access code to obtain unauthorised access will also generally infringe Film Copyright Rights.<sup>100</sup> (emphasis added)

- 2.109 For the Committee, this argument – that a measure taken by a copyright holder which regulates **all** uses of copyright material is straightforward copyright protection because it will also inhibit the possibility of infringement – is suspect. It does not take into account the non-infringing uses currently allowable under Australian copyright legislation, and seems to extend the zone of preventive control too far into the rights of copyright users. The subsequent statement by AFACT that ‘TPMs are not designed to prevent legitimate uses of copyright material’<sup>101</sup> does not present a good fit with the fact that such prevention can be their very effect, particularly in the case of region coding.

### Combined region coding TPMs

- 2.110 Similar to evidence received from IEAA concerning region coding of electronic games, the Committee was informed by AVSDA that the region playback is part of CSS and ‘is inextricably linked, so you cannot remove region coding without destroying the whole content scrambling system protection’.<sup>102</sup> The Committee also notes, however, evidence from a representative of the US Motion Picture Association of America to the USCO during its 2003 rule making process:

To me, regional coding is a marketing decision. A copyright owner decides what regions or what players he or she wants to market the work and makes a decision. Some owners of works will say I don’t care. All players can play my content. Others will say no, I only want it to be play on Region I layers or Region II players and so forth.

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100 AFACT, *Submission No. 39*, p. 6. Film Copyright Rights were listed by AFACT as being the right to exclusively control copying, communication and public performance of their films; prevent and control infringement by sale and distribution of pirated and counterfeited products; and the right to control the importation of film products into Australia, including the right to determine the territories and timeframes in which films are distributed, p. 3.

101 AFACT, *Submission No. 39*, p. 10.

102 Mr Simon Bush, *Transcript of Evidence*, 14 November 2005, p. 21.

...In the case of movie companies, we do it sequentially for marketing reasons.<sup>103</sup>

- 2.111 At the same hearing, a witness representing the American DVD Copy Control Association made the following statement:

The region code is not a required feature under CSS or the DVD format licenses. It is something which is available to motion picture companies to use if they wish. It's also usable in combination.

...region code is in fact independent from the technology of CSS.<sup>104</sup>

- 2.112 Subsequent questioning during the rule making process confirmed the view that, in the US, the region code itself was considered a technological measure that controls access, but that it was **not** an essential component without which CSS would not operate. The decision to bundle both CSS and region coding is a decision taken by copyright owners to serve a range of purposes, but the driving force behind region coding appears to be that of market segmentation.

### The status of region coding TPMs under the liability regime

- 2.113 An important factor regarding the issue of region coding TPMs is their status under the liability regime once Article 17.4.7 is passed into Australia law. When asked to comment on this, AVSDA submitted that, as part of the CSS, region code TPMs would be treated as TPMs. While noting that under current Australian law (and the *Stevens v Sony* case), as region coding does not 'directly prevent an infringing copy of a film from being made', it is unclear whether region coding would be protected in its own right. AVSDA also stated that:

However, RPC will be required to be protected as a TPM in its own right under Australia's FTA obligations, as RPC will be covered by the FTA definition of an 'effective technological protection measure' (i.e., it is a technology, device or

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103 Mr Fritz Attaway, Evidence to Rulemaking hearing, USCO, May 2, 2003, p. 82. Full transcript available at: [www.copyright.gov./1201/2003/hearings/transcript-may2.pdf](http://www.copyright.gov./1201/2003/hearings/transcript-may2.pdf) (accessed 10/01/2006).

104 Mr Bruce Turnbull, Evidence to Rulemaking hearing, Copyright Office, May 2, 2003, pp.113, 116. Full transcript available at: [www.copyright.gov./1201/2003/hearings/transcript-may2.pdf](http://www.copyright.gov./1201/2003/hearings/transcript-may2.pdf) (accessed 10/01/2006).

component that controls access to a copyright work or other subject-matter).<sup>105</sup>

2.114 The Committee also sought advice from the AGD on this issue. The Department responded in the affirmative, explaining that:

The question refers specifically to the definition of an ETM in the AUSFTA. An ETM as defined in Article 17.4.7(b) refers to two types of technological measures – those that control access and those that protect copyright. Region coding technology controls access to copyright material.<sup>106</sup>

2.115 However, the Department also stated that:

whether region coding measures fall within the scope of the liability scheme depend [*sic*] on the particular components of the technology itself. ...Specific information is required about these technological measures before an assessment can be made of whether they play a genuine part in copy protection. Much of that information is not publicly available.<sup>107</sup>

2.116 The AGD further indicated that:

the definition of an ETM must be read together with the chapeau to Article 17.4.7(a) which establishes the limits of the proposed liability scheme. According to the words of the chapeau, the ETMs that will be included within the scope of the proposed liability scheme are those used by authors, performers and producers ‘in connection with their rights and that restrict unauthorised acts’.<sup>108</sup>

2.117 The following exchange from one of the Committee’s public hearings also indicates that the ultimate status of region coding TPMs may be something of a live issue for the Government:

MR TURNBULL: The reality is that a regional access control TPM is really not regional access control at all; it is device access control. If I buy my DVD in New York and I come back to Australia with an American DVD player that is capable of playing that DVD, I can play it in Australia or anywhere I like in the world. This comes back to the Sony case. It is really related to a type of device. I would put it to

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105 AVSDA, *Submission No. 25.1*, p. 1.

106 AGD, *Submission No. 52.1*, p. 5.

107 AGD, *Submission No. 52.1*, p. 4.

108 AGD, *Submission No. 52.1*, p. 5.

you that has got nothing to do with copyright. The restriction relates to the device rather than the region.

Ms Daniels: And it is whether the device is an ETM, which our obligations under the agreement require us to bring into the liability regime.

MR TURNBULL: Do we say it is illegal for someone who is moving from America to live in Australia to bring their DVD player with them? Is that the case?

Ms Daniels: No

MR TURNBULL: If that is not the case, then if it is legal to have a US DVD player here then it is perfectly possible to play a US DVD here. I just do not see what this has got to do with protecting copyright.

Ms Daniels: I think that is right. Most ETMs are directed to antipiracy measures, which is what copyright owners are most concerned about, but the region-coding issues gets merged with the access issue and it is hard to disentangle them.<sup>109</sup>

2.118 The IPC argued that regional access controls are:

best dealt with not in the context of exceptions to liability, but the way in which liability is properly characterised. It might be that a regional access control which does no more than control access (and not related to copying or some other exercise of copyright within Australia) and which is applied to an importable, should not be treated as an access control capable of legal protection, on the basis that it is unrelated to any exercise of a right in copyright.

This outcome seems to be in harmony with the US jurisprudence relating to use of access controls for non-copyright objectives...<sup>110</sup>

## Non-infringing use

2.119 The Committee notes that, under Australian copyright law, it is currently illegal to parallel import DVDs into Australia for

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109 Mr Malcolm Turnbull MP and Ms Daniels, *Transcript of Evidence*, 5 December 2005, p. 35.

110 IPC, *Submission No. 15*, p. 8.

commercial purposes. However, the law does not prohibit individuals purchasing DVDs from overseas, either over the internet or when visiting that country, for their own personal use.

- 2.120 At the heart of any discussion about region coding lies the issue of the consumer's right to use genuine copyright material that has been lawfully obtained. Genuine DVDs lawfully purchased overseas by Australian consumers and brought back into Australia for private use only are not infringing copyright as it currently stands in Australia. Although speaking in connection with region coding devices used by Sony in PlayStation games, the comments by Justice Kirby in *Stevens v Sony* are also pertinent for DVDs generally:

In effect, and apparently intentionally, those restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit...

The right of the individual to enjoy lawfully acquired private property... would ordinarily be a right inherent in Australian law upon the acquisition of such a chattel.<sup>111</sup>

- 2.121 For Australian consumers wishing to play DVDs coded other than region 4, AVSDA stated that region specific machines can be changed up to 5 times, thus allowing some limited playing of DVDs from other regions.<sup>112</sup> It was also suggested elsewhere that a consumer could purchase additional DVD players, encrypted for various regions:

You can have a DVD player that you keep for your [for example] Japanese films. DVD players are now cheaper than DVDs in a lot of instances... There is no financial disincentive. But I would argue, even if there was a financial disincentive, that what we are talking about is the capacity to buy a DVD player that will play it... versus the harm against providing the consumer the right to decrypt the playback card.<sup>113</sup>

- 2.122 While such an approach may be possible, the Committee seriously doubts that Australian consumers would see the purchase and importation of multiple DVD players to deal with region coding, or only having a small number of opportunities to view a DVD on their pre-existing machine, as reasonable solutions. This therefore leaves
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111 Paras 175, 215 per Kirby J.

112 See for example, Mr Simon Bush, *Transcript of Evidence*, 14 November 2005, p. 28.

113 Ms Adrienne Pecotic, *Transcript of Evidence*, 14 November 2005, p. 49.

consumers and others wishing to access legitimately acquired DVDs coded for other regions with having to use modified DVD players. However, there is considerable doubt as to whether such machines will be legal under the AUSFTA. The issue of modified DVD players is discussed further below.

2.123 AFACT did acknowledge that:

the use of TPMs that include an aspect of region coding functionality may have some limited impact on consumers who wish to import legitimate products for private, non-commercial purposes from places outside Australia.<sup>114</sup>

2.124 However, AFACT also argued that this group of consumers is numerically small in relation to the overall size of the Australian market, and that:

any inconvenience for a small class of consumers must be compared to the significant and serious harm posed to copyright owners if the primary technology used to control Distribution and Importation Rights were able to be circumvented.<sup>115</sup>

2.125 AFACT went on to observe that the policy balance struck by the *Copyright Amendment (Digital Agenda) Act 2000* can be distilled into a number of principles, including that 'enabling private citizens to have general access to circumvention devices and services would make the TPM provisions in copyright legislation inoperable'.<sup>116</sup>

2.126 The Committee is not convinced that the number of people impacted by region coding is as limited as claimed. In addition to ordinary consumers, the educational sector, cultural institutions, parliamentary libraries, and public broadcasters all attested to the likely impact of region coding on their operations should it be covered by the liability scheme and no exceptions granted.<sup>117</sup>

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114 AFACT, *Submission No. 39*, p. 10.

115 AFACT, *Submission No. 39*, p. 10.

116 AFACT, *Submission No. 39*, p. 9.

117 See for example, National Gallery of Australia (NGA), *Submission No. 18*, p. 3; Department of Parliamentary Services, Parliament of Australia, *Submission No. 24*, p. 4; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission No. 46*, p. 10; Copyright Advisory Group of the Ministerial Council on Employment, Education Training and Youth Affairs (CAG), *Submission No. 40*, p. 13.

- 2.127 Both public broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS), raised problems associated with using regional coded DVDs. The ABC noted that it currently uses technology that allows it to use DVDs from around the world, but that 'if regional coding is considered a TPM, the ABC will need a legitimate exception in order to circumvent the regional coding for fair dealing purposes'.<sup>118</sup> Similarly, SBS noted that it is already encountering problems with regional coding of DVDs which cannot be played on machines or computers coded for the Australian market.<sup>119</sup>

### The status of multi-region DVD players under the liability scheme

- 2.128 Although many DVD players are set to play DVDs from one region only, different modification options are possible. These include modifying the player to play DVDs from all regions (all region setting); programming of the DVD so that it changes its region depending on the region of the DVD inserted (region switching); and changing the region code setting using a hidden menu (manual region setting).<sup>120</sup> Not all players can be modified in the same way.
- 2.129 It is estimated that, in early 2001, there were some 500,000 DVD players in Australia,<sup>121</sup> and that figure is likely to have increased exponentially with the increasing affordability of such units. While there are no current statistics on how many of the players may have been modified, a rough estimate can be made, based on 2001 figures for the United Kingdom, which indicated up to 60% of all players had been modified to play all regions.<sup>122</sup>
- 2.130 In rejecting any proposal for an exception for region coding, AVDSA submitted that:

the current ready availability of multi-region DVD players in Australia gives the Australian consumer the ability to play region coded DVD's other than region 4. The consequences on consumers are very small in this context.<sup>123</sup>

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118 ABC, *Submission No. 14*, p. 9.

119 SBS, *Submission No. 37*, p. 1.

120 Professor Joshua Gans, *Exhibit No. 1*, p. 5.

121 Professor Joshua Gans, *Exhibit No. 1*, p. 14.

122 Professor Joshua Gans, *Exhibit No. 1*, p. 14.

123 AVDSA, *Submission No. 25*, p. 5.



2.131 It is not clear to the Committee, however, that multi-region DVD players will be permitted under the AUSFTA, as there will be liability attached to the provision of devices to overcome TPMs.

2.132 AVSDA went on to submit that in its view a DVD player is not a circumvention device:

DVD players have a lawfully commercially significant purpose of playing DVD discs that have been zoned for the region in which the owner of the DVD player resides. As a result, they cannot be considered to be circumvention devices under the Act.<sup>124</sup>

2.133 However, AVSDA added that:

This does not mean that it is lawful to modify a DVD player to circumvent or ignore RPC coding, to operate as a multi-zoned DVD player. These activities and devices would be prohibited under the Act and by the FTA...<sup>125</sup>

2.134 Despite the view the effect on owners of legitimately acquired DVDs will be reduced through access to multi-region DVDs, it appears that such players could very well be prohibited under Article 17.4.7. The Committee believes it is ludicrous to envisage a situation where an individual's only option to use legally acquired genuine non-zone 4 DVDs will be to purchase a DVD player tuned to each of the other regions, rather than have the ability to modify a DVD player to access all regions.

2.135 It is also relevant to note here that in a side letter to the United States-Singapore Free Trade Agreement, dated 6 May 2003, the parties agreed to the following:

Nothing in this agreement shall require Singapore to restrict the importation or domestic sale of a device that does not render effective a technological measure whose sole purpose is to control market segmentation for legitimate copies of motion pictures, and is not otherwise a violation of law.<sup>126</sup>

2.136 It is difficult to envisage that circumstances in Singapore are so radically different from those in Australia as to warrant such a

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124 AVSDA, *Submission No. 25.1*, p. 2.

125 AVSDA, *Submission No. 25.1*, p. 2.

126 Quoted in Ms Kimberlee Weatherall, *Submission No. 38*, p. 31.

different treatment of such devices, where in both instances the uses are non-infringing.

## Conclusion

- 2.137 For this Committee at least, the arguments that region coding TPMs are an essential tool in preventing piracy, that they cannot be separated from other varieties of TPM, and that they are actually copyright protection because they inhibit the possibility of infringement, are not at all persuasive. Nor does the Committee see why a legitimate DVD, lawfully purchased overseas, should not be able to be played on a DVD machine set for any region. The Committee is of the view that region coding TPMs should not come within the compass of the meaning of ETM in the new liability scheme. Ultimately, however, it will be a decision for the Government, based on revised definitions in the *Copyright Act 1968*, as to whether region coding should come within the scheme. The Committee is not aware at this stage of what will be the final policy decision on this matter.
- 2.138 Should regional coding TPMs be included within the meaning of ETM under the new liability scheme, the Committee is of the view that exceptions to circumvention liability regarding region coding TPMs should be permitted under Article 17.4.7 wherever the criteria are met.

### 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.**

**Should the government include region coding TPMs within the definition of 'effective technological measure', the Committee recommends that exceptions proposed for region coding TPM circumvention under Article 17.4.7(e)(viii) be granted wherever the criteria for further exceptions under Article 17.4.7(e)(viii) are met.**

## The task ahead

- 2.140 It is clear from the policy statements by Government ministers and officials that the AUSFTA was negotiated in the expectation that Australia could provide certain exceptions to the liability scheme for circumvention of TPMs that reflect Australia's domestic copyright regime and history. In addition, it was clearly not the intention of the Government that US domestic copyright law, and in particular provisions of the DMCA, be adopted wholesale into Australian law.
- 2.141 The task facing the government in translating the AUSFTA provisions into law, and in particular in setting out clear and concise definitions of key terms, should not be minimised. The Committee has been at a considerable disadvantage in not knowing the final format of proposed legislation and the approach that will be adopted by the Government. It is clear, however, that just as in the past compromise has been an essential part of copyright amendments to date, such compromise will also be necessary in this instance.

## The specified exceptions and the criteria for further exceptions

- 3.1 This Chapter focuses on the following aspects of Article 17.4.7:
- The exceptions to liability specified in Article 17.4.7(e)(i) – (vii); and
  - The criteria for further exceptions under Article 17.4.7(e)(viii).
- 3.2 The lack of a device or service exception for Article 17.4.7(e)(v), (vii) and (viii) under Article 17.4.7(f) is also considered at the end of this Chapter.

### **The specified exceptions in Article 17.4.7(e)(i) – (vii)**

- 3.3 Article 17.4.7(e)(i) – (vii) specifies a number of exceptions to the liability scheme for particular activities. These are as follows:
- (e)(i) non-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 the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
  - (e)(ii) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorisation for such activities,

to the extent necessary for the sole purpose of identifying and analysing flaws and vulnerabilities of technologies for scrambling and descrambling of information;

- e(iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing sub-paragraph (a)(ii);
- e(iv) non-infringing good faith activities that are authorised by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;
- e(v) non-infringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;
- e(vi) lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes; and
- e(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.

3.4 As noted in Chapter 2, the scope of the exceptions specified in Article 17.4.7(e)(i) – (vii) is narrow in comparison to the range of permitted purposes currently available in the *Copyright Act 1968*.<sup>1</sup>

3.5 In addition, Article 17.4.7(f) specifies that:

(f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (e) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:

- (i) any measures implementing sub-paragraph (a)(i) may be subject to exceptions with respect to each activity set forth in sub-paragraph (e);
- (ii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that control

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1 The current permitted purposes are listed in Chapter 2.

access to a work, performance, or phonogram, may be subject to exceptions with respect to activities set forth in sub-paragraph (e)(i), (ii), (iii), (iv), and (vi); and

- (iii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that protect any copyright, may be subject to exceptions with respect to the activities set forth in subparagraph (e)(i) and (vi).

3.6 Article 17.4.7(f) provides, in effect, that:

- All of the exceptions in Article 17.4.7(e) will be available to liability for the act of circumvention as described in Article 17.4.7(a)(i);
- Only the exceptions specified in Article 17.4.7(e)(i) – (iv) and (vi) will be available to liability for manufacturing or trafficking or dealing in circumvention devices or services as described in Article 17.4.7(a)(ii) regarding ETMs controlling access; and
- Only the exceptions specified in Article 17.4.7(e)(i) and (vi) will be available to liability for manufacturing or trafficking in circumvention devices or services as described in Article 17.4.7(a)(ii) regarding ETMs protecting copyright.

3.7 This is set out in tabular form below.

Table 3.1 Effect of Article 17.4.7(f)

<b>Exceptions in Article 17.4.7(e)</b>	<b>Exceptions to liability for circumventing of access control ETMs</b>	<b>Exceptions to liability for dealing in devices and provision of services to circumvent access control ETMs</b>	<b>Exceptions to liability for dealing in devices and provision of services to circumvent copyright protection ETMs</b>
17.4.7(e)(i)	✓	✓	✓
17.4.7(e)(ii)	✓	✓	
17.4.7(e)(iii)	✓	✓	
17.4.7(e)(iv)	✓	✓	
17.4.7(e)(v)	✓		
17.4.7(e)(vi)	✓	✓	✓
17.4.7(e)(vii)	✓		
17.4.7(e)(viii)	✓		

Source Adapted from AGD, Submission No. 52, p. 10.

3.8 Article 17.4.7(f) also provides that all of the exceptions in Article 17.4.7(e) will only apply to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of ‘effective technological measures’ (ETMs).

- 3.9 Although the exceptions in Article 17.4.7(e)(i) – (vii) were not referred to the Committee for consideration, the scope of Article 17.4.7(e)(vi) in relation to its coverage of government activities was raised in the evidence. The Committee also notes that a number of the proposed further exceptions appear to be covered by the specified exceptions in Article 17.4.7(e)(i) – (vii). Both of these issues are discussed below.

### Scope of Article 17.4.7(e)(vi)

- 3.10 In its submission the Australian Tax Office (ATO) indicated a need both to access copyright material and circumvent technological protection measures (TPMs) where necessary:

Even outside of the investigation of particular matters, the Tax Office relies heavily on access and use of a wide range of copyright material to support its operations. Generally such access and use is made on agreed commercial terms, however, there are some instances where... this is not possible. In some of these cases, it is necessary to use circumvention devices.<sup>2</sup>

- 3.11 The ATO submitted that ‘Whilst the circumstances in which the Tax Office would wish to use circumvention devices is very narrow, the loss of this as an option even in very few cases could have an adverse effect on our operations’.<sup>3</sup> The ATO noted the exception set out in Article 14.7.4(e)(vi) but stated that:

it is critical that the concept of “law enforcement” be sufficiently wide so as to cover civil (including tax-related) as well as criminal law administration and enforcement.<sup>4</sup>

- 3.12 The ATO indicated that specific circumstances where it would need to continue to circumvent TPMs would include cases where the copyright owner could not be identified or contacted; where permission could not be obtained from the copyright owner in time; where a work was out of copyright but TPM protected; and where agreement could not be reached with the copyright owner but access to the material was required for the ATO's operations.<sup>5</sup>

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2 ATO, *Submission No. 9*, para. 7.

3 ATO, *Submission No. 9*, para. 8.

4 ATO, *Submission No. 9*, para. 6.

5 ATO, *Submission No. 9*, para. 9.

- 3.13 The Office of Film and Literature Classification (OFLC) did not explicitly refer to Article 17.4.7(e)(vi) but raised a similar issue regarding its TPM circumvention requirements:

The OFLC currently circumvents technological protection measures for the purpose of its classification functions under the Classification Act. ... There is no specific exception in Article 17 for classification functions and we seek an appropriate exception for the national classification scheme.<sup>6</sup>

- 3.14 The OFLC stated that 'Any restriction on our access to material submitted for classification would severely impair our ability to perform our statutory classification functions',<sup>7</sup> and indicated that it would require an exception to enable it to circumvent TPMs for the fulfilment of these functions.<sup>8</sup>

- 3.15 It is clear that the key issue here is the precise scope of the coverage afforded to government activity by the exception in Article 17.4.7(e)(vi). Dr Anne Fitzgerald noted that:

It is unclear whether the concept of "law enforcement" in this exception is broad enough to include activities relating to civil as well as criminal law administration and enforcement.<sup>9</sup>

- 3.16 In the Committee's view, this is an important issue that will require careful consideration and resolution by the Government. The Attorney-General's Department (AGD) stated that the 'scope of the term 'law enforcement' will be considered further by the Department when preparing our domestic legislation'.<sup>10</sup> The AGD also gave some indication of how the key terms in Article 17.4.7(e)(vi) might be interpreted:

The exception provides that the activity must be lawfully authorised. In other words, it must be provided for in existing legislation or some other form of regulation. Secondly, the activities must be carried out by 'government employees, agents, or contractors'. This is taken to include individuals working for or on behalf of the Government. The third criterion is that the activities are limited to those relating to 'law enforcement, intelligence, essential security, or similar

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6 OFLC, *Submission No. 44*, pp. 2, 5.

7 OFLC, *Submission No. 44*, p. 6.

8 OFLC, *Submission No. 44*, p. 6.

9 Dr Anne Fitzgerald, *Submission No. 59*, p. 10.

10 AGD, *Submission No. 52.1*, p. 3.



governmental purposes'. Intelligence and security purposes can be directly related to the agencies involved in that work, for instance the Australian Secret Intelligence Organisation or the Department of Defence respectively.<sup>11</sup>

3.17 The AGD also noted the equivalent provision in the US Digital Millennium Copyright Act of 1998 (DMCA) and stated that:

The Department understands that the concept of 'law enforcement' as used in the United States encompasses a broad range of activities that are performed to ensure obedience to the laws. These may include civil actions such as activities related to enforcing competition law, taxation law, proceeds of crime and other regulatory functions. The addition of the words 'similar governmental purposes' would allow for the exception to include a broader range of activities.<sup>12</sup>

3.18 The Committee is reassured that the Government is cognisant of the need to carefully determine the extent of the exception in Article 17.4.7(e)(vi) for the purposes of its implementation. The Committee believes that the types of activities outlined by the ATO and the OFLC will need to come within the compass of Article 17.4.7(e)(vi).

### **Recommendation 5**

3.19 **The Committee recommends that, in the implementing legislation, Article 17.4.7(e)(vi) of the Australia-United States Free Trade Agreement should be interpreted so as to permit exceptions to liability for TPM circumvention for the government activities identified by the Australian Tax Office and the Office of Film and Literature Classification at paragraphs 3.10 – 3.14 of this report.**

3.20 Other issues relating to government activity under Article 17.4.7 were also raised in the evidence and are considered in Chapter 4.

### **Coverage of proposed exceptions by Article 17.4.7(e)(i) – (vii)**

3.21 A number of the further exceptions proposed to the Committee appear to be covered by the exceptions in Article 17.4.7(e)(i) – (vii). These are follows.

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11 AGD, *Submission No. 52.1*, p. 3.

12 AGD, *Submission No. 52.1*, p. 3.

## Circumvention for reverse engineering of software for interoperability purposes

- 3.22 Cybersource Pty Ltd proposed an exception for the reverse engineering of software for interoperability purposes:

Historically, Australian law has... explicitly allowed the right to reverse-engineer software for the purpose of interoperability. ...An exemption to the anti-circumvention law is absolutely critical to prevent software providers, particularly monopolists or near monopolists, from limiting users' right to access their own intellectual property or breaking interoperability. To protect these essential rights, there must be a TPM exception for the purposes of allowing interoperability.<sup>13</sup>

- 3.23 It appears to the Committee that the exception specified in Article 17.4.7(e)(i) will permit non-infringing TPM circumvention of precisely this nature.

## Circumvention for software installed involuntarily or without acceptance, or where the user has no awareness a TPM or no reasonable control over the presence of a TPM

- 3.24 Ms Janet Hawtin submitted that software that is installed involuntarily or without acceptance by the recipient should not gain anti-circumvention protection:

A product which is involuntarily installed such as adware, spyware or any program which is installed without prior acceptance by the user of the specifics of the TPM and associated legality should not be protected.<sup>14</sup>

- 3.25 Mr James Cameron also proposed an exception for TPM circumvention where the user of a computer program has no awareness of a TPM or no reasonable control over the presence of a TPM in the program being used.<sup>15</sup>
- 3.26 The Committee notes that the exception in Article 17.4.7(e)(iv) should permit circumvention for the purposes of rejecting software installed

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13 Cybersource Pty Ltd, *Submission No. 13*, p.3. See also Mr Steven D'Aprano, *Transcript of Evidence*, 15 November 2005, p. 22. Cybersource also proposed an exception for TPM circumvention for the purpose of investigating copyright infringement; this is discussed in Chapter 4.

14 Ms Janet Hawtin, *Submission No. 6*, p. 2.

15 Mr James Cameron, *Submission No. 2*, para. 2.1.

involuntarily or without acceptance by the computer owner, or where the user has no awareness of a TPM or no reasonable control over the presence of a TPM in the program being used.

### Circumvention for security testing of software

- 3.27 The National Gallery of Australia (NGA) submitted that there should be an exception enabling the Gallery to ‘undertake routine security testing of software before installation’.<sup>16</sup>
- 3.28 It appears to the Committee that the exception specified in Article 17.4.7(e)(iv) will permit non-infringing circumvention of this nature. There is nothing in the specified exception to suggest that the testing of software would be excluded; indeed, it would seem to be self-evident that a computer, computer system or computer network is essentially useless without software.

### Circumvention for individual privacy online

- 3.29 Ms Janet Hawtin raised the issue of TPM protection of personal information collected online:
- A product which collects personal information of the user should not be protected by a TPM. I feel it is inappropriate for a package which collects information about me as person [*sic*] or as a web user to be collected in locked down software which may not be scrutinised for appropriate storage and use of that data.<sup>17</sup>
- 3.30 The Committee agrees with this concern and notes that the exception specified in Article 17.4.7(e)(v) should permit TPM circumvention for the purposes of maintaining individual privacy online.
- 3.31 Although the proposed exceptions discussed above appear to be covered by the exceptions specified in Article 17.4.7(e)(i), (iv) and (v), the Committee is conscious that the particular form which the seven exceptions in Article 17.4.7(e)(i) – (vii) will eventually assume in the implementing legislation is unknown at this time. The Committee is therefore of the view that the exceptions specified in Article 17.4.7(e)(i), (iv) and (v) should be interpreted in the implementing legislation so as to encompass the four proposed exceptions examined above.

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16 NGA, *Submission No. 18*, p. 3.

17 Ms Janet Hawtin, *Submission No. 6*, p. 2.

**Recommendation 6**

3.32 The Committee recommends that the exceptions specified in Article 17.4.7(e)(i), (iv) and (v) of the Australia-United States Free Trade Agreement should be interpreted in the implementing legislation so as to permit exceptions to liability for the following TPM circumventions:

- Circumvention for reverse engineering of software for interoperability purposes;
- Circumvention for software installed involuntarily or without acceptance, or where the user has no awareness a TPM or no reasonable control over the presence of a TPM;
- Circumvention for security testing of software; and
- Circumvention for individual privacy online

examined at paragraphs 3.22 – 3.30 of this report.

3.33 The Committee is also of the view that the ultimate legislative form of the seven specified exceptions in Article 17.4.7(e)(i) – (vii), however they are drafted, should not narrow their scope in any way.

**Recommendation 7**

3.34 The Committee recommends that the form in the implementing legislation of the exceptions specified in Article 17.4.7(e)(i) – (vii) of the Australia-United States Free Trade Agreement should not narrow their scope, as delineated by the Agreement text, in any way.

**The criteria for further exceptions under Article 17.4.7 (e)(viii)**

3.35 Under Article 17.4.7, any further exceptions granted under Article 17.4.7(e)(viii) must satisfy the following four criteria:

- The use of a work, performance, or phonogram must be non infringing (Article 17.4.7(e)(viii));
- A work, performance, or phonogram that is used must be in a particular class of works, performances, or phonograms (Article 17.4.7(e)(viii));

- An actual or likely adverse impact on the non-infringing use of a work, performance, or phonogram must be credibly demonstrated in a legislative review or proceeding (Article 17.4.7(e)(viii)); and
  - The exception must not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of ETMs (Article 17.4.7(f)).
- 3.36 It is important to also note that, under Article 17.4.7(f), any exceptions to liability granted under Article 17.4.7(e)(viii) will only be for the act of circumvention as described in Article 17.4.7(a)(i). No exception granted under Article 17.4.7(e)(viii) will apply for the manufacturing or trafficking or dealing in circumvention devices or services as described in Article 17.4.7(a)(ii).
- 3.37 The appropriate interpretation of the criteria emerged as a significant issue in the evidence and was a critical factor for the Committee in assessing proposed exceptions under Article 17.4.7(e)(viii). The four criteria are discussed below.

### Non-infringing use of a work, performance, or phonogram

- 3.38 In its evidence the AGD indicated that the terms ‘infringing’ and ‘non-infringing’:
- are terms of art in the copyright field. They are applied to denote whether the use of material or material itself infringes copyright.<sup>18</sup>
- 3.39 The Department indicated its view that ‘the term infringing refers to infringing under Australian copyright law’<sup>19</sup> and stated that:
- the term ‘non-infringing uses’ in (e)(viii) may be seen in the Australian context as covering uses of copyright material that are authorised by the copyright owner or covered by existing exceptions or licences.<sup>20</sup>
- 3.40 The Committee agrees with this interpretation. An infringing use is such by virtue of Australian copyright law, while ‘non-infringing use’

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18 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, p. 26.

19 AGD, *Submission No. 52*, p.13.

20 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, p. 26. The International Intellectual Property Alliance submitted that ‘non-infringing use’ should be interpreted to cover the use of works covered by statutory exceptions and also the use of works ‘carried out with the consent of the copyright owner pursuant to license’: *Submission No. 10*, p. 5.

is a fairly straightforward term referring to either the authorised use of copyright material or the use of copyright material that is lawful by virtue of licences (including statutory licences) or statutory exceptions. The Committee notes that the use of copyright material will also be non-infringing where that use falls outside of the rights of the copyright owner, for example the purchaser of an audio compact disc playing that compact disc for private enjoyment.

## Particular class of works, performances, or phonograms

### The USCO interpretation

3.41 The Committee's attention was drawn to the interpretation of the United States Copyright Office (USCO) of its own class of works criterion for its TPM circumvention rule making process. In the October 2000 process the USCO indicated that a class of works should not be interpreted 'by reference to some external criteria such as the intended use or users of the works' but should be 'defined primarily, if not exclusively, by reference to attributes of the works themselves'.<sup>21</sup> In the more recent October 2003 rule making process, the USCO affirmed this interpretation of the criterion:

A "particular class of works" to be exempted from the prohibition on circumvention must be based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works.<sup>22</sup>

3.42 In the 2003 process the USCO also stated that:

The starting point for any definition of a "particular class" of works in this rulemaking must be one of the categories of works set forth in section 102 of the Copyright Act, but those categories are only a starting point and a "class" will generally constitute some subset of a section 102 category. The determination of the appropriate scope of a "class of works" recommended for exemption will also take into account the likely adverse effects on noninfringing uses and

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21 US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64559 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 12/01/2006).

22 US National Archives and Records Administration, *Federal Register* Vol. 68 No. 211, p. 62012 (<http://www.copyright.gov/fedreg/2003/68fr2011.pdf>, accessed 12/01/2006).

the adverse effects an exemption may have on the market for or value of copyrighted works.<sup>23</sup>

### Views expressed in the evidence

3.43 Much of the evidence to the inquiry regarding the proper Australian interpretation of the ‘particular class of works, performances, or phonograms’ criterion in Article 17.4.7(e)(viii) fell into two broad divisions. On one side, a number of organisations recommended that the approach of the USCO in interpreting its own class of works criterion should be followed in Australia. The Australian Federation Against Copyright Theft (AFACT), for example, submitted that:

the USCO approach is appropriate to be followed in Australia, given the harm to copyright owners that would be caused if widespread circumvention were permitted to occur. AFACT also notes the decision by the USCO not to permit a ‘particular class’ to be defined by the nature of the users in question. AFACT strongly supports this approach, due to the practical difficulties of confining access to circumvention devices to the particular class.<sup>24</sup>

3.44 The Australian Record Industry Association (ARIA) also recommended the Australian adoption of the USCO approach,<sup>25</sup> as did the Interactive Entertainment Association of Australia (IEAA).<sup>26</sup> The International Intellectual Property Alliance (IIPA) stated that the USCO’s 2003 conclusion regarding the definition of a class of works according to attributes of works themselves should be ‘seriously considered’ by the Committee, and that the USCO’s rejection of classifying a class of works by the type of user or use is ‘critically important in keeping this proceeding [i.e. the Committee’s inquiry] within the bounds set out for it in the FTA and the terms of reference’.<sup>27</sup>

3.45 On the other side, the Committee also received evidence arguing against the Australian adoption of the USCO interpretation. Ms Kimberlee Weatherall, for example, contended that the USCO interpretation:

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23 US National Archives and Records Administration, *Federal Register* Vol. 68 No. 211, p. 62012 (<http://www.copyright.gov/fedreg/2003/68fr2011.pdf>, accessed 12/01/2006).

24 AFACT, *Submission No. 39*, p. 11.

25 ARIA, *Submission No. 32*, section IV.

26 IEAA, *Submission No. 43*, p. 8.

27 IIPA, *Submission No. 10*, p. 6.

is a very narrow view, adopted by the US Copyright Office on the basis of the US legislative history. This Committee need not, and should not do the same – first, because it is not required, and second, because the narrow interpretation has led to practical problems in the US:

- It disadvantages inexperienced people or uses, who may not have any idea how to ‘define’ a particular ‘class’;
- Sometimes, users with real, identifiable problems making non-infringing uses cannot identify a ‘particular class’ to the satisfaction of the Office, leading to the proposed exception failing without serious consideration.<sup>28</sup>

3.46 Ms Weatherall also stated that the USCO interpretation ‘doesn’t match what the process is meant to be doing’ in that it prevents particular classes of works being identified according to TPMs themselves or according to the use of the work.<sup>29</sup> Ms Weatherall submitted that a particular class of work can legitimately be formulated in a range of ways ‘providing only that the class can sensibly be identified’, for example in reference to the type of use of a work, particular users of a work, the type of work itself as identified in the *Copyright Act 1968*, the distributed media, and the particular TPM used on the work.<sup>30</sup>

3.47 The Department of Education, Science and Training (DEST) noted the USCO interpretation of its class of works criterion and submitted that ‘there is no reason to apply a similar restrictive interpretation for purposes [*sic*] of Australia’s obligations under AUSFTA’.<sup>31</sup> DEST expressed the view that a class of material may be identified according to ‘any attributes of the material, or any characteristics relating to the form in which it is distributed or communicated’, but also that the question of the particular user of copyright material ‘does not go to the question of class of material’.<sup>32</sup> DEST also submitted that:

any class of copyright subject matter (other than *all* subject matter) that is meaningful having regard to the rationale of the exception, is a permissible ‘class’. Indeed, a rationale-based approach seems necessary to promote technological

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28 Ms Kimberlee Weatherall, *Submission No. 38*, p. 19.

29 Ms Kimberlee Weatherall, *Submission No. 38*, p. 20.

30 Ms Kimberlee Weatherall, *Submission No. 38*, pp. 20, 21.

31 DEST, *Submission No. 48*, p. 23.

32 DEST, *Submission No. 48*, p. 23. See also DEST, *Submission No. 48.1*, para. 17.



neutrality, to avoid artificial distinctions and to harmonise with the design of existing exemptions under the Act.<sup>33</sup>

3.48 In its oral evidence DEST also stated that:

any formulation or predication of classes of subject matter by reference to the category they fit into in the Copyright Act in terms of literary, dramatic, musical, artistic and so on, or by reference to other attributes of the way that the work is formatted, the medium on which it is stored, the way in which it is delivered to the consumer or, indeed, the fact that it is subject to a particular category of a technological protection measure is itself a characteristic that might serve to delineate the class of works. Anything that is referable to the work or its attributes might count as part of the predication.<sup>34</sup>

3.49 The Australian Digital Alliance/Australian Libraries' Copyright Committee (ADA/ALCC) submitted that:

Australia is not required to implement the provisions of the US Copyright Act. The fact that the US Copyright Office found it appropriate to implement an extremely narrow & specific set of exceptions should not govern Australian Copyright law. Rather, Australia's obligations are to implement the AUSFTA in a manner consistent with the Australian environment<sup>35</sup>

3.50 The ADA/ALCC recommended a broad interpretation of the particular class criterion for a number of reasons including technological neutrality, the importance of copyright material and the purpose of its use for libraries, educational and cultural institutions rather than the particular form of copyright material, the low value of narrow constructions for consumers, and an increased likelihood of definitional disputes.<sup>36</sup>

3.51 The Australian Vice-Chancellors' Committee (AVCC) also noted the USCO interpretation and submitted that its adoption in Australia would not be appropriate due to Australia's different statutory

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33 DEST, *Submission No. 48*, p. 23.

34 Mr Philip Crisp, *Transcript of Evidence*, 5 December 2005, p. 17.

35 ADA/ALCC, *Submission No. 49*, p. 16. The National Library of Australia also identified technological neutrality as an issue and observed that 'many classes of works may evolve and become obsolete within a very short timeframe. It is therefore impractical to use a narrowly defined list of exceptions which will become out-of-date very quickly': *Submission No. 28*, p. 2.

36 ADA/ALCC, *Submission No. 49*, pp. 15-17.

regime for the education sector's use of copyright and the Government's intention that Article 17.4.7(e)(viii) meet the needs of the education sector.<sup>37</sup>

### The Committee's approach

3.52 In its submission, the AGD observed that:

the AUSFTA does not provide guidance on how the word 'class' must be interpreted, aside from precluding an exception that would apply to all works (including cinematograph films), sound recordings or recorded performances.<sup>38</sup>

3.53 The Department advised that 'In accordance with the Vienna Convention, these words ['particular class'] should be given their ordinary meaning'<sup>39</sup> and that:

Their ordinary meaning reflects something less than the whole and their context provides guidance on the issue of how much less than the whole. By way of context, the preceding reference to 'work, performance or phonogram' provides important guidance. That work, performance or phonogram will be part of a class that can be identified, be it broad or narrow.<sup>40</sup>

3.54 Article 31(1) of the Vienna Convention on the Law of Treaties states that:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its objects and purpose.

3.55 The Committee agrees with the AGD's view on these points. It is clear that, on a primary level, the 'particular class of works, performances, or phonograms' criterion cannot legitimately be interpreted to mean all works, performances or phonograms. 'Particular class', on its ordinary meaning in its context, entails the identification of a subset of works, performances, or phonograms, however that subset is identified.

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37 AVCC, *Submission No. 53*, p.11.

38 AGD, *Submission No. 52*, p. 14.

39 AGD, *Submission No. 52*, p. 14.

40 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, p. 26.

3.56 The Committee also received evidence from the AGD in relation to the ‘works, performances, or phonograms’ component of the criterion, along with the possible ramifications for this of the presence of the ‘other protected subject matter’ category in the definition of ETM in Article 17.4.7(b). The Department indicated that, according to the *Copyright Act 1968* and in the context of international conventions on copyright such as the Berne Convention for the Protection of Literary and Artistic Works and the World Intellectual Property Organisation (WIPO) Performances and Phonograms Treaty (WPPT), ‘works, performances, and phonograms’ would include ‘literary, musical, dramatic and artistic works, and cinematograph films’, along with ‘sound recordings’ and ‘performances fixed in phonograms’.<sup>41</sup> The AGD further stated that:

The definition of an ETM itself is not an operative clause and does not, by itself, require liability to be imposed. ...The liability scheme required under Article 17.4.7 is limited to only those ETMs that are used by authors, performers or producers of ‘works, performances and phonograms’.<sup>42</sup>

3.57 The Department also indicated that published editions and broadcasts would not need to be included in the new TPM scheme as they do not come within the compass of protected copyright material under Article 17.4.7.<sup>43</sup> Accordingly, the Committee does not make any recommendations in this report concerning published editions or broadcasts.

3.58 Due to the practical difficulties facing the Committee outlined in Chapter 1, the Committee does not consider itself to be in a position to formulate a firm definition of the ‘particular class of works, performances, or phonograms’ criterion at this time. However, the Committee’s approach to the interpretation of this criterion is as follows.

3.59 Firstly, the Committee does not believe that the USCO interpretation of its class of works criterion should be followed in Australia when the ‘particular class of works, performances, or phonograms’ criterion in Article 17.4.7(e)(viii) is written into the implementing legislation. In terms of formal considerations, there is no requirement under the AUSFTA for Australia to follow the USCO on this matter. The point was made to the Committee that Article 17.4.7 is ‘intended to more

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41 AGD, *Submission No. 52*, p. 14. See also *Submission 52.1*, pp. 1-2.

42 AGD, *Submission No. 52.1*, p. 2.

43 AGD, *Submission No. 52.1*, p. 2.

closely align the application of Australian law to circumvention of TPMs with that of US law'.<sup>44</sup> While this may be true, and will indeed be the case once Article 17.4.7 is passed into Australian law,<sup>45</sup> Australia is under no obligation whatsoever to extend this alignment beyond the boundaries of Article 17.4.7 by adopting the USCO interpretation. As the representatives of the Department of Foreign Affairs and Trade (DFAT) stated to the Senate Select Committee during its inquiry into the AUSFTA:

so long as Australia remains consistent with its international obligations, then the AUSFTA does not constrain future government's [*sic*] abilities to make laws relevant to intellectual property to suit our social and legal environment.<sup>46</sup>

- 3.60 It is also worth noting that the legislative framework and history surrounding copyright regulation in the US is not the legislative framework and history surrounding copyright regulation in Australia. Australia's legislative copyright regime and regulatory history can be clearly differentiated from that of the US. Thus, while the USCO interpretation may be perfectly correct in the US regulatory context, it has no **automatic** congruence or weight with the Australian regulatory context.
- 3.61 There are also a number of substantial considerations which argue against the adoption of the USCO interpretation in Australia:
- Formulating 'a particular class of works, performances, or phonograms' only according to attributes of the works, performances or phonograms themselves and to the exclusion of external criteria would be undesirably narrow and restrictive, particularly given the current formulation of the permitted purposes in the *Copyright Act 1968* and the diverse and rapidly changing nature of technology. A formulation of 'a particular class of works, performances, or phonograms' should be able to draw on a range of pertinent factors so as to accommodate a variety of

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44 ACC, *Submission No. 7*, p. 2.

45 As Ms Kimberlee Weatherall observed, the 'bare obligations contained in Article 17.4.7 necessarily move Australian law further into 'harmony' with the US position': *Submission No. 38*, p. 15.

46 DFAT cited in the final report of the Senate Select Committee on the Free Trade agreement between Australia and the United States of America, p. 68. Accessible online at: [http://www.apf.gov.au/Senate/committee/fretrade\\_ctte/report/final/ch03.pdf](http://www.apf.gov.au/Senate/committee/fretrade_ctte/report/final/ch03.pdf).

circumstances and technologies, be in accord with the current approach in the Act, and achieve a level of technological neutrality.

- None of the seven specified exceptions in Article 17.4.7(e)(i) – (vii) have been framed in compliance with the USCO approach of formulating classes of works strictly according to attributes of the works themselves and to the exclusion of external criteria. A number of these exceptions identify broad categories of copyright material (for example Article 17.4.7(e)(ii), (iii), (iv) and (vii)), and a number also delineate copyright material with clear reference to external factors such as the availability of the material or the legal status of a transaction (Article 17.4.7(e)(i), (ii) and (vii)). All of the exceptions are framed with reference to external factors such as an identified party/parties, the user of copyright material, an activity of the user, the use of the material, or the purpose of the use of the material. Particularly striking is the exception in Article 17.4.7(e)(vi), which does not refer to copyright material or works at all. Given this context, it would be absurd to adopt an interpretive approach to the ‘particular class of works, performances, or phonograms’ criterion that would create inconsistency between the exception in Article 17.4.7(e)(viii) and the other exceptions in Article 17.4.7(e)(i) – (vii).
- The Committee does not consider that the role and position of the USCO is analogous to that of this Committee in its present inquiry. The USCO functions under constraints (most particularly, the statutory constraints imposed by the US copyright legislation and the DMCA) that do not apply to this Committee, and, unlike this Committee, the USCO is not concerned with policy issues or with legislation that will create a national TPM liability scheme. In its October 2000 rule making process the USCO stated that:

While many commenters [*sic*] and witnesses made eloquent policy arguments in support of exemptions for certain types of works or certain uses of works, such arguments in most cases are more appropriately directed to the legislator rather than to the regulator who is operating under the constraints imposed by section 1201(a)(1).<sup>47</sup>

This Committee is under no such constraints, and the consideration of policy arguments in the context of forthcoming legislation is an

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<sup>47</sup> US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64562 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 12/01/2006).

integral part of its role in this inquiry. The Committee agrees with the observation of Ms Kimberlee Weatherall here that:

The process now being undertaken by the Committee – considering what exceptions are necessary for Australian conditions – is more analogous to the deliberations that occurred within Congress *prior* to the US Copyright Office ‘taking over’ with its triennial reviews.<sup>48</sup>

3.62 Secondly, there are a number of factors which strike the Committee as being pertinent and appropriate for the formulation of ‘a particular class of works, performances, or phonograms’. These are as follows:

- Attributes of works, performances, or phonograms;
- Reference to the relevant category of copyright material as set out in the *Copyright Act 1968* – for example literary, dramatic, musical or artistic works, performances, and sound recordings;
- Attributes of the form or media in which works, performances, or phonograms are distributed or stored;
- The presence of particular TPMs on or with works, performances, or phonograms;
- Identified users of works, performances, or phonograms, or categories of users of works, performances, or phonograms;
- The purpose of uses of works, performances, or phonograms; and
- The purpose of proposed circumvention of TPMs.

3.63 The question of whether any one or more of these factors should always be present in a formulation of ‘a particular class of works, performances, or phonograms’, whether there should be some minimum (or maximum) number of factors in a formulation, or the range of appropriate combinations of these factors, is a matter for the Government. It does seem to the Committee, however, that any formulation of ‘a particular class of works, performances, or phonograms’ should have a proper grounding in the works, performances or phonograms concerned. Regardless of the specific factor or factors that, apart from information about the copyright material itself, are utilised to formulate ‘a particular class of works, performances, or phonograms’, there should be a sufficient level of detail about the copyright material concerned.

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48 Ms Kimberlee Weatherall, *Submission No. 38*, p. 14.

- 3.64 Thus, for example, ‘a particular class of works, performances, or phonograms’ that was formulated according to an identified user, or a particular TPM, or attributes of the storage media, or the purpose of the use, would also need to specify sufficient information about the copyright material concerned. This information could be information regarding an attribute of the material itself or a reference to the relevant category of copyright material set out in the *Copyright Act* 1968. Without this grounding, excessively broad formulations that could emerge (for example ‘works used by educational institutions’) would not, in the Committee’s view, satisfy the requirements of the criterion.
- 3.65 The Committee is of the view that the Government should adopt the approach to the ‘particular class of works, performances, or phonograms’ criterion set out above when preparing the legislation implementing Article 17.4.7. The Committee has followed this approach when assessing proposed exceptions under Article 17.4.7(e)(viii) in Chapter 4.

### **Recommendation 8**

- 3.66 **The Committee recommends that the Government adopt the Committee’s approach, set out in paragraphs 3.55 – 3.64 of this report, to the ‘particular class of works, performances, or phonograms’ criterion in Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.**

## **Credibly demonstrated actual or likely adverse impact on non-infringing uses**

### **The USCO interpretation**

- 3.67 As with the ‘particular class of works, performances, or phonograms’ criterion, the Committee’s attention was drawn to the USCO’s interpretation of its own adverse effect criterion for its TPM circumvention rule making process. In the October 2000 process the USCO stated that:

The legislative history makes clear that a determination to exempt a class of works from the prohibition on circumvention must be based on a determination that the

prohibition has a substantial adverse effect on noninfringing use of that particular class of works.<sup>49</sup>

- 3.68 The USCO also noted that the rule making proceeding should focus on ‘distinct, verifiable, and measurable impacts, and should not be based upon de minimis impacts’.<sup>50</sup> In the more recent October 2003 rule making process, the USCO affirmed its 2000 stance and also indicated its view regarding the evidentiary burden on those applying for exceptions:

Proponents of an exception have the burden of proof. In order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works. De minimis problems, isolated harm or mere inconveniences are insufficient to provide the necessary showing.<sup>51</sup>

- 3.69 In addition, in both the 2000 and 2003 rule making processes the USCO stated its interpretation of the ‘likely’ component of its adverse effect criterion:

it appears that a similar showing of substantial likelihood is required with respect to such future harm. ...“Likely” – the term used in section 1201 to describe the showing of future harm that must be made – means “probable”, “in all probability,” or “having a better chance of existing or occurring than not” [2000 process].<sup>52</sup>

for proof of “likely” adverse effects on noninfringing uses, a proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima facie case of likely adverse effects on noninfringing uses [2003 process].<sup>53</sup>

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49 US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64558 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 19/01/2006).

50 US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64558 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 19/01/2006).

51 US National Archives and Records Administration, *Federal Register*, Vol. 68 No. 211, p. 62012 (<http://www.copyright.gov/fedreg/2003/68fr2011.pdf>, accessed 19/01/2006).

52 US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64562 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 19/01/2006).

53 US National Archives and Records Administration, *Federal Register*, Vol. 68 No. 211, p. 62012 (<http://www.copyright.gov/fedreg/2003/68fr2011.pdf>, accessed 19/01/2006).



## Views expressed in the evidence

3.70 As with the ‘particular class of works, performances, or phonograms’ criterion, much of the evidence to the inquiry regarding the proper Australian interpretation of the credibly demonstrated actual or likely adverse impact criterion in Article 17.4.7(e)(viii) fell into two broad categories. On one side, a number of organisations either recommended a similar approach in Australia to that followed by the USCO or submitted that Australia should adopt the USCO’s interpretation of its own adverse effect criterion. The IEAA contended that ‘due to the similarity of the investigations required to be conducted, the Committee should largely adopt the analysis of the [US] Copyright Office in its own approach’.<sup>54</sup> ARIA equated the meaning of the term “credible” with the USCO interpretation:

The word “credible” indicates that the evidence provided in support of the exception should be objective and based on factual information rather than speculation or opinion. This is... consistent with the approach taken in the United States, where, even without “credibly demonstrated” wording, the Librarian found that “in order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on non-infringing uses by users of copyright works”.<sup>55</sup>

3.71 ARIA also submitted that:

in order to justify an exception, the adverse impact should have broad effect and should be more than an isolated problem. ...if only a very small percentage of non-infringing uses within a particular class of works may be affected, there may be insufficient adverse impact.<sup>56</sup>

3.72 AFACT argued that the USCO interpretation:

should be similarly applied in the current enquiry. The standards set out by the USCO are appropriate to ensure compliance with the provisions of the FTA and the requirement in the Article that any alleged harm to non-infringing uses must be “credibly demonstrated”. In particular, this approach is consistent with the common

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54 IEAA, *Submission No. 43*, p. 8.

55 ARIA, *Submission No. 32*, section V.

56 ARIA, *Submission No. 32*, section V. See also ARIA, *Submission No. 32.1*, pp. 6-7.

principle in Australian copyright law that copyright policy must carefully balance the interests of copyright owners and copyright users.<sup>57</sup>

3.73 In its submission the Business Software Association of Australia (BSAA) emphasised the USCO interpretation of its adverse effect criterion,<sup>58</sup> and the IIPA submitted that the USCO interpretation of the 'likely' component of the criterion should be followed by the Committee.<sup>59</sup>

3.74 On the other side, a number of organisations argued against the adoption of the USCO interpretation in Australia. The Special Broadcasting Service Corporation (SBS) stated that:

Some submissions made to this inquiry adopt the US approach and suggest that the threshold for proving adverse effect be set very high, that any exception must be supported by evidence of adverse effects going beyond mere inconvenience. However, let us remember that this new regime is effectively criminalising the existing and legal activities of Australians in their daily business and private lives. Adverse effects should be provable whenever the prohibition is shown to interfere with these existing and legal activities, particularly where the interference may result in higher business costs to small and medium enterprises or the restriction of free speech or other private rights of individuals. As we have stated in our submission, this committee is not bound by the US approach, and you can form your own view of what is appropriate in local conditions.<sup>60</sup>

3.75 The Flexible Learning Advisory Group (FLAG) submitted that 'in agreeing paragraph 7(e)(viii) the government made it clear that the paragraph was intended to protect educational interests', and that this background and intent permits and indeed mandates the adoption of 'a different and more generous approach to the granting of exceptions' with regard to the credibly demonstrated actual or likely adverse impact criterion.<sup>61</sup>

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57 AFACT, *Submission No. 39*, p. 10.

58 BSAA, *Submission No. 41*, p. 4.

59 IIPA, *Submission No. 10*, p. 5.

60 Ms Sally McCausland, *Transcript of Evidence*, 14 November 2005, p. 66. See also SBS, *Submission No. 37*, section 4.

61 FLAG, *Submission No. 34*, pp. 7-8.

3.76 DEST contended that:

*any* adverse impact – actual or likely – will suffice. It is significant in DEST’s view that the AUSFTA provision does not say that the impact must be ‘substantial’. ...it is necessary under the US DMCA to show that significant activities are inhibited. There is no reason for Australia to follow this interpretation. If it was intended that users demonstrate adverse impacts of a ‘substantial’ degree, it would have been exceedingly simple for the drafters of AUSFTA [*sic*] to include that word in Article 17.4.7(e)(vii) [*sic*]. The fact that they did not is telling. Accordingly, DEST submits that the ‘adverse impact’ criterion is met wherever users can credibly demonstrate a likely adverse impact on non-infringing use – even if that is manifest only occasionally.<sup>62</sup>

3.77 Ms Kimberlee Weatherall submitted that ‘the Committee should accept a flexible view’,<sup>63</sup> adding that ‘reasonable anticipation’ should be sufficient for the ‘likely’ element of the criterion in the context of evolving technology and that credible evidence of adverse impacts from overseas should be sufficient to establish an adverse impact in Australia.<sup>64</sup>

3.78 Some organisations proposed their own formulations for the threshold for demonstrating an adverse impact. The Australian Copyright Council (ACC), for example, proposed a test whereby it would need to be shown that:

access to the work is not available by other means, including by purchasing a copy at a reasonable price or getting access to a copy of the work held in a library; and the public interest in the person getting access to the information in the work by circumventing a TPM is greater than the public interest in the protection of the work against unauthorised access.<sup>65</sup>

3.79 The ACC also submitted that an adverse impact ‘is not credibly demonstrated unless those who would be affected by the exemption have an opportunity to respond to evidence submitted by those seeking the exemption’.<sup>66</sup>

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62 DEST, *Submission No. 48*, p. 24.

63 Ms Kimberlee Weatherall, *Submission No. 38*, p. 22.

64 Ms Kimberlee Weatherall, *Submission No. 38*, p. 22.

65 ACC, *Submission No. 7*, p. 6.

66 ACC, *Submission No. 7*, p. 3.

3.80 The Copyright Agency Limited (CAL) submitted that the benefit of permitting TPM circumvention of a class of works must be shown to outweigh the detriment to copyright owners.<sup>67</sup>

3.81 The Copyright Advisory Group of the Ministerial Council on Employment, Education Training and Youth Affairs (CAG) stated that:

there will be likely or actual adverse impact on non-infringing uses for the present purposes if not being able to use a circumvention device or service would place an unreasonable burden on the user. This might be because of an unreasonable:

- increase in cost to enable access or use;
- level of difficulty to obtain access or use; or
- effect on the choices available to users;

caused by the inability or difficulty of accessing material in an unprotected format.<sup>68</sup>

3.82 CAG also indicated that:

the adverse or likely [*sic*] impact on non-infringing use might also be evaluated by reference to the number of people affected. Further, where the impact on each individual person might be minimal but the number of people impacted is significant, then the cumulative adverse impact should be sufficient to justify an exception under Article 17.4.7(e)(viii).<sup>69</sup>

### The Committee's approach

3.83 As with the 'particular class of works, performances, or phonograms' criterion examined above, the Committee does not consider itself to be in a position to formulate a firm definition of the credibly demonstrated actual or likely adverse impact criterion at this time.

3.84 Further, as noted in Chapter 1, Article 17.4.7 has not yet been passed into Australian law, so no party is currently able to identify an actual adverse impact in order to justify further exceptions under Article 17.4.7(e)(viii). Thus in Chapter 4 the Committee has only been able to consider adverse impacts identified as likely in the process of assessing proposed exceptions. However, the Committee is certainly

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67 CAL, *Submission No. 16*, para. 36.

68 CAG, *Submission No. 40*, p. 9.

69 CAG, *Submission No. 40*, p. 9.

able at this point to develop an approach to the interpretation of the key elements of the criterion – ‘actual’, ‘likely’, ‘adverse impact’, and ‘credibly demonstrated’. The possible nature of future legislative or administrative reviews or proceedings is considered in Chapter 5.

#### Actual or likely adverse impact

3.85 Regarding the ‘actual’ and ‘likely’ elements of the criterion, the AGD submitted that:

The person or body seeking the exception must demonstrate that the requisite impact is ‘actual or likely’ – that is, it is already happening or is reasonable [*sic*] foreseeable. As this is the first ‘legislative or administrative review’ to consider possible exceptions under Article 17.4.7(e)(viii) and the liability scheme required under Article 17.4.7 has yet to be implemented, it may be difficult to establish an ‘actual’ impact. For the purposes of the Committee’s inquiry, a person or body seeking an exception should establish that an adverse impact is reasonably foreseeable when the prohibition on circumvention under Article 17.4.7 is implemented. Once the legislative scheme is in place, actual adverse impacts may become apparent and prompt further requests for additional exceptions to be included in the scheme.<sup>70</sup>

3.86 The AGD also gave evidence regarding the ‘adverse impact’ element of the criterion:

The term ‘adverse impact’ is not defined under the AUSFTA. In accordance with the Vienna Convention, the words should be given their ordinary meaning. Whether an adverse impact is demonstrated should be determined on a case-by-case basis.<sup>71</sup>

3.87 In terms of the ‘actual’ element, the Committee considers that any adverse impact that can be credibly demonstrated to exist or have existed should be sufficient to satisfy the criterion in this respect. The Committee is not of the view that the USCO position that an impact must be ‘substantial’ should be adopted in Australian copyright law. To begin with, the Committee considers that the factors outlined at paragraphs 3.59 – 3.60 above and at paragraph 3.61 regarding the

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70 AGD, *Submission No. 52*, pp.13-14.

71 AGD, *Submission No. 52*, p.14.

comparative positions of the USCO and the Committee apply here. A number of other considerations also apply:

- As the AUSFTA does not define 'actual' adverse impact, the ordinary meaning of the term should be applied in accordance with article 31(1) of the Vienna Convention on the Law of Treaties. The ordinary meaning of 'actual' does not contain any requirements concerning orders of magnitude; it merely requires that the relevant situation exist in fact. To stipulate that an adverse impact should be substantial, therefore, would be to depart from this ordinary meaning and import a separate condition.
- If the drafters of the AUSFTA had intended that an adverse impact should be substantial, they would have included that term or an equivalent in Article 17.4.7(e)(viii). The Committee regards the absence of such an inclusion as significant.
- There may well be instances where impacts cannot be precisely measured but will nevertheless be credibly demonstrable as adverse impacts. An example would be the inability of an educational institution to comply with disability education standards due to strictures on TPM circumvention - a clear adverse impact, but not necessarily susceptible of precise measurement. Any requirement that impacts be substantial could preclude such genuine adverse impacts from being considered.

3.88 In terms of the 'likely' element, the Committee agrees with the AGD's interpretation cited above. In the Committee's view, an adverse impact that is reasonably foreseeable should be sufficient to satisfy the criterion in this respect. While a mere possibility of an adverse impact with no supporting evidence as to likelihood would presumably not be sufficient, the Committee does not believe that the USCO approach of requiring a 'substantial likelihood' of an adverse impact or requiring an adverse impact to be shown 'in all probability' should be followed in Australia. Again, the Committee considers that the factors outlined at paragraphs 3.59 – 3.60 above and at paragraph 3.61 regarding the comparative positions of the USCO and the Committee apply here. One other consideration also applies:

- A threshold of the type required by the USCO, particularly in conjunction with the USCO stipulation that there needs to be a 'preponderance of the evidence' to demonstrate likelihood, is far too high. Such a threshold virtually requires the proponent of the exception to prove the case beyond doubt before the relevant circumstances have arisen.

3.89 In terms of the 'adverse impact' element itself, the Committee agrees with the AGD that this question should be determined on a case-by-case basis. It is doubtful that any one formulation of what constitutes an adverse impact will suit all circumstances or permutations of what can legitimately be classified as an adverse impact. However, the Committee is not of the view that the USCO position that incidents of 'isolated harm' are not adverse impacts should be adopted in Australia. Firstly, the factors outlined at paragraphs 3.59 – 3.60 above and at paragraph 3.61 regarding the comparative positions of the USCO and the Committee apply here. A number of other considerations also apply:

- Individual or isolated incidents of alleged adverse impacts should not *prima facie* be disregarded. Wherever a TPM has a negative effect (particularly where a financial impost is involved), it is entirely possible that an adverse impact may be credibly demonstrated, and the evidence should be considered. To take the example of DVD region coding, the Committee cites again the solution envisaged by AFACT for consumers hindered by region coding measures:

Each player can be changed five times on a region. If someone cannot wait the additional three months that it is going to take for the film they saw in the US to be available in Australia or if they are a foreign film buff and are interested in a Japanese film that is never likely to surface in Australia, they can simply purchase a DVD player coded to the code that applies in Japan and play every DVD that they want to buy. ...you can have a DVD player that you keep for your Japanese films.<sup>72</sup>

As stated in Chapter 2, the Committee seriously doubts that Australian consumers would regard such solutions as reasonable. The financial impost resulting from having to purchase multiple DVD players in order to use lawfully acquired copyright material would, in the Committee's view, certainly qualify as an adverse impact on that use.

- If the drafters of the AUSFTA had intended that incidences of isolated harm should not be within the compass of 'adverse impact', they would have included a specification to this effect in

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72 Ms Adrienne Pecotic, *Transcript of Evidence*, 14 November 2005, p. 49.

Article 17.4.7(e)(viii). The Committee regards the absence of such an inclusion as significant.

- 3.90 The Committee does not doubt, however, that in some instances alleged adverse impacts may clearly be more in the nature of minor nuisances (for example where there is no demonstrated material negative consequence or impost). Again, no one formulation of what constitutes a minor nuisance (or, in USCO terms, a 'mere inconvenience') will suit all circumstances and a case-by-case approach will be necessary.
- 3.91 While the existence of an adverse impact on a non-infringing use should be determined on a case-by-case basis, two types of circumstance in particular strike the Committee as being pertinent for the credible demonstration of an adverse impact:
- A financial impost relating to the use of works, performances, or phonograms incurred or likely to be incurred directly as a result of an ability to circumvent a TPM and not incurred or likely to be incurred otherwise; and
  - An actual or likely inability to use, or an actual or likely material impediment to the use of, works, performances, or phonograms directly as a result of an inability to circumvent a TPM, especially where that use is indispensable or necessary:
    - ⇒ for the fulfilment of statutory obligations, roles, functions, mandates, or purposes; or
    - ⇒ in the course of business, occupation, work, or the discharge of professional responsibilities; or
    - ⇒ for the maintenance of a quality of life.

### Credibly demonstrated

- 3.92 In terms of the 'credibly demonstrated' element, the AGD submitted that:

The AUSFTA does not define what amounts to a credible demonstration so the words should be given their ordinary meaning. A credible demonstration would require that the Committee be satisfied that there is reasonable evidence to make the case in support of an exception. It will be up to the person or body seeking an exception to demonstrate the



requisite impact to the satisfaction of the body conducting the legislative or administrative review or proceeding.<sup>73</sup>

3.93 Clearly, under Article 17.4.7, the proponent of an exception carries the evidentiary burden of credibly demonstrating the actual or likely adverse impact as a result of the inability to circumvent a TPM. The question is how great this burden should be. In the Committee's view, the AGD's interpretation of the 'credibly demonstrated' evidentiary requirement is a sensible one. Reasonable, believable evidence adduced to establish an adverse impact should be sufficient to satisfy the criterion in respect of the 'credibly demonstrated' element. The Committee does not believe that the USCO approach of requiring a 'preponderance of the evidence' to establish an adverse effect should be written into Australian copyright law. Again, the factors outlined at paragraphs 3.59 – 3.60 above and at paragraph 3.61 regarding the comparative positions of the USCO and the Committee apply here. A number of other considerations also apply:

- As the AUSFTA does not define 'credibly' demonstrated, the ordinary meaning of the term should be applied in accordance with article 31(1) of the Vienna Convention on the Law of Treaties. The ordinary meaning of 'credibly' does not contain any requirements concerning preponderance; it requires only that the argument or evidence in question is believable. To stipulate that an adverse impact must be demonstrated by a preponderance of evidence, therefore, would be to depart from this ordinary meaning and import a separate condition.
- If the drafters of the AUSFTA had intended that a preponderance of the evidence would be necessary to credibly demonstrate an adverse impact, they would have included such a requirement in Article 17.4.7(e)(viii). The Committee regards the absence of such a requirement as significant.
- The high evidentiary burden entailed by requiring a preponderance of evidence could favour those with the resources or legal representation to adduce a preponderance of evidence and disadvantage those without such resources or representation. The liability scheme as it is implemented in Australia should not contain the potential for such inequity.
- Focusing the evidentiary requirement on the preponderance of evidence could lead to the undesirable situation of aggregate

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73 AGD, *Submission No. 52*, p.13.

evidence of doubtful probative value outweighing evidence with probative value but of a lesser volume. Evidence of probative value, regardless of the case it supports, should receive careful consideration even if it comes from a single source or is small in volume.

- 3.94 The Committee agrees with Ms Kimberlee Weatherall that credible evidence of adverse impacts from overseas should be sufficient to credibly demonstrate an adverse impact in Australia. However, the Committee is strongly of the view that any such evidence would need to be of overseas circumstances identical or very similar to the relevant circumstances in Australia. Evidence of overseas circumstances differing in any significant degree from the relevant circumstances in Australia should not have probative value.
- 3.95 As noted at paragraph 3.79 above, the ACC contended that an adverse impact cannot be credibly demonstrated without those affected by proposed exceptions having an opportunity to respond. It is certainly conceivable that an adverse impact could be credibly demonstrated by evidence without the benefit of external comment, but the Committee is nevertheless of the view that, from a natural justice perspective, opportunity for comment on proposed exceptions should be built into the review process under the liability scheme. This and other matters relating to future legislative or administrative reviews or proceedings are dealt with in Chapter 5.
- 3.96 The Committee does not believe that the balance between copyright owners and users is an appropriate factor to consider when examining the credibly demonstrated actual or likely adverse impact criterion under Article 17.4.7(e)(viii). It is the impact on non-infringing uses of works, performances, or phonograms that is the focus of this criterion, not impacts in other areas.
- 3.97 The Committee is of the view that the Government should adopt the approach to the credibly demonstrated actual or likely adverse impact criterion set out above when preparing the legislation implementing Article 17.4.7. The Committee has followed this approach when assessing proposed exceptions under Article 17.4.7(e)(viii) in Chapter 4.

## Recommendation 9

- 3.98 **The Committee recommends that the Government adopt the Committee’s approach, set out in paragraphs 3.87 – 3.96 of this report, to the credibly demonstrated actual or likely adverse impact criterion in Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.**

### No impairment of the adequacy of legal protection or the effectiveness of legal remedies against circumvention of ETMs

#### The USCO interpretation

- 3.99 The USCO does not appear to have a requirement of this nature.

#### Views expressed in the evidence

- 3.100 The final criterion in Article 17.4.7(f) attracted a range of commentary in the evidence. The ACC, for example, noted that:

The issue there is that once circumvention has been achieved there is a genie out of the bottle issue – it can be difficult to confine the effects of the circumvention to the particular person who has access to it. That is why it is an issue that has to be treated quite seriously in allowing people to circumvent.<sup>74</sup>

- 3.101 AFACT submitted that the Committee should:

recognise that to allow access to circumvention devices for some classes of users in circumstances where it is not practically possible to confine the use of a circumvention device or service to that class is likely to breach Article 17.4.7(f) of the FTA in that it would make the legal remedies available to copyright owners in relation to TPMs and circumvention devices and services practically ineffective.<sup>75</sup>

- 3.102 ARIA suggested that the Committee have regard to the following factors set out in the US copyright legislation when considering the criterion:

- Availability for use of copyright works

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74 Ms Libby Baulch, *Transcript of Evidence*, 14 November 2005, p. 4.

75 AFACT, *Submission No. 39*, p. 12.

- Availability for use of works for non profit archival, preservation and educational purposes
  - Impact of the prohibition on the circumvention of TPMs on criticism, comment, news reporting, teaching, scholarship or research
  - Effect of circumvention of TPMs on the market value for or value of copyright works.<sup>76</sup>
- 3.103 The BSAA stated that ‘as a general proposition, BSAA believes that this requirement dictates that any exception must be narrowly crafted’.<sup>77</sup>
- 3.104 Ms Kimberlee Weatherall argued that:
- the provision cannot mean that there should be *no* impairment (since by definition an exemption ‘impairs’ the prohibition): the impairment would need to be significant for this provision to make sense.<sup>78</sup>
- 3.105 DEST submitted that this criterion is ‘more relevant to the exceptions for ‘dealing’’<sup>79</sup> than to exceptions for use, and that:
- Where mere use is involved it is difficult to see where enforcement measures may be impaired, as long as the circumvention process that is developed is not marketed and is protected from disclosure or use by others. DEST submits that the ‘no impairment’ criterion would generally be met as a matter of course in those cases where the exception applies only to institutional users... it is highly unlikely that educational and other institutions would expose themselves to the risk of liability for dealing in circumvention services or circumvention devices developed by them.<sup>80</sup>
- 3.106 SBS contended that proponents of exceptions should not have the evidentiary burden in addressing this criterion:
- users should not have some sort of negative onus to prove that an exception to preserve their existing rights will not impair the legal protection of TPMs. To do so would be to presume that users are pirates. As we know, the majority are not – particularly broadcasters. Once an adverse effect

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76 ARIA, *Submission No. 32*, section V.

77 BSAA, *Submission No. 41*, p. 4.

78 Ms Kimberlee Weatherall, *Submission No. 38*, p. 23.

79 DEST, *Submission No. 48*, p. 24.

80 DEST, *Submission No. 48*, p. 24.

justifying an exception is shown, those who oppose the exception should, in our view, demonstrate why they cannot prevent piracy of their copyright products through other means.<sup>81</sup>

### The Committee's approach

- 3.107 As with the 'particular class of works, performances, or phonograms' and the credibly demonstrated actual or likely adverse impact criteria examined above, the Committee does not consider itself to be in a position to formulate a firm definition of the non-impairment of legal protection or legal remedies criterion at this time. However, the Committee's approach to the interpretation of this criterion is as follows.
- 3.108 As noted at paragraph 3.8 above, this criterion will apply to all exceptions in Article 17.4.7(e) – that is, both the seven specific exceptions in Article 17.4.7(e)(i) – (vii) and any further exceptions permitted under Article 17.4.7(e)(viii). Thus any exceptions permitted under Article 17.4.7(e)(i) – (vii) to liability for manufacturing or trafficking in circumvention devices or services, or any exceptions permitted under Article 17.4.7(e)(viii) to liability for the act of circumvention, will only be permitted to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against circumvention of ETMs.
- 3.109 It is particularly difficult to approach this criterion in advance of the liability scheme, for it refers to interactions between legal protections/remedies and exceptions that do not yet exist. On one level the criterion could be said to be somewhat oxymoronic within Article 17.4.7, for the very existence of exceptions to a liability scheme will arguably impair the adequacy of that liability scheme. Be that as it may, it seems to the Committee that the basic aim of the criterion is to ensure that permitted exceptions under the liability scheme do not weaken the relevant legal protections and remedies existing in Australian law. The phrase 'to the extent that' in Article 17.4.7(f) suggests that exceptions which contain elements both complying with and contravening the criterion will remain viable to the extent of the compliance.
- 3.110 The Committee does not believe that any regard should be had to the provisions of the US copyright legislation when this criterion is

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81 Ms Sally McCausland, *Transcript of Evidence*, 14 November 2005, p. 64.

interpreted and applied in Australia. The legislative framework and history surrounding copyright regulation in the US is not the legislative framework and history surrounding copyright regulation in Australia. Australia's copyright regulatory framework should be the relevant context for the application and interpretation of this criterion in Australia, not the regulatory framework of the US.

- 3.111 One clearly pertinent aspect of Australia's copyright framework is the *Copyright Amendment (Digital Agenda) Act 2000*. The Committee notes that one of the aims of the passage of this Act was to enable Australia to accede to two treaties agreed to at the WIPO Diplomatic Conference of 1996 – the WPPT and the WIPO Copyright Treaty (WCT). The Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 stated that:

Australia is unable to accede to these treaties unless the Copyright Act is amended to implement the package of standards in the new treaties including a new right of communication to the public, exceptions, remedies against the defeat of technological protection measures and remedies against the abuse of rights management information.<sup>82</sup>

- 3.112 Article 18 of the WPPT and Article 11 of the WCT both require parties to provide adequate legal protection and effective legal remedies against the circumvention of ETMs, and the *Copyright Amendment (Digital Agenda) Act 2000* was enacted partially in order to implement these specific treaty obligations in Australia. The Committee can only assume therefore that the Government was mindful of its obligations in this area when it negotiated the text of Article 17.4.7, and that any exceptions permitted under Article 17.4.7(e)(i) – (vii) will not impair the adequacy of legal protection or the effectiveness of legal remedies against ETM circumvention.
- 3.113 DEST observed that exceptions permitted under Article 17.4.7(e)(viii) will be unlikely to fall foul of the non-impairment criterion given that they relate to uses of copyright material. DEST observed that the criterion will be more relevant to other exceptions permitted under Article 17.4.7 which allow for the manufacturing or trafficking or dealing in circumvention devices or services.<sup>83</sup>

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82 Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (<http://www.comlaw.gov.au/comlaw/Legislation/Bills1.nsf/framelodgmentattachments/40D25983FE193955CA256F72002E10A0>, accessed 26/01/2006).

83 DEST, *Submission No. 48*, p. 24.

- 3.114 It does not seem to the Committee that the criterion will necessarily impose a great evidentiary burden on the proponents of exceptions. While it will obviously be in proponents' interests to frame their proposed exceptions carefully in order to satisfy the criterion, the question of whether a proposed exception will impair legal protection or remedies will be determined independently by the relevant body conducting the legislative or administrative review or proceeding. It will be the role and responsibility of this body to ensure that exceptions satisfy this criterion, not that of proponents or opponents of exceptions.
- 3.115 The Committee is of the view that the Government should adopt the approach to the non-impairment of legal protection or legal remedies criterion set out above when preparing the legislation implementing Article 17.4.7. The Committee has followed this approach when assessing proposed exceptions under Article 17.4.7(e)(viii) in Chapter 4.

### **Recommendation 10**

- 3.116 **The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.109 – 3.114 of this report, to the non-impairment of legal protection or legal remedies criterion in Article 17.4.7(f) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.**

### **No device or service exception for Article 17.4.7(e)(v), (vii) and (viii) under Article 17.4.7(f)**

- 3.117 As noted at paragraph 3.6 and Table 3.1 above, under Article 17.4.7(f) only the exceptions specified in Article 17.4.7(e)(i) – (iv) and (vi) will be available to the liability for manufacturing or trafficking or dealing in circumvention devices or services as described in Article 17.4.7(a)(ii) regarding access control ETMs, and only the exceptions specified in Article 17.4.7(e)(i) and (vi) will be available to the liability for manufacturing or trafficking in circumvention devices or services as described in Article 17.4.7(a)(ii) regarding copyright protection ETMs. These exceptions to liability for manufacturing or trafficking or dealing in circumvention devices or services will **not**, therefore, apply for any of the exceptions permitted under Article 17.4.7(e)(v), (vii), and (viii).

- 3.118 In the Committee's view, this is a lamentable and inexcusable flaw in the text of Article 17.4.7; indeed, it is a flaw that verges on absurdity. The effect is to make Article 17.4.7 work against itself, for it creates the potential scenario of those with permitted exceptions to circumvent under Article 17.4.7(e)(v), (vii) or (viii) being denied the very tools to perform this circumvention. In this light, these exceptions appear to be little more than empty promises.
- 3.119 Further, the flaw in Article 17.4.7 is at odds with the clear expectation during the negotiation of the AUSFTA that certain exceptions could be realised under the liability scheme in Australia.<sup>84</sup> The AGD noted in its evidence that:
- (f)(ii) cannot operate to render (e)(v), (vii) and (viii) ineffective. Effect must be given to all provisions of a treaty.<sup>85</sup>
- 3.120 Clearly, therefore, a solution to this flaw needs to be found.

## Possible solutions

- 3.121 Three main solutions to the flaw in Article 17.4.7 were suggested.

### Creation and non-commercial importation of circumvention devices

- 3.122 The AGD submitted that individuals or organisations could create their own circumvention devices or import devices on a non-commercial basis:

This exclusion does impact on the means available to persons or organisations seeking to make use of those exceptions. ...To give effect to the exceptions under (e)(v), (vii) and (viii), persons or organisations will need to have access to devices or services that do not fall within the scope of (a)(ii). Persons or organisations can create their own circumvention devices or import a circumvention device for a non-commercial purpose.<sup>86</sup>

- 3.123 In the Committee's view, the creation of circumvention devices by individuals or organisations is no solution to the problem raised by the flaw in Article 17.4.7. Creation of a circumvention device requires technical knowledge, skill and resources that might not be possessed by all (or even many) of those with the relevant exceptions. Nor is it

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84 See paragraph 2.140 in Chapter 2 above.

85 AGD, *Submission No. 52.2*, p. 1.

86 AGD, *Submission No. 52.2*, p. 1.



reasonable, in the Committee's view, to impose the burden of having to create a circumvention device upon those who do happen to possess the requisite knowledge, skill and resources. As the IPC stated:

Sound policy demands that a person's freedom to take advantage of an exception from liability should not be determined by whether that person actually has (or can employ) the technical human capital to circumvent.<sup>87</sup>

- 3.124 It is not even certain that the creation of a circumvention device on such a non-commercial basis would escape the restriction on the manufacturing of devices, products or components stipulated in Article 17.4.7(a)(ii). To at least put this particular issue beyond question, however, and to enable those who are willing and able to make their own devices to do so, the legislation implementing Article 17.4.7(a)(ii) should, as far as is possible within the confines of giving effect to the AUSFTA, clarify the term 'manufactures' in order to allow for the non-commercial creation of circumvention devices for the purpose of utilising the relevant permitted exceptions.

### **Recommendation 11**

- 3.125 **The Committee recommends that, as far as is possible within the confines of giving effect to the Australia-United States Free Trade Agreement, the implementing legislation should clarify the term 'manufactures' in Article 17.4.7(a)(ii) in order to permit the non-commercial creation of circumvention devices for the purpose of utilising exceptions permitted under Article 17.4.7(e)(v), (vii) and (viii).**
- 3.126 As regards the other element of the solution envisaged by the AGD – the importation of circumvention devices for a non-commercial purpose – it appears to the Committee that the text of Article 17.4.7(a)(ii) will prohibit such importation of devices. Article 17.4.7(a)(ii)(C) will presumably ensure that even the non-commercial importation of circumvention devices, products or components will not be permitted. Even if it will be possible to import devices non-commercially, however, it is not reasonable to impose the burden of having to import devices from overseas on those with the relevant permitted exceptions.

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<sup>87</sup> IPC, *Submission No. 15*, p. 4.

## Third party circumvention

3.127 The Intellectual Property Committee of the Law Council of Australia (IPC) suggested that allowing third parties to undertake circumvention on behalf of those with permitted exceptions under Article 17.4.7(e)(v), (vii) or (viii) could be a workable solution:

There seems to be sufficient scope within the regime for someone who has the benefit of an exception to avail themselves of services from someone else to actually circumvent access control. I suspect that those services should be supplied consistent with the requirements of the FTA regime, pursuant to some sort of rigorous controls such as the existing declaration system that is in place already for the permitted purposes supply under our existing law.<sup>88</sup>

3.128 The Committee observes however that:

- Third parties would be subject to the same strictures in Article 17.4.7(a)(ii) governing the manufacturing or trafficking or dealing in circumvention devices, products or components as those holding permitted exceptions under Article 17.4.7(e)(v), (vii) or (viii); and
- By virtue of Article 17.4.7(a)(ii), particularly Article 17.4.7(a)(ii)(B) and (C), third parties would presumably be prevented from providing circumvention services for those with permitted exceptions under Article 17.4.7(e)(v), (vii) or (viii).

3.129 The AGD stated that:

The position of third parties is governed by the operation of Article 17.4.7(a)(ii) and (f)(ii) and (iii). If the actions of third parties would attract liability under (a)(ii), their capacity to assist:

- persons or organisations seeking to make use of exceptions in (e) in circumventing access control ETMs will be governed by the application of (f)(ii),
- persons or organisations seeking to circumvent copy control ETMs will be governed by the application of (f)(iii).<sup>89</sup>

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88 Dr David Brennan, *Transcript of Evidence*, 15 November 2005, p. 41.

89 AGD, *Submission No. 52.2*, p. 2.

## Conclusion

3.130 In essence, no satisfactory solution has been proposed to the egregious flaw in the text of Article 17.4.7 regarding the lack of manufacturing, trafficking or dealing exceptions for devices or services for the circumvention exceptions possible under Article 17.4.7(e)(v), (vii) or (viii). The Committee is strongly of the view that the Government must devise a workable and adequate solution to this problem prior to implementation of the liability scheme. Those with exceptions will have to be able to lawfully exercise them, whether according to a statutory licensing system or approval regime. Any lack of a solution will seriously endanger the viability of many exceptions permitted under Article 17.4.7(e)(v), (vii) and (viii) once the scheme is in place.

### **Recommendation 12**

3.131 **The Committee recommends that the Government devise a workable and adequate solution to the flaw in Article 17.4.7 of the Australia-United States Free Trade Agreement identified at paragraphs 3.117 – 3.119 of this report, for example a statutory licensing system or some other approval regime, to enable the proper exercise of exceptions under Article 17.4.7(e)(v), (vii) and (viii).**

**The Committee also recommends that the solution devised by the Government should be distinct from those identified at paragraphs 3.122 – 3.129 of this report.**

## Exceptions proposed to the Committee

- 4.1 This Chapter considers exceptions to the liability scheme proposed to the Committee during the course of its inquiry. Proposed exceptions are assessed against the criteria set out in Article 17.4.7(e)(viii) and 17.4.7(f) (the Committee's approach to these criteria is discussed in Chapter 3). The Committee notes that, while it can make an assessment of exceptions at this stage, it will be the responsibility of the Government to assess comprehensively proposed exceptions for inclusion under the legislation implementing Article 17.4.7.
- 4.2 Due to the fact that a large number of exceptions were proposed to the Committee, for simplicity and clarity exceptions are grouped according to sectors and are conflated where possible. A number of proposed exceptions which appear to be covered by the specified exceptions in Article 17.4.7(e)(i) – (vii) are considered in Chapter 3, and the issue of region coding is considered separately in Chapter 2.
- 4.3 It was proposed in a number of submissions that the current permitted purposes/exceptions under the *Copyright Act* 1968 should be put into exceptions under Article 17.4.7(e)(viii) as a matter of course.<sup>1</sup> The Government has indicated its support for maintaining the existing permitted purposes under the Act in the new liability

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<sup>1</sup> See for example, NSW Attorney-General's Department, *Submission No. 35*, p. 5; Electronic Frontiers Australia (EFA), *Submission No. 36*, p. 6; Department of Education, Science and Training (DEST), *Submission No. 48*, p. 25; Australian Digital Alliance/Australian Libraries' Copyright Committee (ADA/ALCC), *Submission No. 49*, pp. 22, 25. The permitted purposes are set out in Chapter 2 above.

scheme,<sup>2</sup> and the Committee endorses the Government's position in this regard.

### **Recommendation 13**

- 4.4 **The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the Government maintain the existing permitted purposes and exceptions in the *Copyright Act 1968*.**
- 4.5 A number of the proposed exceptions considered in this Chapter relate closely to the current permitted purposes.
- 4.6 The issue of the exclusion or limitation of permitted exceptions by agreement is also considered at the end of the Chapter.

## **Information technology**

### **Circumvention for the investigation of copyright infringement**

- 4.7 An exception was proposed for technological protection measure (TPM) circumvention for the purpose of investigating copyright infringement of licensed computer programs.<sup>3</sup> It was submitted to the Committee that, where an infringing reproduction or adaptation of a computer program has been created and then protected with a TPM, that TPM can prevent the original copyright owner from investigating the infringement.<sup>4</sup>

### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.8 *Non-infringing use* – the use of copyright material by a copyright owner in this context will not be infringing if done for the purposes of s.43 of the *Copyright Act 1968*.
- 4.9 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.10 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

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2 Mr Peter Treyde, *Transcript of Evidence*, 5 December 2005, p. 33.

3 Cybersource Pty Ltd, *Submission No. 13*, p. 2; Ms Janet Hawtin, *Submission No. 6*, p. 2.

4 Cybersource Pty Ltd, *Submission No. 13*, pp. 1-2.

- Inability of software developers to access critical TPM-protected copyright material in order to investigate possible copyright infringement; and
  - Financial impost incurred by a copyright owner paying subscription fees to access TPM-protected data which infringes their own copyright.<sup>5</sup>
- 4.11 *Non-impairment of legal protection or remedies* – currently under s.43 of the *Copyright Act 1968* anything done for the purposes of a judicial proceeding or a report of a judicial proceeding is lawful; also a fair dealing with a literary, dramatic, musical or artistic work is lawful if it is done for the purpose of the giving of professional advice by legal practitioners, patent attorneys, or trade marks attorneys.

### The Committee's assessment

- 4.12 The Committee is concerned that an unrestricted exception to circumvent TPMs on software for the purpose of investigating copyright infringement could lead to abuse. A general ability to circumvent could encourage fishing expeditions, particularly where there was no reasonable belief of an infringement. In addition, an unrestricted exception to circumvent of this nature could conceivably lead to situations of intellectual property theft under the guise of infringement investigation.
- 4.13 It was suggested to the Committee that this issue could be resolved by focusing on the results of the circumvention – that the propriety of the circumvention, in other words, would be confirmed if it was found that copyright had indeed been infringed.<sup>6</sup> This however still does not address the central question of the legitimacy of the initial act of circumvention itself, and would raise a problematic situation for the circumventing party if no infringement was found.
- 4.14 The Committee is of the view therefore that an unrestricted exception to circumvent TPMs on software for the purpose of investigating copyright infringement would not be desirable from a public policy perspective. The Committee does believe however that the concerns of the proponents of this exception are valid, and it appears that the criteria are satisfied for an exception for TPM circumvention on computer programs for the investigation of copyright infringement. In order to strike a proper balance, it would to seem to the Committee

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5 Cybersource Pty Ltd, *Submission No. 13*, pp. 2-3.

6 Mr Steven D'Aprano, *Transcript of Evidence*, 15 November 2005, p. 20.

that such an exception should only be granted upon the order of a court where the court is satisfied that there are reasonable grounds for the investigation.

#### **Recommendation 14**

**4.15 The Committee recommends that the proposed exception to liability for TPM circumvention for the investigation of copyright infringement of licensed computer programs examined at paragraphs 4.7 - 4.14 of this report be included as a permitted exception in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

**This exception should only be available upon the order of a court where the court is satisfied that there are reasonable grounds for the investigation.**

### **Circumvention for making back-up copies of computer programs**

4.16 An exception was proposed for TPM circumvention for the purpose of making back-up copies of computer programs on media such as CD-ROMs, floppy discs, DVD-ROMs and data tapes.<sup>7</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

4.17 *Non-infringing use* – lawful use of copyright material under s.47C of the *Copyright Act 1968*.

4.18 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.

4.19 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Financial impost as a result of needing to replace purchased copies of computer programs that are fragile or stored on fragile media.<sup>8</sup>

4.20 *Non-impairment of legal protection or remedies* – currently under s.47C of the *Copyright Act 1968* the making of back-up copies of computer programs is lawful under certain circumstances.

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7 Mr Alex Andrews, *Submission No. 23*, p. 3; see also Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section C. An exception was also proposed for TPM circumvention for making back-up copies of copyright material other than computer programs; this is considered at paragraphs 4.191 – 4.198 below.

8 Mr Alex Andrews, *Submission No. 23*, p. 3.

## The Committee's assessment

- 4.21 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the purpose of making back-up copies of computer programs, to the extent currently delineated in s.47C of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

## Circumvention for the reproduction or adaptation of computer programs for interoperability

- 4.22 An exception was proposed for TPM circumvention for the reproduction or adaptation of computer programs for achieving interoperability between computer programs.<sup>9</sup>

## The criteria under Article 17.4.7(e)(viii) and (f)

- 4.23 *Non-infringing use* – lawful use of copyright material under s.47D of the *Copyright Act 1968*.
- 4.24 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.25 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the inquiry:
- Inability to implement an important organisation-wide digital asset storage strategy due to a lack of software interoperability and inability to access particular computer programs.<sup>10</sup>
- 4.26 *Non-impairment of legal protection or remedies* – currently under s.47D of the *Copyright Act 1968* the reproduction or adaptation of a computer program for creating interoperable products for program interoperability is lawful.

## The Committee's assessment

- 4.27 It may be that TPM circumvention for the reproduction or adaptation of computer programs for software interoperability purposes will be covered by the exception specified in Article 17.4.7(e)(i). However, to the extent that this is not the case, it appears to the Committee that the criteria are satisfied and that an exception of this nature, to the extent

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9 See for example National Gallery of Australia (NGA), *Submission No. 18*, p. 2; ADA/ALCC, *Submission No. 49*, pp. 22, 25.

10 NGA, *Submission No. 18*, p. 2.



currently delineated in s.47D of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

- 4.28 Exceptions were also proposed for TPM circumvention for the purposes of achieving interoperability between software and computer systems or hardware.<sup>11</sup> The Committee considers that such interoperability needs will be covered either by the exception discussed above or by the exception specified in Article 17.4.7(e)(i).

### Circumvention for the reproduction or adaptation of computer programs for error correction

- 4.29 An exception was proposed for TPM circumvention for the reproduction or adaptation of computer programs for correcting errors in computer programs.<sup>12</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.30 *Non-infringing use* – lawful use of copyright material under s.47E of the *Copyright Act 1968*.
- 4.31 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.32 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the inquiry:
- Financial loss due to the purchase of computer programs with errors where the program vendor was unable/refused to correct the problem.<sup>13</sup>
- 4.33 *Non-impairment of legal protection or remedies* – currently under s.47E of the *Copyright Act 1968* the reproduction or adaptation of a computer program for error correction is lawful.

#### The Committee's assessment

- 4.34 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction or adaptation

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11 See for example Ms Janet Hawtin, *Submission No. 6*, p. 2; NGA, *Submission No. 18*, p. 2; Mr Alex Andrews, *Submission No. 23*, p. 2. Ms Kimberlee Weatherall submitted that circumvention should be permitted for 'all activities required to ensure interoperability': *Submission No. 38*, p. 35.

12 Supporters of Interoperable Systems in Australia (SISA), *Submission No. 47*, p. 3; ADA/ALCC, *Submission No. 48*, pp. 22, 25.

13 SISA, *Submission No. 47*, p. 3.

of computer programs for correcting errors in computer programs, to the extent currently delineated in s.47E of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

- 4.35 The Committee notes the recent difficulties experienced in the United States when a 'patch' released by Sony to correct problems initially created by a Sony TPM (or 'rootkit') on selected music CDs failed to adequately correct these problems.<sup>14</sup> The Committee was relieved to receive advice from the Attorney-General's Department (AGD) that, to its knowledge, these issues have not yet manifested in Australia.<sup>15</sup>

### Circumvention for interoperability between computer programs and data

- 4.36 An exception was proposed for TPM circumvention for achieving interoperability between computer programs and data.<sup>16</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.37 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.38 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.39 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the inquiry:
- Inability to access data due to the presence of a TPM on the proprietary application program within which the data is stored;<sup>17</sup> and
  - Inability of owners of data to migrate data from a proprietary format protected by TPMs to another format.<sup>18</sup>
- 4.40 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

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14 See <http://www.eff.org/deeplinks/archives/004117.php> (accessed 25/01/2006).

15 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 27.

16 Open Source Software Industry Australia Ltd, *Submission No. 17*, section 4. See also National Library of Australia (NLA), *Submission No. 28*, p. 7.

17 Mr Brendan Scott, *Transcript of Evidence*, 14 November 2005, p. 52. See also NLA, *Submission No. 28*, p. 7.

18 NLA, *Submission No. 28*, p. 7.

## The Committee's assessment

- 4.41 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for interoperability between computer programs and data should be permitted under Article 17.4.7(e)(viii).
- 4.42 The Committee was informed by the AGD that the specified exception in Article 17.4.7(e)(i) would not provide for computer program-data interoperability unless the program was decompiled and a separate computer program created.<sup>19</sup>

### Recommendation 15

- 4.43 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**

- Making back-up copies of computer programs;
- The reproduction or adaptation of computer programs for interoperability between computer programs;
- The reproduction or adaptation of computer programs for correcting errors in computer programs; and
- Interoperability between computer programs and data

examined at paragraphs 4.16 – 4.42 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

## Circumvention for legitimate research into encryption, technical access, copy control measures, and other issues relating to computer security

- 4.44 An exception was proposed for TPM circumvention for the purpose of legitimate research into encryption, technical access and/or copy control measures and any other issues relating to computer security.<sup>20</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.45 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*; see also ss.47B and 47F of the Act.

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19 AGD, *Submission No. 52.1*, p. 7.

20 Ms Kimberlee Weatherall, *Submission No. 38*, p. 31.

- 4.46 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.47 *Credibly demonstrated likely adverse impact* – the following adverse impact was identified in evidence to the Committee:
- Well-documented cases of threats of legal action against legitimate researchers in the United States conducting security research.<sup>21</sup>
- 4.48 *Non-impairment of legal protection or remedies* – currently under ss.47B and 47F of the *Copyright Act 1968* the making copies of computer programs for study and security investigation purposes is lawful under certain circumstances.

### The Committee's assessment

- 4.49 As far as the Committee is aware, the circumstances outlined in the evidence of the overseas adverse impacts have no equivalent in Australia. No likely adverse impact within Australia was credibly demonstrated. Accordingly, the Committee is unable to recommend an exception for TPM circumvention for legitimate research into encryption, technical access and/or copy control measures and any other issues relating to computer security.
- 4.50 This being said, the Committee does not discount the possibility that such adverse impacts may become relevant to Australia in the future and that a corresponding exception may well be needed in due course. The Committee is of the view therefore that the issue should be monitored by the Government.

### Recommendation 16

- 4.51 **The Committee recommends that the Government monitor the potential adverse impact of threats of legal action being made against legitimate researchers in Australia conducting research into encryption, access, copy control measures, and other issues relating to computer security.**
- 4.52 The Committee also notes that TPM circumvention for legitimate research into encryption, access, copy controls and other issues relating to computer security may well be covered in any event by the exception specified in Article 17.4.7(e)(ii). The Committee notes further that ss.47B and 47F of the *Copyright Act 1968* currently permit acts in relation to computer programs for certain study and security

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21 Ms Kimberlee Weatherall, *Submission No. 38*, pp. 33-35.

flaw/vulnerability investigation and correction purposes. As noted at paragraph 4.3 above, the Government has indicated its support for maintaining the existing permitted purposes under the Act in the new liability scheme, and the Committee endorses this position.

## Circumvention for the temporary copying of computer programs

4.53 An exception was proposed for TPM circumvention for temporary copying of licensed computer programs.<sup>22</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

4.54 *Non-infringing use* – lawful use of lawfully obtained copyright material in accordance with license conditions and ‘special grants’.<sup>23</sup>

4.55 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.

4.56 *Credibly demonstrated likely adverse impact* – the following adverse impact was identified in evidence to the Committee:

- Likely inability or material impediment to the use of computer programs in the course of volunteer work.<sup>24</sup>

4.57 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee’s assessment

4.58 No likely adverse impact was credibly demonstrated, given that license conditions and ‘special grants’ currently operate to authorise the temporary copying and no indication was given that these licences and grants would not continue to operate under the liability scheme. Accordingly the Committee is unable to recommend an exception for TPM circumvention for temporary copying of computer programs at this time.

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22 Mr James Cameron, *Submission No. 2*, para. 2.2. An exception catering for ‘ignorance of downloads’ was also proposed in this submission but was not sufficiently detailed for full consideration.

23 Mr James Cameron, *Submission No. 2*, para. 2.2.

24 Mr James Cameron, *Submission No. 2*, para. 2.2.

## Circumvention for compilations of lists of websites blocked by commercial filtering software

- 4.59 An exception was proposed for TPM circumvention for compilations of lists of websites blocked by commercial filtering software.<sup>25</sup> It was noted in the submission that an equivalent exception has been granted in the United States by the United States Copyright Office (USCO).

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.60 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.61 *Particular class of works, performances, or phonograms* – literary works as categorised under the *Copyright Act 1968*; computer programs; other factors may also be relevant.
- 4.62 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee.
- 4.63 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee's assessment

- 4.64 The Committee is unable to recommend an exception for TPM circumvention for compilations of lists of websites blocked by commercial filtering software as no likely adverse impact was demonstrated in the evidence.
- 4.65 However, given that an equivalent exception was permitted by the USCO and that adverse impacts must therefore have been identified in the American context, the Committee does not discount the possibility that equivalent adverse impacts may become more relevant to Australia in the future and that a corresponding exception may well be needed in due course. The Committee is of the view that the issue should be monitored by the Government.

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25 Mr Danny Yee, *Submission No. 11*, p. 1.

## Recommendation 17

- 4.66 **The Committee recommends that the Government monitor the potential adverse impact in Australia of compilations of lists of websites being blocked by commercial filtering software.**

### Circumvention for tinkering, decompilation and exploitation of 'abandonware'

- 4.67 An exception was proposed for TPM circumvention for tinkering, decompilation and exploitation of 'abandonware'.<sup>26</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.68 *Non-infringing use* – currently there is no exception under the *Copyright Act 1968* to authorise the reproduction etc. of copyright material purely because the copyright owner is not asserting or enforcing their copyright.
- 4.69 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.70 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee:
- 4.71 *Non-impairment of legal protection or remedies* – no exception currently exists in the *Copyright Act 1968*.

#### The Committee's assessment

- 4.72 The Committee is unable to recommend an exception for TPM circumvention for tinkering, decompilation and exploitation of 'abandonware' as it was not shown that this is a non-infringing use, and no likely adverse impact was credibly demonstrated. The desirability of supporting innovation in the information technology sector was emphasised in the submission. While the Committee agrees wholeheartedly with the principle of supporting innovation in this sector, the fact that there is no exception in the *Copyright Act 1968* and the lack of a credibly demonstrated likely adverse impact precludes the Committee from recommending an exception.

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26 Department of Communications, Information Technology and the Arts (DCITA), *Submission No. 56*, p. 3.

4.73 The Committee notes that the issue of seemingly abandoned or ‘orphaned’ works is being considered by the Government as part of its review of the fair dealing provisions in the *Copyright Act 1968*.<sup>27</sup> The Committee believes that the use of ‘orphaned’ works such as ‘abandonware’ should not be an infringing use under the Act in the future. Should the tinkering, decompilation and exploitation of ‘abandonware’ become a non-infringing act, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

### Recommendation 18

4.74 **The Committee recommends that, should the tinkering, decompilation and exploitation of ‘abandonware’ become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

The Committee would also support any moves to render the use of ‘orphaned’ works non-infringing under the *Copyright Act 1968*.

## Parliament and government

### Circumvention for the provision of copyright material to members of Parliament

4.75 An exception was proposed for TPM circumvention for the provision of copyright material to members of Parliament.<sup>28</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

4.76 *Non-infringing use* – lawful use of copyright material under ss.48A, 104A and 50 of the *Copyright Act 1968*.

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27 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 29. Accessible online at: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

28 Department of Parliamentary Services, Parliament of Australia (DPS), *Submission No. 24*, p. 2; Queensland Parliamentary Library (QPL), *Submission No. 22*, section 5; Ms Hilary Penfold QC, *Transcript of Evidence*, 28 November 2005, pp. 1-2.



- 4.77 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.78 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Compromised ability to provide copyright material in support of members of Parliament;<sup>29</sup> and
  - Hindrance of parliamentarians’ free access to published information (with an associated risk of compromised democratic processes).<sup>30</sup>
- 4.79 *Non-impairment of legal protection or remedies* – currently under ss.48A and 104A of the *Copyright Act 1968* copyright is not infringed by acts done by parliamentary libraries for members of Parliament. Also, under s.50 of the Act other libraries and archives are authorised to provide parliamentary libraries with copies of certain copyright materials under certain circumstances in order to assist members of Parliament.

### The Committee’s assessment

- 4.80 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the provision of the identified classes of works, performances, or phonograms to members of Parliament, to the extent currently delineated in ss.48A, 50 and 104A of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii). Both the Department of Parliamentary Services of the Parliament of Australia and the Queensland Parliamentary Library indicated that they do not currently perform TPM circumvention, but anticipate that this is likely to be necessary in the future.<sup>31</sup>

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29 DPS, *Submission No. 24*, pp. 2-3; QPL, *Submission No. 22*, section 5.

30 QPL, *Submission No. 22*, sections 4-5.

31 DPS, *Submission No. 24*, pp. 3-4; QPL, *Submission No. 22*, sections 3, 5.

## Circumvention for the use of copyright material for the services of the Crown

4.81 An exception was proposed for TPM circumvention for the use of copyright material for the services of the Crown.<sup>32</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

4.82 *Non-infringing use* – lawful use of copyright material under s.183 of the *Copyright Act 1968*.

4.83 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.

4.84 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

- Hindrance of the performance of significant government functions due to inability to use copyright material;<sup>33</sup>
- Hampering of government's ability to engage in non-infringing use of copyright material;<sup>34</sup>
- Delay or prevention of government service delivery and increase in delivery costs;<sup>35</sup> and
- Decrease in availability of potential resources to government.<sup>36</sup>

4.85 *Non-impairment of legal protection or remedies* – currently under s.183 of the *Copyright Act 1968* copyright is not infringed by any use of copyright material for the services of the Commonwealth or a State.

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32 See for example DEST, *Submission No. 48*, p. 35; ACT Government, *Submission No. 50*, p. 2; Queensland Government, *Submission No. 51*, pp. 2-3; NSW Attorney-General's Department, *Submission No. 35*, p. 4; Australian Government Libraries Information Network (AGLIN), *Submission No. 20*, p. 1; States and Territories Copyright Group (STCG), *Submission No. 63*, p. 2; Australian Tax Office (ATO), *Submission No. 9*, paras 5-8. See also WA Department of the Premier and Cabinet and Department of Justice, *Submission No. 58*, pp. 8-10.

33 Dr Anne Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 74.

34 ACT Government, *Submission No. 50*, p. 2.

35 Queensland Government, *Submission No. 51*, p. 2; see also STCG, *Submission No. 63*, p. 2.

36 Queensland Government, *Submission No. 51*, p. 2.

## The Committee's assessment

- 4.86 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the identified classes of works, performances, or phonograms for the services of the Crown, to the extent currently delineated in s.183 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).
- 4.87 As discussed in Chapter 3, the Australian Tax Office (ATO) raised concerns regarding the scope of the specified exception in Article 17.4.7(e)(vi), and the Office of Film and Literature Classification (OFLC) also raised concerns about the discharge of its statutory functions without an appropriate exception (both the ATO and the OFLC indicated that they currently utilise s.183 of the Act<sup>37</sup>). The Committee reiterates its view, stated in Chapter 3, that the issue of the precise scope of the exception in Article 17.4.7(e)(vi) will need to be carefully considered and resolved by the Government. As recommended by the Committee in that Chapter, Article 17.4.7(e)(vi) should also be interpreted in the implementing legislation so as to permit exceptions to liability for TPM circumvention for the government activities identified by the ATO and the OFLC.
- 4.88 The Committee is also of the view that the Government will need to ensure that the exception permitted for the use of copyright material for the services of the Crown in line with s.183 integrates smoothly with the eventual scope of the exception in Article 17.4.7(e)(vi), and that the coverage provided by both exceptions will need to be sufficient for the full range of government activity.

### Recommendation 19

- 4.89 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**
- **The provision of copyright material to members of Parliament; and**
  - **The use of copyright material for the services of the Crown**
- examined at paragraphs 4.75 - 4.86 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

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37 ATO, *Submission No. 9*, para. 7; OFLC, *Submission No. 44*, p. 2.

## Recommendation 20

- 4.90 The Committee recommends that the Government ensure that the exception permitted for the use of copyright material for the services of the Crown integrates smoothly with the scope of the exception in Article 17.4.7(e)(vi) of the Australia-United States Free Trade Agreement, and that the coverage provided by both exceptions is sufficient for the full range of government activity.

## Educational institutions

### Circumvention for the reproduction and communication of copyright material by educational and other institutions

- 4.91 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by educational and other institutions.<sup>38</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.92 *Non-infringing use* – lawful use of copyright material under Part VB of the *Copyright Act 1968*.
- 4.93 *Particular class of works, performances, or phonograms* – literary works, dramatic works, musical works, and artistic works as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.94 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Significantly compromised ability of educational institutions to discharge fundamental teaching and learning roles due to inability to use copyright material;<sup>39</sup>

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38 See for example Copyright Advisory Group of the Ministerial Council on Employment, Education Training and Youth Affairs (CAG), *Submission No. 40*, p. 14; Australian Vice-Chancellors' Committee (AVCC), *Submission No. 53*, pp. 14-15; Flexible Learning Advisory Group (FLAG), *Submission No. 34*, pp. 9-10; ADA/ALCC, *Submission No. 49*, pp. 19-20, 24; University of Southern Queensland, *Submission No. 26*, p. 1.

39 ADA/ALCC, *Submission No. 49*, p. 20.

- Inability of schools and TAFEs to perform their primary role as educational institutions teaching Australian students due to inability to use copyright material;<sup>40</sup>
- Inability to assist students with disabilities in using copyright material;<sup>41</sup>
- Denial of use of copyright material found only on compilation media;<sup>42</sup> and
- Inability of students to create new works on the basis of past copyright material, review copyright material or use copyright material as a learning aid;<sup>43</sup> and
- Inability to use copyright material due to an inability to reformat material for cultural suitability.<sup>44</sup>

4.95 *Non-impairment of legal protection or remedies* – currently under Part VB of the *Copyright Act 1968* the reproduction and communication of copyright material by educational and other institutions is lawful under certain circumstances.

### The Committee's assessment

4.96 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms by educational and other institutions, to the extent currently delineated in Part VB of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

4.97 The Committee notes that the statutory licence contained in Part VB of the Act contains a number of safeguards to prevent abuse of the licence. Copyright owners are generally paid for the use of their copyright material, and there are limits about the types of material and the amount that may be copied. Part VB of the Act also sets out conditions applicable to copying such as commercial availability tests, marking of copies, and requirements for protection of material made available online.

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40 CAG, *Submission No. 40*, p. 5.

41 CAG, *Submission No. 40*, p. 13; AVCC, *Submission No. 53*, p. 18.

42 CAG, *Submission No. 40*, p. 13.

43 CAG, *Submission No. 40*, p. 13.

44 CAG, *Submission No. 40*, p. 13.

- 4.98 The Committee is unaware of the extent (if any) to which Part VB of the Act prevents educational institutions from assisting students with disabilities to gain access to copyright material. The Committee is aware that this issue is currently being considered by the Government as part of the review of the *Copyright Amendment (Digital Agenda) Act 2000*. If any activities for assisting students with disabilities outside of the scope of Part VB subsequently become non-infringing and satisfy the criteria in Article 17.4.7(e)(viii) and (f), the Committee is of the view that the Government should investigate the appropriateness of introducing a corresponding TPM circumvention exception for these activities.

### **Recommendation 21**

- 4.99 **The Committee recommends that, if any activities for assisting students with disabilities outside of Part VB of the *Copyright Act 1968* become non-infringing in future and satisfy Article 17.4.7(e)(viii) and (f) of the Australia-United States Free Trade Agreement, the Government investigate the appropriateness of introducing a corresponding TPM circumvention exception for these activities.**

### **Circumvention for those with a print disability and for institutions assisting those with a print disability**

- 4.100 An exception was proposed for TPM circumvention for those with a print disability and for the reproduction and communication of copyright material by institutions assisting those with a print disability.<sup>45</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.101 *Non-infringing use* – lawful use of copyright material under s.40 and Part VB of the *Copyright Act 1968*.
- 4.102 *Particular class of works, performances, or phonograms* – literary works as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.103 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

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45 Vision Australia, *Submission No. 19*, p. 3; Mr Tim Evans, *Transcript of Evidence*, 15 November 2005, pp. 53-54.

- Inability of those with a print disability to access copyright material;<sup>46</sup>
  - Reduction of quality of life for those with a print disability due to inability to access copyright material;<sup>47</sup> and
  - Diminished capacity for those with a print disability to participate in the social, cultural and professional life of the Australian community due to inability to access copyright material.<sup>48</sup>
- 4.104 *Non-impairment of legal protection or remedies* – currently under s.40 of the *Copyright Act 1968*, an individual with a print disability can engage in a fair dealing with material for the purposes of research or study. Also, under Part VB of the *Copyright Act 1968* the reproduction and communication of copyright material by institutions assisting persons with a print disability is lawful under certain circumstances.

### The Committee's assessment

- 4.105 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the identified class of works, performances, or phonograms for those with a print disability, and for the reproduction and communication of the identified class of works, performances, or phonograms by institutions assisting those with a print disability, to the extent currently delineated in s.40 and Part VB of the *Copyright Act 1968* respectively, should be permitted under Article 17.4.7(e)(viii).
- 4.106 The Committee is conscious that the exception discussed at paragraph 4.96 above relating to Part VB of the Act may provide sufficient coverage for institutions assisting those with a print disability. However, to avoid doubt, the Committee believes it desirable to recommend an exception for these institutions here also.

### Recommendation 22

- 4.107 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**
- **The reproduction and communication of copyright material by educational and other institutions; and**

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46 Vision Australia, *Submission No. 19*, p. 2.

47 Vision Australia, *Submission No. 19*, p. 2.

48 Vision Australia, *Submission No. 19*, p. 2.

- **Those with a print disability and for the reproduction and communication of copyright material by institutions assisting those with a print disability**

**examined at paragraphs 4.91 – 4.105 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

- 4.108 In addition, the classification of devices used as accessibility aids by or for those with a print disability as circumvention devices under the TPM liability scheme was raised as a significant concern in the evidence.<sup>49</sup> The Committee believes that the Government should examine this issue with a view to exempting such devices from the liability scheme.

### **Recommendation 23**

- 4.109 **The Committee recommends that the Government examine the issue of the classification of devices used as accessibility aids by or for those with a print disability with a view to exempting such devices from the TPM liability scheme.**
- 4.110 The Committee also notes that the operation of the fair dealing exception in s.40 of the *Copyright Act 1968* is currently being considered by the Government as part of its fair dealing review.<sup>50</sup> The Committee is of the view that, pending the outcome of this review, the Government should examine the adequacy of s.40 as a mechanism for those with a print disability and consider implementing a provision which specifically allows for the reproduction and communication of copyright material for private use by those with a print disability.

### **Recommendation 24**

- 4.111 **The Committee recommends that, pending the outcome of its fair dealing review, the Government examine the adequacy of s.40 of the *Copyright Act 1968* as a mechanism for those with a print disability and consider implementing a provision specifically allowing for the reproduction and communication of copyright material for private use**

49 Vision Australia, *Submission No. 19*, pp. 2-3.

50 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, pp. 11-17, 36.

Accessible online at:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).



by those with a print disability.

### Circumvention for access to copyright material pursuant to Parts VA and VB of the *Copyright Act 1968*

- 4.112 An exception was proposed for TPM circumvention for access to copyright material pursuant to Parts VA and VB of the *Copyright Act 1968*.<sup>51</sup>
- 4.113 In relation to Part VA of the Act, in Chapter 3 the Committee noted indications from the Government that broadcasts would not need to be included in the new TPM liability scheme as they do not come within the compass of protected copyright material under Article 17.4.7.<sup>52</sup> The Committee therefore does not make any recommendations in this report concerning broadcasts.<sup>53</sup>
- 4.114 In relation to Part VB of the Act, an exception for TPM circumvention for the reproduction and communication of copyright material by educational and other institutions, to the extent currently delineated in Part VB of the *Copyright Act 1968*, is recommended above.

### Circumvention for reformatting copyright material for cultural suitability

- 4.115 An exception was proposed for TPM circumvention for the purpose of reformatting copyright material for cultural suitability.<sup>54</sup>
- 4.116 An exception for TPM circumvention for the reproduction and communication of copyright material by educational and other institutions, to the extent currently delineated in Part VB of the *Copyright Act 1968*, is recommended above. This exception should provide coverage for circumvention for this use.

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51 See for example CAG, *Submission No. 40*, pp. 14-15; AVCC, *Submission No. 53*, pp. 14-16; FLAG, *Submission No. 34*, pp. 9-12; ADA/ALCC, *Submission No. 49*, pp. 19-21, 24; Ms Robin Wright, *Submission No. 45*, p. 11. See also Australian Broadcasting Corporation (ABC), *Submission No. 14*, p. 13.

52 See AGD, *Submission No. 52.1*, p. 2.

53 Some other proposed exceptions relevant to broadcasters are considered below at paragraphs 4.157 – 4.173.

54 FLAG, *Submission No. 34*, pp. 15-16; AVCC, *Submission No. 53*, p. 20.

## Circumvention for access to data owned by an educational institution but held by an application service provider

- 4.117 An exception was proposed for TPM circumvention for access to data owned by educational institutions but held by application service providers.<sup>55</sup>
- 4.118 An exception for TPM circumvention for interoperability between computer programs and data is recommended above; this exception should provide coverage for circumvention for this use. Beyond this, issues relating to data held in a proprietary format by an application service provider will be contractual in nature and will be more appropriately dealt with under contract law.

## Circumvention for classroom performances of copyright material

- 4.119 An exception was proposed for TPM circumvention for the purpose of classroom performances of copyright material.<sup>56</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.120 *Non-infringing use* – lawful use of copyright material under s.28 of the *Copyright Act 1968*.
- 4.121 *Particular class of works, performances, or phonograms* – literary works, dramatic works, sound recordings, and cinematograph films as categorised in the *Copyright Act 1968*; other factors may also be relevant.
- 4.122 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee.
- 4.123 *Non-impairment of legal protection or remedies* – currently under s.28 of the *Copyright Act 1968* performances of copyright material in class, by a teacher in the course of giving educational instruction, or by a student receiving educational instruction in are deemed not to be performances in public.

### The Committee's assessment

- 4.124 The Committee is unable to recommend an exception for TPM circumvention for the purpose of classroom performances as no likely adverse impact was demonstrated.

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55 FLAG, *Submission No. 34*, p. 15; AVCC, *Submission No. 53*, pp. 19-20.

56 CAG, *Submission No. 40*, p. 15.

- 4.125 In addition, the Committee is somewhat unsure how, in practice, TPMs could prevent the performance of copyright material in a class setting. The Committee notes further that s.28 of the *Copyright Act* 1968 merely deems certain performances of copyright material in certain educational settings not to be performances in public.

## Libraries, archives and cultural institutions

### Circumvention for the reproduction and communication of copyright material for research and study purposes

- 4.126 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for research and study purposes.<sup>57</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.127 *Non-infringing use* – lawful use of copyright material under ss.49 and 110A of the *Copyright Act* 1968.
- 4.128 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works as categorised in the *Copyright Act* 1968; other factors may also be relevant.
- 4.129 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to fulfil or material impediment to fulfilling key or mandated organisational functions due to inability to provide access to copyright material for users;<sup>58</sup>
  - Inability to fulfil major organisational strategic goals due to restrictions on providing access to copyright material;<sup>59</sup> and
  - Increased cost for research and study use of copyright material which has no commercial impact on the markets of copyright owners.<sup>60</sup>

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57 See for example National Library of Australia (NLA), *Submission No. 28*, letter pp. 1-2; DCITA, *Submission No. 56*, pp. 3-4; NGA, *Submission No. 18*, p. 2; ADA/ALCC, *Submission No. 49*, pp. 18-19, 24; TAFE Libraries Australia (TAFE), *Submission No. 21*, p. 2. See also Ms Robin Wright, *Submission No. 45*, p. 11.

58 NLA, *Submission No. 28*, letter pp. 1-2, p. 2; DCITA, *Submission No. 56*, pp. 3-4.

59 NGA, *Submission No. 18*, p. 2.

- 4.130 *Non-impairment of legal protection or remedies* – currently under s.49 of the *Copyright Act 1968* copyright is not infringed by the reproduction and communication of certain copyright materials by libraries and archives for research and study purposes under certain circumstances. Also, under s.110A of the Act copyright is not infringed by the reproduction or communication of unpublished sound recordings and cinematograph films by libraries and archives for research, study or publication purposes under certain circumstances.

### The Committee's assessment

- 4.131 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms for research and study purposes, to the extent currently delineated in ss.49 and 110A of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Circumvention for the reproduction and communication of copyright material for other libraries, archives and cultural institutions

- 4.132 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for other libraries, archives and cultural institutions.<sup>61</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.133 *Non-infringing use* – lawful use of copyright material under s.50 of the *Copyright Act 1968*.
- 4.134 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, sound recordings, cinematograph films as categorised in the *Copyright Act 1968*; computer programs; databases; geospatial works; other factors may also be relevant.

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60 NGA, *Submission No. 18*, p. 2.

61 See for example DCITA, *Submission No. 56*, pp. 3-4; NGA, *Submission No. 18*, pp. 1-3; NLA, *Submission No. 28*, letter pp. 1-2; TAFE, *Submission No. 21*, p. 2; ADA/ALCC, *Submission No. 49*, pp. 18-19, 24. See also Ms Robin Wright, *Submission No. 45*, p. 11.

- 4.135 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to fulfil or material impediment to fulfilling key or mandated organisational functions due to inability to provide access to copyright material for users (via other institutions);<sup>62</sup> and
  - Impediment to key preservation functions due to inability to make communication copies for sending to other institutions.<sup>63</sup>
- 4.136 *Non-impairment of legal protection or remedies* – currently under s.50 of the *Copyright Act 1968* libraries and archives are authorised to provide other libraries and archives with copies of certain copyright material under certain circumstances.

### The Committee's assessment

- 4.137 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms for other libraries, archives and cultural institutions, to the extent currently delineated in s.50 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Circumvention for the reproduction and communication of copyright material for preservation purposes

- 4.138 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes.<sup>64</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.139 *Non-infringing use* – lawful use of copyright material under ss.51A and 110B of the *Copyright Act 1968*.
- 4.140 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, sound recordings, cinematograph

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62 NLA, *Submission No. 28*, letter pp. 1-2, pp. 2, 4-7; DCITA, *Submission No. 56*, pp. 3-4.

63 NGA, *Submission No. 18*, p. 1.

64 See for example TAFE, *Submission No. 21*, p. 2; DCITA, *Submission No. 56*, pp. 3-4; NGA, *Submission No. 18*, pp. 1-2; NLA, *Submission No. 28*, letter p. 2; Australian Film Commission (AFC), *Submission No. 55*, section 9 and Appendix B; ADA/ALCC, *Submission No. 49*, pp. 18-19, 24. See also Ms Robin Wright, *Submission No. 45*, p. 11.

films as categorised in the *Copyright Act 1968*; computer programs; databases; geospatial works; other factors may also be relevant.

- 4.141 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to copy copyright materials for preservation purposes, including long-term preservation;<sup>65</sup>
  - Inability to fulfil or material impediment to fulfilling statutory roles and functions due to inability to make preservation copies of copyright material;<sup>66</sup> and
  - Increased financial impost in fulfilling statutory roles and responsibilities due to inability to make preservation copies of preservation material and increased contractual financial impost.<sup>67</sup>
- 4.142 *Non-impairment of legal protection or remedies* – currently under s.51A of the *Copyright Act 1968* copyright is not infringed by the reproduction and communication of copyright material by libraries and archives for preservation and other purposes under certain circumstances. Also, under s.110B of the Act copyright is not infringed by the reproduction or communication of sound recordings and cinematograph films by libraries and archives for preservation and other purposes under certain circumstances.

### The Committee's assessment

- 4.143 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms for preservation and other purposes, to the extent currently delineated in ss.51A and 110B of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Recommendation 25

- 4.144 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**

65 See for example DCITA, *Submission No. 56*, pp. 3-4; NLA, *Submission No. 28*, pp. 1-7; Ms Delma Volker, *Transcript of Evidence*, 5 December 2005, p. 4.

66 See for example NLA, *Submission No. 28*, letter p. 2; AFC, *Submission No. 55*, section 9 and Appendix B; ADA/ALCC, *Submission No. 49*, pp. 18-19; DCITA, *Submission No. 56*, pp. 3-4.

67 AFC, *Submission No. 55*, section 9; DCITA, *Submission No. 56*, p. 5.

- **The reproduction and communication of copyright material by libraries, archives and cultural institutions for research and study purposes;**
- **The reproduction and communication of copyright material by libraries, archives and cultural institutions for other libraries, archives and cultural institutions; and**
- **The reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes**

examined at paragraphs 4.126 – 4.143 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

### Circumvention for the temporary reproduction of digital material for exhibition and preservation purposes

4.145 An exception was proposed for TPM circumvention for the temporary reproduction of digital material for exhibition and preservation purposes.<sup>68</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

4.146 *Non-infringing use* – lawful use of copyright material provided under authorisation.

4.147 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.

4.148 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Degradation of the original digital media due to continuous use.<sup>69</sup>

4.149 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

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68 NGA, *Submission No. 18*, pp. 1, 3.

69 NGA, *Submission No. 18*, p. 1; Ms Delma Volker, *Transcript of Evidence*, 5 December 2005, p. 3.

## The Committee's assessment

- 4.150 The Committee is unable to recommend an exception for TPM circumvention for the temporary reproduction of digital copyright material for exhibition purposes as no particular class of works, performances, or phonograms was identified.
- 4.151 However, the Committee would support an exception of this type in the future, particularly given the increasing use of digital media by artists. The Committee is of the view therefore that the Government should consult with the NGA (and with any other relevant institutions) to identify an appropriate exception.

### **Recommendation 26**

- 4.152 **The Committee recommends that, in advance of the implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement, the Government consult with the National Gallery of Australia and any other relevant institutions to identify an appropriate exception for TPM circumvention for the temporary reproduction of digital material for exhibition and preservation purposes.**

## Circumvention for fair dealing with copyright material by libraries and archives

- 4.153 An exception was proposed for TPM circumvention for fair dealing with copyright material by libraries and archives.<sup>70</sup>
- 4.154 Exceptions for TPM circumvention for the reproduction and communication of copyright material for research and study purposes and for other institutions, to the extent currently delineated in ss.49, 50 and 110A of the *Copyright Act* 1968, are recommended above.

## Broadcasting

- 4.155 The Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS) proposed a number of exceptions for TPM circumvention in relation to broadcasts.<sup>71</sup> As noted in Chapter 3 and at paragraph 4.113 above, Government has

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70 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission No. 46*, p. 11.

71 ABC, *Submission No. 14*, p. 21-23; SBS, *Submission No. 37*, sections 3, 5.



indicated to the Committee that broadcasts would not need to be included in the new TPM liability scheme as they do not come within the compass of protected copyright material under Article 17.4.7.<sup>72</sup> The Committee therefore does not make any recommendations in this report concerning broadcasts.

- 4.156 Other exceptions relating to the activities of broadcasters, however, (i.e. not just to broadcasts *per se*) were also proposed in the evidence, and are considered below.

### **Circumvention for fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice**

- 4.157 An exception was proposed for TPM circumvention for fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice.<sup>73</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.158 *Non-infringing use* – lawful use of copyright material under ss.41, 42, 43, 103A, 103B and 104 of the *Copyright Act 1968*.
- 4.159 *Particular class of works, performances, or phonograms* – literary works, dramatic works, musical works, artistic works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.160 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:
- Inability to fulfil or material impediment to fulfilling statutory obligations due to inability to access copyright material for fair dealing and other purposes;<sup>74</sup>
  - Inability or restricted ability to use copyright material due to an inability to rely on the fair dealing provisions in the *Copyright Act 1968*.<sup>75</sup>

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72 See also AGD, *Submission No. 52.1*, p. 2.

73 ABC, *Submission No. 14*, pp. 19-21; SBS, *Submission No. 37*, sections 3, 5. SBS' fair dealing exception request also related to region coding on DVDs, which is discussed separately in Chapter 2.

74 ABC, *Submission No. 14*, p. 8.

75 ABC, *Submission No. 14*, p. 9.

4.161 *Non-impairment of legal protection or remedies* – currently under ss.41, 42, 103A and 103B of the *Copyright Act 1968* copyright is not infringed by fair dealing with copyright material for the purposes of criticism or review or reporting news under certain circumstances. Also, under ss.43 and 104 of the Act copyright is not infringed by fair dealing and other actions for judicial proceedings or for the giving of professional advice by legal practitioners, patent attorneys, or trade marks attorneys.

### The Committee's assessment

4.162 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the identified classes of works, performances, or phonograms for fair dealing and other actions for criticism, review, news reporting, judicial proceedings, and professional advice, to the extent currently delineated in ss.41, 42, 43, 103A, 103B, and 104 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Circumvention for the inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes

4.163 An exception was proposed for TPM circumvention for the inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes.<sup>76</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

4.164 *Non-infringing use* – lawful use of copyright material under ss.45, 47, 67, 70, 107 and 109 of the *Copyright Act 1968*.

4.165 *Particular class of works, performances, or phonograms* – literary works, dramatic works, musical works, artistic works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.

4.166 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Loss of value due to unavailability of statutory licenses for use of copyright material currently available to broadcasters.<sup>77</sup>

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<sup>76</sup> ABC, *Submission No. 14*, pp. 19-21; SBS, *Submission No. 37*, section 3.

<sup>77</sup> SBS, *Submission No. 37*, section 3; see also ABC, *Submission No. 14*, p. 10.

4.167 *Non-impairment of legal protection or remedies* – currently under ss.45, 47, 67, 70, 107 and 109 of the Act copyright is not infringed by the inclusion of copyright material in broadcasts or the reproduction of copyright material for broadcasting purposes in certain circumstances.

### The Committee's assessment

4.168 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the inclusion of the identified classes of works, performances, or phonograms in broadcasts and for the reproduction of the identified classes of works, performances, or phonograms for broadcasting purposes, to the extent currently delineated in ss.45, 47, 67, 70, 107 and 109 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Recommendation 27

4.169 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**

- **Fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice; and**
- **The inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes**

**examined at paragraphs 4.157 – 4.168 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

### Circumvention for the purposes of archival retention, maintenance and preservation of cinematograph films and sound recordings

4.170 An exception was proposed for TPM circumvention for the purpose of archival retention, maintenance and preservation of cinematograph films and sound recordings.<sup>78</sup>

4.171 An exception for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes, to the extent currently delineated in ss.51A and 110B of the *Copyright Act 1968*, is

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78 ABC, *Submission No. 14*, pp. 22-23.

recommended above. This exception should provide coverage for circumvention for this use.

## Circumvention for use of copyright material under blanket licences

- 4.172 An exception was proposed for TPM circumvention for the use of copyright material under blanket licences.<sup>79</sup>
- 4.173 The Committee notes that such blanket licences are contractual arrangements entered into by the users of copyright material with copyright owners or their representatives. The Committee is of the view that issues arising in relation to such licenses are contractual in nature and are more appropriately dealt with under contract law.<sup>80</sup>

## Other exceptions

- 4.174 Along with the exceptions examined above by sector, a number of other exceptions were proposed in relation to a diverse range of issues.

## Circumvention for access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided

- 4.175 An exception was proposed for TPM circumvention for access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided.<sup>81</sup>

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79 ABC, *Submission No. 14*, p. 10.

80 The ABC also raised the issues of format shifting, TPM interference with equipment, and DVD region coding within its discussion of blanket licenses: these issues are considered separately in this Chapter and in Chapter 2.

81 See for example Ms Kimberlee Weatherall, *Submission No. 38*, pp. 25-26; DEST, *Submission No. 48*, pp. 34-35; AVCC, *Submission No. 53*, pp. 17-18; Dr Anne Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 74; NLA, *Submission No. 28*, pp. 2-3, 5-7; CAG, *Submission No. 40*, pp. 15-16; Ms Delia Browne, *Transcript of Evidence*, 14 November 2005, p. 55; ADA/ALCC, *Submission No. 49*, p. 24.

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.176 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.177 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works, sound recordings, cinematograph films as categorised in the *Copyright Act 1968*; computer programs; databases; geospatial works; licensed data products; other factors may also be relevant.
- 4.178 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to access and utilise digitally-stored material;<sup>82</sup>
  - Inability to provide and ensure long-term access to digitally-stored copyright material;<sup>83</sup> and
  - Hindrance of the performance of significant government functions due to inability to use copyright material.<sup>84</sup>
- 4.179 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee's assessment

- 4.180 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for access for the identified classes of works, performances, or phonograms where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided, should be permitted under Article 17.4.7(e)(viii).
- 4.181 The exception would only apply where the copyright or TPM owner did not provide effective support to rectify the problem or a replacement TPM.
- 4.182 The Committee notes that a somewhat similar exception was granted in the United States by the USCO in its 2000 rule making process,<sup>85</sup> and that an exception for computer programs protected by obsolete,

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82 Ms Kimberlee Weatherall, *Submission No. 38*, p. 25; AVCC, *Submission No. 53*, p. 17.

83 Ms Kimberlee Weatherall, *Submission No. 38*, p. 25.

84 Dr Anne Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 74.

85 US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64574 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 06/02/2006).

damaged or malfunctioning dongles was granted by the USCO in the more recent 2003 rule making process.<sup>86</sup>

### **Circumvention for access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product**

4.183 An exception was proposed for TPM circumvention for access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product.<sup>87</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

4.184 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.

4.185 *Particular class of works, performances, or phonograms* – sound recordings, cinematograph films as categorised in the *Copyright Act 1968*; computer programs; other factors may also be relevant.

4.186 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

- Breakdown of systems or products as a result of TPM operation with associated time and resource costs;<sup>88</sup> and
- Loss or damage or risk (e.g. health risk) if repair of a TPM-protected product is not effected.<sup>89</sup>

4.187 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

#### **The Committee's assessment**

4.188 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for access for the identified classes of works, performances, or phonograms where a TPM interferes with or causes damage or a malfunction to a product, or where

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86 US National Archives and Records Administration, *Federal Register* Vol. 68 No. 211, p. 62018 (<http://www.copyright.gov/fedreg/2003/68fr2011.pdf>, accessed 06/02/2006).

87 ABC, *Submission No. 14*, pp. 11, 23; Ms Janet Hawtin, *Submission No. 6*, pp. 2-3. The ABC identified this issue as a blanket licensing issue, but the Committee is of the view that it also has a broader significance.

88 ABC, *Submission No. 14*, p. 11.

89 Ms Janet Hawtin, *Submission No. 6*, pp. 2-3.

circumvention is necessary to repair a product, should be permitted under Article 17.4.7(e)(viii).

- 4.189 The Committee again notes the TPM product interference issue that emerged in the United States regarding a Sony TPM on CDs.<sup>90</sup> The Committee also notes again advice from the AGD that, to its knowledge, this problem has not yet manifested in Australia.<sup>91</sup>

### **Recommendation 28**

- 4.190 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**

- **Access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided; and**
- **Access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product**

**examined at paragraphs 4.175 – 4.188 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

### **Circumvention for making back-up copies of copyright material other than computer programs**

- 4.191 An exception for TPM circumvention was proposed for the purpose of making back-up copies of copyright material other than computer programs such as material on CDs, DVDs and video tapes.<sup>92</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.192 *Non-infringing use* – currently there is no exception under the *Copyright Act 1968* for the making of back-up copies of copyright material other than computer programs.
- 4.193 *Particular class of works, performances, or phonograms* – sound recordings and cinematograph films as categorised under the *Copyright Act 1968*.

<sup>90</sup> See paragraph 4.35 above.

<sup>91</sup> Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 27.

<sup>92</sup> Mr Alex Andrews, *Submission No. 23*, p. 3; see also Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section C.

- 4.194 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:
- Financial impost as a result of needing to replace purchased copies of copyright material that is fragile or stored on fragile media.<sup>93</sup>
- 4.195 *Non-impairment of legal protection or remedies* – no exception currently exists in the *Copyright Act 1968*.

### The Committee's assessment

- 4.196 The Committee is unable to recommend an exception for TPM circumvention for making back-up copies of copyright material other than computer programs as it was not shown that this is a non-infringing use.
- 4.197 The Committee notes that the Government is currently considering, as part of its fair dealing review, whether the Act should contain an exception for making back-up copies of copyright material other than computer programs.<sup>94</sup> The Committee would support any moves to implement such an exception in the Act. The Committee is of the view that, should making back-up copies of such copyright material become a non-infringing act in future, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

### Recommendation 29

- 4.198 **The Committee recommends that, should the act of making back-up copies of copyright material other than computer programs become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

**The Committee would also support any moves to render the making of back-up copies of copyright material other than computer programs non-infringing under the *Copyright Act 1968*.**

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93 Mr Alex Andrews, *Submission No. 23*, p. 3.

94 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 29. Accessible online at:  
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).



## Circumvention for access to lawfully acquired or possessed copyright material

- 4.199 A general exception was proposed for TPM circumvention for access to lawfully acquired or possessed copyright material.<sup>95</sup>
- 4.200 The Committee is unable to recommend such an exception. By its very nature, the exception is incapable of complying with the ‘particular class of works, performances, or phonograms’ criterion. The breadth of the exception also militates against its ability to comply with the non-impairment of legal protection or remedies criterion.

## Circumvention for format shifting copyright material

- 4.201 An exception was proposed for TPM circumvention for the purposes of format shifting copyright material.<sup>96</sup>
- 4.202 As noted in Chapter 2, format shifting (along with time shifting) is currently an infringing use of copyright material under the *Copyright Act 1968*. As such, the Committee is unable to recommend an exception for TPM circumvention for format shifting at this time.
- 4.203 The Committee notes that the Government is currently considering, as part of its fair dealing review, whether the Act should contain an exception for format shifting of copyright material.<sup>97</sup> The Committee would support any moves to implement such an exception in the Act. The Committee is of the view that, should format shifting become a non-infringing act in future, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

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95 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section H. See also EFA, *Submission No. 36*, pp. 5-6, and ADA/ALCC, *Submission No. 49.1*, pp. 1-2.

96 See for example Mr Alex Andrews, *Submission No. 23*, p. 2; ABC, *Submission No. 14*, pp. 9, 10, 22; FLAG, *Submission No. 34*, p. 12; AVCC, *Submission No. 53*, pp. 16-17; NGA, *Submission No. 18*, p. 3.

97 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, pp. 27-28.

Accessible online at:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

### Recommendation 30

4.204 **The Committee recommends that, should the format shifting of copyright material become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

**The Committee would also support any moves to render the format shifting of copyright material non-infringing under the *Copyright Act 1968*.**

### Circumvention for the reproduction and communication of 'orphaned' works

4.205 An exception was proposed for TPM circumvention for the reproduction and communication of 'orphaned' works.<sup>98</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

4.206 *Non-infringing use* – currently there is no exception under the *Copyright Act 1968* to authorise the reproduction etc. of copyright material purely because the copyright owner is not asserting or enforcing their copyright.

4.207 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.

4.208 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Inability to use 'orphaned' copyright material protected by TPMs in the event that an exception for such material is incorporated into the *Copyright Act 1968* but no corresponding TPM circumvention exception is permitted.<sup>99</sup>

4.209 *Non-impairment of legal protection or remedies* – no exception currently exists in the *Copyright Act 1968*.

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98 See for example FLAG, *Submission No. 34*, p. 17; AVCC, *Submission No. 53*, pp. 21-22; ATO, *Submission No. 9*, para. 9.

99 FLAG, *Submission No. 34*, p. 17; AVCC, *Submission No. 53*, p. 22.

## The Committee's assessment

- 4.210 The Committee is unable to recommend an exception for TPM circumvention for the reproduction and communication of 'orphaned' works as it was not shown that this is a non-infringing use, and no particular class of works, performances, or phonograms was identified.
- 4.211 The Committee notes that the issue of seemingly abandoned or 'orphaned' works is being considered by the Government as part of its fair dealing review.<sup>100</sup> The Committee is of the view that, should the reproduction and communication of 'orphaned' copyright material become a non-infringing act in future, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

### Recommendation 31

- 4.212 The Committee recommends that, should the reproduction and communication of 'orphaned' copyright material become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.**

## Circumvention for access to material not protected by copyright

- 4.213 An exception was proposed for TPM circumvention for access to material not protected by copyright (i.e. public domain material).<sup>101</sup>
- 4.214 The Committee understands that no such exception will be necessary. During the course of the inquiry the Committee put the following question to the AGD:

In the Department's view, will a TPM, in order to come within the scope of the AUSFTA provisions as implemented

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100 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 29. Accessible online at:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

101 See for example FLAG, *Submission No. 34*, pp. 13-14; Ms Robin Wright, *Submission No. 45*, pp. 4-5; AVCC, *Submission No. 53*, p. 18; CAG, *Submission No. 40*, p. 16; ADA/ALCC, *Submission No. 49*, p. 24; ATO, *Submission No. 9*, para. 9; Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section B.

in the new scheme, have to be attached to a work protected by copyright?<sup>102</sup>

4.215 In response, the AGD stated that:

Yes. The use of the word ‘protected’ in the definition of an ETM means that the work must currently be protected by copyright. Copyright protection for works will generally subsist for the life of the author plus 70 years. After this time period copyright protection ceases and the material passes into the public domain. Once the material passes into the public domain there is no liability against circumvention under Article 17.4.7. ...For an ETM to fall within the scope of the AUSFTA liability provisions it must be attached to a work, performance or phonogram that is protected under Australian copyright law at the time.<sup>103</sup>

4.216 The Committee is conscious however that an issue may arise in relation to ‘mixed’ works consisting of both copyright material that is in the public domain and material that is protected by copyright. The Committee notes that, under certain circumstances, the *Copyright Act* 1968 extends protection to compilations of copyright material.<sup>104</sup> However, the Committee is of the view that it is also in the public interest that non-copyright material be accessible. While the Committee acknowledges that the potential exists for tension between these two legitimate objectives, copyright owners should not be able to obtain de facto protection for non-copyright material by bundling it with copyright material in mixed works. Accordingly, the Government should develop a TPM circumvention with respect to such works for non-infringing uses where the amount of non-copyright material present is substantial.

### Recommendation 32

**4.217 The Committee recommends that the Government develop an exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement to allow for circumvention of TPMs for access to mixed works consisting of both copyright material and non-copyright material where the amount of non-copyright material in the**

102 See AGD, *Submission No. 52.1*, p. 6.

103 AGD, *Submission No. 52.1*, p. 6.

104 The Committee also notes that s.135ZK of the *Copyright Act* 1968 provides that copyright is not infringed where a literary or dramatic work published in an anthology to a certain extent is reproduced for educational purposes.

**work is substantial.**

### **Circumvention for access to copyright material used under authorisation where TPMs have been installed**

4.218 An exception was proposed for TPM circumvention for access to copyright material used under authorisation where TPMs have been installed.<sup>105</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

4.219 *Non-infringing use* – lawfully obtained copyright material used with the express authorisation of the copyright owner.

4.220 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.

4.221 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee:

4.222 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

#### **The Committee's assessment**

4.223 The Committee is unable to recommend an exception for TPM circumvention for access to copyright material used under authorisation where TPMs have been installed as no particular class of works, performances, or phonograms was identified and no likely adverse impact was credibly demonstrated.

4.224 The Committee is also of the view that issues of this type relating to the use of copyright material under express authorisation from copyright owners will be contractual in nature and will be more appropriately dealt with under contract law.

### **Circumvention for access to copyright material which the copyright owner did not intend to be protected by TPMs**

4.225 An exception was proposed for TPM circumvention for access to copyright material which the copyright owner did not intend to be protected by TPMs.<sup>106</sup>

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<sup>105</sup> AGLIN, *Submission No. 20*, p. 2.

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.226 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.227 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.
- 4.228 *Credibly demonstrated likely adverse impact* – the following adverse impact was identified in evidence to the Committee:
- Inability to access protected copyright material due to the presence of unintended TPMs.<sup>107</sup>
- 4.229 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee's assessment

- 4.230 The Committee is unable to recommend an exception for TPM circumvention for access to copyright material which the copyright owner did not intend to be protected by TPMs as no particular class of works, performances, or phonograms was identified.
- 4.231 Further, the Committee notes the following statement from the AGD on this issue:
- There is nothing in the AUSFTA that negates liability for the circumvention of an ETM that is unintentionally applied to copyright material. However, it is difficult to foresee circumstances in which an unintentional application of an ETM could have been placed on the copyright material with the consent of the copyright owner.<sup>108</sup>
- 4.232 The Committee also notes that, in the relevant submission, this issue was discussed in the context of copyright material protected by obsolete TPMs.<sup>109</sup> An exception for TPM circumvention for access to copyright material where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided, is recommended above.

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106 ADA/ALCC, *Submission No. 49*, pp. 23-24.

107 ADA/ALCC, *Submission No. 49*, p. 23.

108 AGD, *Submission No. 52.1*, p. 6.

109 ADA/ALCC, *Submission No. 49*, p. 23.

## Circumvention for access where TPMs are not related to copyright but are anti-competitive in nature

- 4.233 An exception was proposed for TPM circumvention for access where TPMs are not related to copyright but are anti-competitive in nature.<sup>110</sup>
- 4.234 The connection between TPMs and copyright protection and the issue of anti-competitiveness are considered in Chapter 2. The Committee recommends in that Chapter 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 and services.

## Exclusion or limitation of permitted exceptions by agreement

- 4.235 The issue of excluding or limiting permitted exceptions by agreement was raised in evidence to the Committee. One submission contended that:

The first principle that must be recognised is that any rights provided by exceptions to liability for circumvention must be protected from exclusion by agreement. Section 47H provides that an agreement which purports to limit the application of the computer program exceptions has no effect. The exceptions to the anti-circumvention measures in s116A are not similarly protected from exclusion.<sup>111</sup>

- 4.236 It was also submitted that allowing exclusion or limitation by agreement can result in 'significant detriment to innovation',<sup>112</sup> and that:

Restrictions to the limitation of exceptions by agreement should not be limited to the permitted purposes of ss 47D, 47E, 47F, but should extend to all exceptions to circumvention and dealings with circumvention devices and services. There is no reason to allow any exceptions to be contractually

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110 FLAG, *Submission No. 34*, pp.16-17; AVCC, *Submission No. 53*, pp. 20-21; ADA/ALCC, *Submission No. 49*, pp. 10-11, 24; EFA, *Submission No. 36*, p. 6. See also the Intellectual Property Committee of the Law Council of Australia (IPC), *Submission No. 15*, pp. 5-6, and Robin Wright, *Submission No. 45*, pp. 5-6.

111 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section A.

112 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section A.

limited, particularly given the potential negative impacts on consumers and the limited bargaining power in consumer contracts.<sup>113</sup>

- 4.237 The AGD indicated that it will be considering the issue of exclusion or limitation of permitted exceptions by agreement prior to the implementation of Article 17.4.7.<sup>114</sup>
- 4.238 The Committee is of the view that the exclusion or limitation of permitted exceptions by agreement should be prohibited under the liability scheme implementing Article 17.4.7. The widespread use of exclusionary or limiting agreements, particularly when presented to copyright users as virtual *faits accomplis* in the form of end user licence agreements, could easily render the very concept of permitted exceptions meaningless. The approach in s.47H of the *Copyright Act* 1968 should be followed with respect to all exceptions permitted under the liability scheme implementing Article 17.4.7.

### **Recommendation 33**

- 4.239 **The Committee recommends that the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement should nullify any agreements purporting to exclude or limit the application of permitted exceptions under the liability scheme.**

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113 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section A. See also Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29.2*, p. 3, and Professor Brian Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 71.

114 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 28.



## Future reviews

- 5.1 This inquiry has been just the first step in an on-going process of regular reviews to determine whether additional exceptions to the access control technological protection measure (TPM) liability provisions of the Australia-United States Free Trade Agreement (AUSFTA) are required. Although the Committee was not asked in its Terms of Reference to comment on the nature of subsequent reviews, a number of submissions did address this matter. The Committee considered those views carefully along with its own experience during this inquiry, and has reached a number of conclusions about the form subsequent reviews should take.
- 5.2 As with other aspects of the AUSFTA provisions examined during this inquiry, different interpretations have been placed on the meaning of the actual text. Additional exceptions may be granted following:
- a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.<sup>1</sup>
- 5.3 This Chapter examines how this requirement should be implemented in the Australian context, who should conduct such a review, and how the results of any such review should be made public and implemented.

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<sup>1</sup> AUSFTA, Article 17.4.7(e)(viii).

## The US system

5.4 As noted in Chapter 2, under US domestic copyright legislation, there have now been two reviews of possible exceptions to circumvention of technological protection measures: in 2000 and in 2003. A third review is currently underway. The way in which those 'rulemakings' occur is set out in subparagraph 1201(a)(1)(C) of the US Code, as inserted by the Digital Millennium Copyright Act of 1998 (DMCA). That subparagraph specifies:

During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights ... shall make the determination in a rulemaking proceeding on the record for purposes of sub-paragraph (b) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make non-infringing uses under this title of a particular class of copyright works.<sup>2</sup>

5.5 Subparagraph 1201(a)(1)(C) also includes a list of factors to be considered in the rulemaking process. Subparagraph 1201(a)(1)(D) determines that any exceptions granted will last for the ensuing 3-year period.

5.6 In conducting the two rulemakings to date, the United States Copyright Office (USCO) has commenced with a public consultation phase, publicising the rulemaking and seeking written and reply comments from interested parties regarding whether any non-infringing uses of particular classes of works are, or are likely to be, adversely affected by the prohibition of anti-circumvention devices. The USCO has then held public hearings, based around specific exceptions requested. Post-hearing written submissions are also accepted. Following further consultation, the Register of Copyrights then makes recommendation to the Librarian of Congress whose responsibility it is to make a determination in regard to any exemptions. The process has taken approximately 12 months on each occasion.<sup>3</sup>

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2 Section 1201, DMCA, HR 2281 (available at: <http://www.copyright.gov/title17/chapter12.pdf> (accessed 17/01/2006).

3 For more details see [www.copyright.gov/1201/anticirc.html](http://www.copyright.gov/1201/anticirc.html) (accessed 19/12/2005).

- 5.7 In summary, therefore, the US system has the following features:
- A triennial administrative review, conducted by the USCO
  - A public process, with all written submissions and transcripts of hearings available
  - Exceptions are granted for a specific three year period, at the end of which time they expire and can only be reinstated following a recommendation from the next review
  - Detailed guidance as to other factors to be considered by those conducting the review.
- 5.8 There is no equivalent of section 1201(a)(1)(C) in the AUSFTA.

## Australia's obligations

- 5.9 Under the AUSFTA, in order for requests for exceptions to be made under Article 17.4.7(e)(viii), Australia is obliged to:
- Hold either a legislative or administrative review or proceeding
  - Conduct such a review **at least** once every **four years** from the date of the previous review.
- 5.10 As the Attorney-General's Department (AGD) noted, the obligation on Australia in determining whether future exceptions are required is that such 'additional exceptions ... be identified in a legislative review or proceeding'.<sup>4</sup> As the term 'review' is used, the Committee has assumed that any existing exceptions granted during previous reviews will also be subject to reconsideration as part of that process.

## Duration of exceptions

- 5.11 The assumption was made in some submissions that exceptions granted under Article 17.4.7(e)(viii) would be temporary in nature, only standing until the period of the next review, where the exception would lapse and a case would have to be re-argued for the exception

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4 AGD, *Submission No. 52*, p. 13.

to be maintained.<sup>5</sup> There is no provision in the AUSFTA that supports this interpretation. Nor can it be argued that this was the implied intent of the agreement, as in at least one other Free Trade Agreement, specific text is used to impose time-limited exceptions<sup>6</sup>

5.12 This misunderstanding appears to have arisen because of the US process, where exceptions are granted for a specific period.<sup>7</sup> Existing exemptions are ‘reviewed de novo and prior exemptions will expire unless sufficient new evidence is presented in each rulemaking that the prohibition has or is likely to have an adverse effect on noninfringing uses’.<sup>8</sup> While it is true that exceptions granted under Article 17.4.7(e)(viii) are subject to periodic review, this is not the same as the US situation where there is an automatic sunset provision applying.

5.13 As Ms Kimberlee Weatherall pointed out, ‘there is no requirement in the text [of the AUSFTA] that exceptions ‘expire’ at the end of the review period – only that their existence be reviewed’. Ms Weatherall went on to note:

- The need to ‘make a case’ for an exception every four years is an unfair and unnecessary burden on users: particularly, on public institutions and/or non governmental organisations
- The interests of copyright owners are protected by the existence of a review
- In other areas of IP law there is no requirement to provide ongoing justification for exceptions
- Uncertainty as to the continuation of exceptions will prevent investment in businesses or practices that rely on such exceptions. For example, a university may not invest in resources that may require circumvention if it is unclear

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5 See, for example, IIPA, *Submission No. 10*, p. 3, where it is stated the role of this inquiry is to recommend which additional exceptions should ‘apply temporarily’.

6 The Singapore-US Free Trade Agreement text reads ‘provided that any exception adopted in reliance on this clause shall have effect for a period of not more than four years from the date of the conclusion of such proceeding’. Quoted in AGD, *Submission No. 52.1*, p. 7.

7 In the 2003 rulemaking, for example, the decision was couched in the following terms: ‘This rule provides that during the period from October 28, 2003, through October 27, 2006, the prohibition against circumvention of technological measures that effectively control access to copyrighted works shall not apply to persons who engage in noninfringing uses of four classes of copyrighted works’. See, US Congress *Federal Register*, Vol. 68, No. 211, Friday October 31, 2003, p. 62011.

8 [www.copyright.gov/fedreg/2005/70fr57526.html](http://www.copyright.gov/fedreg/2005/70fr57526.html) (accessed 17/01/2006).

whether, in four years time, those resources will become unavailable.<sup>9</sup>

- 5.14 The AGD noted that exceptions may be challenged during the review process, but that ‘if there are no adverse comments received then, by default, they would be maintained’.<sup>10</sup>

## Who should conduct the review?

- 5.15 A number of suggestions were made to the Committee on who might best be placed to conduct future reviews. The main proposals were:

- The Copyright Tribunal
- The Copyright Law Review Committee
- The Attorney-General’s Department
- The House of Representatives Standing Committee on Legal and Constitutional Affairs, or a Senate equivalent.

- 5.16 The Copyright Agency Limited (CAL) suggested that the Attorney-General’s Department should conduct the regular reviews, as it ‘has a record in considering public submissions and... does not have a perceived interest in the outcome of such a review’. Alternatively:

the Copyright Tribunal would also be suitable for this role. It is, on the one hand, suitably qualified and, on the other, well experienced at hearing directly from affected people without legal qualifications. It is both legally and socially responsive.<sup>11</sup>

- 5.17 CAL identified the attributes required to undertake the review as:

specialist copyright law expertise, in addition to the ability to consider detailed expert evidence and to weigh up the arguments put by parties with conflicting interests, and making rulings based on their deliberations. The Attorney-General’s office has all these attributes, with a dedicated copyright law branch with lawyers who have a great depth of experience and knowledge in copyright law and practice in Australia and overseas. The department could undertake the

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9 Ms Kimberlee Weatherall, *Submission No. 38*, pp. 16-17.

10 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 36.

11 CAL, *Submission No. 16*, Introduction.

review and make recommendations to the Attorney-General.<sup>12</sup>

5.18 Other submissions raised concerns about the appropriateness of the Copyright Tribunal as the review body. The Department of Education, Science and Training (DEST), for example, highlighted the fact that 'Tribunal procedures are adapted to deal with matters in dispute in an adversary process, not the formation of policy'.<sup>13</sup> The Australian Digital Alliance/Australian Libraries Copyright Committee (ADA/ALCC) also supported the review being conducted by a 'policy body' rather than the Copyright Tribunal which has a more narrow mandate.<sup>14</sup>

5.19 The NSW Attorney-General's Department strongly opposed the Copyright Tribunal undertaking future reviews:

The Copyright Tribunal has no experience in weighing or balancing competing policy claims from copyright stakeholders. It is not within the Copyright Tribunal's jurisdiction to consider the balance between copyright users and creators, and the ways in which the balance is reflected in the *Copyright Act*.

...

The Copyright Tribunal operates very much like a court. ... A Tribunal that runs along the same lines as a Court is not the appropriate forum for the type of review required under the FTA. A more appropriate forum would be one that has experience in public hearings and policy consideration.<sup>15</sup>

5.20 The Special Broadcasting Service Corporation (SBS) was also concerned that the Copyright Tribunal would conduct such review:

SBS strongly supports the current committee process, which allows submissions to be made by letter by any member of the public anywhere in Australia and for them to state their point at hearings without the fear of legal costs or adversarial process. It would be disastrous in our view if this important public inquiry process were to become subject to overly legalistic proceedings in the Copyright Tribunal.<sup>16</sup>

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12 CAL, *Submission No. 16*, paras 30-31.

13 DEST, *Submission No. 48.1*, para 39.

14 ADA/ALCC, *Submission No. 49.1*, p. 6.

15 NSW Attorney-General's Department, *Submission No. 63*, p. 3.

16 Ms Sally McCausland, *Transcript of Evidence*, 14 November 2005, p. 65.

- 5.21 While there was considerable support for the AGD being an appropriate body to undertake future reviews, one reservation was expressed, namely that:
- reviews run entirely internally by the relevant Department not only place a burden on the Department, but they are undesirable from a public policy perspective, due to the lack [of] transparency and predictability, and concerns regarding the role of ordinary political lobbying.<sup>17</sup>
- 5.22 The Committee believes that this concern could be overcome by ensuring that the public nature of any future inquiries be set out in the *Copyright Act 1968*, and by making the process as transparent as possible with all material considered by the review available publicly.
- 5.23 It was noted in the evidence that the Copyright Law Review Committee would have been well-placed to conduct the review, but that it was no longer in existence.<sup>18</sup>
- 5.24 The AUSTFA permits exceptions to be considered either through an administrative or legislative review or proceeding. This Committee's inquiry has fallen under the legislative review mantle, but the Committee would not support future reviews being conducted by a parliamentary committee for a number of practical reasons.
- 5.25 A parliamentary committee is not an expert on either the technology under consideration or the copyright provisions, and such expertise would be desirable in future reviews. In addition, parliamentary elections may delay the review process and hence impact on exceptions being reviewed.
- 5.26 The Committee has concluded that it would be most appropriate for any future reviews to be conducted by the AGD. The Department has expertise in the technical issues associated with TPM exceptions, experience in conducting reviews, and the resources available to support such a review.

### **Recommendation 34**

- 5.27 **The Committee recommends that future administrative reviews required under Article 17.4.7(e)(viii) be conducted by the Attorney-General's Department.**

17 Ms Kimberlee Weatherall, *Submission No. 38*, pp. 17-18.

18 See for example, Ms Kimberlee Weatherall, *Submission No. 38*, p. 17; Ms Anne Flahvin, *Transcript of Evidence*, 15 November 2005, p. 12.

## How often should reviews be held?

- 5.28 A number of submissions assumed that any review of further TPM exceptions would occur on a four year cycle, interpreting the text of the AUSFTA to say a review will be held **every** four years (rather than '**at least**' every four years). This has arisen, most likely, because of assumptions that the US system would be translated into the Australian context largely unaltered.
- 5.29 Other submissions acknowledged that different interpretations are possible:
- The AUSFTA requires a review or proceeding to be conducted at least every four years. In our view, this does not necessarily require a periodic review; a process which allows an application to be made at any time is also consistent with the AUSFTA. However, if there is a determination to allow an exemption, any interested party should be able to apply ... for a review of the determination after a period of time (up to a maximum of four years) if the circumstances which gave rise to the determination change.<sup>19</sup>
- 5.30 The Committee believes there are two separate issues to be considered. There is a requirement for a review (covering existing and proposed exceptions) which must be held at least every four years. The Committee also believes there should also be a mechanism that allows for *ad hoc* exceptions to be granted in the intervening period between reviews.

### *Ad hoc* reviews

- 5.31 Given the rapid pace of technological change and innovation, the Committee considers that up to a four year wait to seek a particular exception or seek to have an exception removed would be difficult for all parties. As the Flexible Learning Advisory Group (FLAG) noted in relation to the education field:

The range, nature, function and impact of TPMs will expand quickly in the future. ...To allow copyright owners to use access controls against the interests of educational interests in period pending the next review could result, in cases where a new exception is subsequently granted, in access being

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<sup>19</sup> Australian Copyright Council, *Submission No. 7*, p. 9.



denied to works and information to many thousands of Australian students without any compensating benefits to the copyright owner. ... Further, if a new exception is allowed in an overseas market there needs to be the flexibility (where appropriate) to implement a similar exception in Australia rather than waiting years for the next review.<sup>20</sup>

5.32 The AGD advised:

In the Department's view, this obligation does not prevent subsequent reviews or proceedings from being conducted at any time to identify more exceptions, provided any exceptions so identified are reviewed at least every four years.<sup>21</sup>

5.33 Continuous access to a process for granting exceptions would be of benefit in allowing a much quicker response time by the appropriate authorities. This would be similar to the system operating in the United Kingdom, whereby people unable to make non-infringing use of material 'may complain to the Secretary of State, who may then 'give directions' ...to ensure that copyright owner makes available to the complainant the means of carrying out the permitted act'.<sup>22</sup>

5.34 The Committee is attracted to a system whereby an individual or organisation may, at any time, apply to the Attorney-General seeking an exception to circumventing a TPM. That request could then be examined by the AGD (an administrative review) and a recommendation made to the Attorney-General. It would be necessary, in such cases, for there to be public notification of the request for an exception and for other interested stakeholders to be given an opportunity to comment on the proposal.

5.35 It should only be possible for a request for a specific exception to be made once in the intervening period between the major reviews, unless new and compelling information emerges after the initial consideration. It would be sensible if such *ad hoc* requests to the Attorney General are not made in the six months preceding and immediately following the major four year review.

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20 FLAG, *Submission No. 34*, pp. 17-18. Similar concerns were also expressed by the Australian Vice-Chancellors' Committee (AVCC), *Submission No. 53*, p. 22.

21 AGD, *Submission No. 52*, p. 13.

22 Ms Kimberlee Weatherall, *Submission No. 38*, p. 17.

- 5.36 To ensure equal treatment for all stakeholders, requests for removal of an exception should also be available through this same procedure and on the same terms.

### **Recommendation 35**

- 5.37 **The Committee recommends that the Attorney-General consider *ad hoc* requests for exceptions under the TPM liability scheme according to a statutorily defined process.**

### **Wider review**

- 5.38 In addition to the facility of *ad hoc* requests, and to meet the requirement of Article 17.4.7(e)(viii), the Committee believes it would be appropriate for a wider examination of existing and proposed exceptions together with an assessment of the process to be conducted every four years, by the Attorney-General's Department.
- 5.39 Given the resources that would need to be devoted to such a review, the Committee believes that every four years would be adequate for such a review, and certainly no more frequently than every three years.
- 5.40 The Committee considers that it will be necessary to have a well-defined and clear process for this review, involving as much public comment and transparency of process as possible. The Committee would encourage the Department to consider an approach along the following lines:
- Phase 1: publicizing of review and requests for written submissions addressing either requests for additional exceptions or requests for existing exceptions to be revoked
  - Phase 2: Publication of all material received, and a period in which comment on other submissions might be made
  - Phase 3: Public consultations (public hearings etc)
  - Phase 4: Post-hearing – period for further written comment on proposals
  - Phase 5: Evaluation by the Attorney-General's Department and recommendation to the Attorney-General.
  - Phase 6: Public notification of the findings of the review.

**Recommendation 36**

- 5.41 **The Committee recommends that existing and proposed exceptions be reviewed every four years through a statutorily defined, public administrative review conducted by the Attorney-General's Department.**

**Exceptions via primary legislation or through regulation?**

- 5.42 The legislative process can be quite time consuming and slow to respond to changing circumstances. It can take many months (or years) for legislation to be drafted, introduced into Parliament, subject to parliamentary scrutiny and perhaps amendment, before receiving royal assent and becoming law.
- 5.43 The Australian Copyright Council (ACC) argued against exceptions be given effect by amendments to the Copyright Act:
- legislative exemptions are inappropriate given the rapid changes in technology, and changes in the way technology is used in the protection and distribution of copyright material. If the justifications for an exemption disappear, the exemption should be removed, but this can be difficult if it is provided by legislation.<sup>23</sup>
- 5.44 The AGD indicated that it had not yet formulated a final view, but that they thought implementing exceptions through regulation provided flexibility and avoided time delays.<sup>24</sup>
- 5.45 The Committee agrees with this view, and does not support exceptions granted under Article 17.4.7(e)(viii) being included in primary legislation. The Copyright Act should set the general policy parameters, approach and factors to be considered in any further exceptions review process. It would be unnecessarily time consuming to have those exceptions then proposed as amendments to the primary legislation. Rather, the Committee believes that such exceptions should be introduced through subordinate legislation, in the form of legislative instruments.

23 ACC, *Submission No. 7*, p. 9.

24 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 37.

- 5.46 Subordinate legislation is still subject to parliamentary scrutiny, but would have the advantage of being able to be made in a much shorter time frame, once the deciding authority has made a determination. Such subordinate legislation would be available to the public, though the on-line Federal Register of Legislative Instruments.<sup>25</sup>

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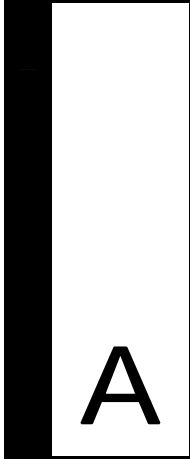
**Recommendation 37**

- 5.47 **The Committee recommends that any exceptions to the liability regime under Article 17.4.7(e)(viii) should be promulgated as subordinate legislation, rather than through amendments to the *Copyright Act 1968*.**

**Hon Peter Slipper MP  
Chairman**

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25 See: [www.frli.gov.au](http://www.frli.gov.au).



## Appendix A: List of Submissions

- 1 Professor Joshua Gans
- 2 Mr James Cameron
- 3 Mr Jiri Baum
- 4 Mr Geoff Russell
- 5 Mr Eric Lindsay
- 6 Ms Janet Hawtin
- 7 Australian Copyright Council
- 8 Mr Andrew Lang
- 9 Australian Taxation Office
- 10 International Intellectual Property Alliance
- 11 Mr Danny Yee
- 12 Viscopy
- 13 Cybersource Pty Ltd
- 13.1 Cybersource Pty Ltd (supplementary)
- 14 Australian Broadcasting Corporation (ABC)
- 15 Intellectual Property Committee, Business Law Section, Law Council of Australia
- 16 Copyright Agency Limited
- 17 Open Source Industry Australia Limited

- 18 National Gallery of Australia
- 19 Vision Australia Information and Library Service
- 20 Australian Government Libraries Information Network
- 21 TAFE Libraries Australia
- 22 Queensland Parliamentary Library
- 23 Mr Alex Andrews
- 24 Department of Parliamentary Services, Parliament of Australia
- 25 Australian Visual Software Distributors Association Ltd
- 25.1 Australian Visual Software Distributors Association Ltd (supplementary)
- 26 The University of Southern Queensland
- 27 CONFIDENTIAL
- 28 National Library of Australia
- 29 Professor Brian Fitzgerald & Mr Nicolas Suzor
- 29.1 Professor Brian Fitzgerald (supplementary)
- 29.2 Professor Brian Fitzgerald & Mr Nicolas Suzor (supplementary)
- 30 Linux Australia
- 30.1 Linux Australia (supplementary)
- 31 Northern Territory Department of Justice
- 32 Australian Record Industry Association
- 32.1 Australian Record Industry Association (supplementary)
- 33 CONFIDENTIAL
- 34 Flexible Learning Advisory Group
- 35 NSW Attorney-General's Department
- 36 Electronic Frontiers Australia Inc
- 36.1 Electronic Frontiers Australia Inc (supplementary)
- 37 Special Broadcasting Services Corporation

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- 38 Ms Kimberlee Weatherall
  - 39 Australian Federation Against Copyright Theft
  - 39.1 Australian Federation Against Copyright Theft (supplementary)
  - 40 Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education, Training and Youth Affairs
  - 40.1 Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education, Training and Youth Affairs (supplementary)
  - 41 Business Software Association of Australia
  - 41.1 Business Software Association of Australia (supplementary)
  - 42 AUUG Inc
  - 43 Interactive Entertainment Association of Australia
  - 43.1 Interactive Entertainment Association of Australia (supplementary)
  - 44 Office of Film and Literature Classification
  - 45 Ms Robin Wright
  - 46 Australian Institute of Aboriginal and Torres Strait Islander Studies
  - 47 Supporters of Interoperable Systems in Australia
  - 48 Department of Education, Science and Training
  - 48.1 Department of Education, Science and Training (supplementary)
  - 49 Australian Digital Alliance and the Australian Libraries' Copyright Committee
  - 49.1 Australian Digital Alliance and the Australian Libraries' Copyright Committee (supplementary)
  - 50 ACT Government
  - 51 Queensland Government
  - 52 Commonwealth Attorney-General's Department

- 52.1 Commonwealth Attorney-Generals' Department  
(supplementary)
- 52.2 Commonwealth Attorney-Generals' Department  
(supplementary)
- 53 Australian Vice-Chancellors' Committee
- 54 Australian Information and Communications Technology in  
Education Committee
- 55 Australian Film Commission
- 56 Department of Communications, Information Technology and  
the Arts
- 57 Department of Family and Community Services
- 58 Western Australian Department of the Premier and Cabinet  
and Department of Justice
- 59 Dr Anne Fitzgerald
- 60 Mr Keith Barrington
- 61 CONFIDENTIAL
- 62 Mr Steven Xuereb
- 63 States and Territories Copyright Group
- 64 Mr Darryn Wiley





## Appendix B: List of Witnesses

**Monday, 14 November 2005 – Sydney**

**Australian Copyright Council**

Ms Elizabeth Baulch, Executive Officer and Principal Legal Officer

**Copyright Agency Limited**

Mr Michael Fraser, Chief Executive

Ms Zoe Rodriguez, Lawyer

**Australian Record Industry Association**

Mr Stephen Peach, Chief Executive Officer

**Australian Visual Software Distributors Association Ltd**

Mr Simon Bush, Chief Executive Officer

**Business Software Association of Australia**

Mr Maurice Gonsalves, Legal Representative

Ms Vanessa Hutley, Alternate Director

Ms Sarah Kaiser, Director

**Australian Federation Against Copyright Theft**

Ms Adrienne Pecotic, Executive Director

**Open Source Industry Australia Ltd**

Mr Brendan Scott, Director

**Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education Training and Youth Affairs**

Ms Delia Browne, National Copyright Director

**Special Broadcasting Service Corporation**

Ms Julie Eisenberg, Head of Policy

Ms Sally McCausland, Senior Lawyer

**Individuals**

Professor Brian Fitzgerald

Dr Anne Fitzgerald

**Tuesday, 15 November 2005 – Melbourne****Supporters of Interoperable Systems in Australia**

Mr Jamie Wodetzki, Spokesman

**Flexible Learning Advisory Group, Australian Flexible Learning Framework**

Ms Kate Fannon, Project Manager, Research and Policy Advice

Ms Anne Flahvin, External Legal Advisor

**Cybersource Pty Ltd**

Mr Steven D'Aprano, Operations Manager

Mr Ben Finney, Senior System Administrator and Developer

**Individuals**

Ms Kimberlee Weatherall

Ms Robin Wright

**Intellectual Property Committee, Business Law Section, Law Council of Australia**

Dr David Brennan, Member

Dr Warwick Rothnie, Member

**Vision Australia Information and Library Service**

Mr Tim Evans, General Manager, Business Enterprises

Mr Michael Simpson, General Manager, Policy and Advocacy

**Electronic Frontiers Australia Inc**

Mr Dale Clapperton, Board Member and Convenor

Mr Andrew Pam, Board Member

**Monday, 28 November 2005 – Canberra****Department of Parliamentary Services, Parliament of Australia**

Ms Hilary Penfold QC, Secretary

Ms Roslynn Membrey, Assistant Secretary, Library Resources and Media Services, Parliamentary Library

Ms Mary Anne Neilsen, Acting Director, Information and Research Services, Parliamentary Library

**Australian Vice-Chancellors' Committee**

Professor Roger Dean, Member

Ms Anne Flahvin, External Legal Adviser

Mr Conor King, Director, Policy and Analysis

**Department of Communications, Information Technology and the Arts**

Mr Simon Cordina, General Manager, Creators Rights and Access Branch

**Australian Digital Alliance and Australian Libraries' Copyright Committee**

Ms Sarah Waladan, Executive Officer, ADA, and Copyright Adviser, ALCC

**Monday, 5 December 2005 – Canberra****National Gallery of Australia**

Ms Delma Volker, Chief Librarian

Ms Leanne Handreck, Acting Manager, Imaging Services

**National Library of Australia**

Ms Jasmine Cameron, Assistant Director-General, Executive and Coordination Support

Ms Somaya Langley, Digital Preservations Officer

**Department of Education, Science and Training**

Dr Evan Arthur, Group Manager, Innovation and Research Systems Group

Ms Margot Bell, Director, Innovation and Research Systems Group

Mr Philip Crisp, Special Counsel, Australian Government Solicitor

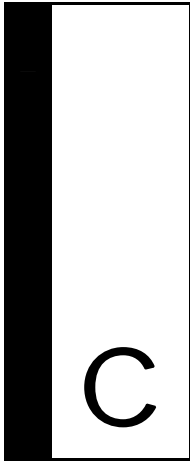
**Attorney-General's Department**

Ms Helen Daniels, Assistant Secretary, Copyright Law Branch

Mr Mark Jennings, Senior Counsel, Office of International Law

Mr Peter Treyde, Principal Legal Officer, Copyright Law Branch

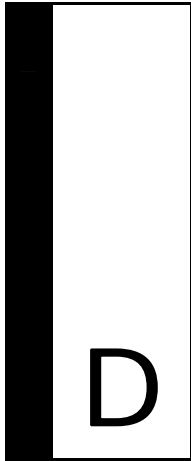
Ms Pam Foo, Senior Legal Officer, Copyright Law Branch



## Appendix C: List of Exhibits

- 1 Dunt, E, Gans, J and King, S, *The Economic Consequences of DVD Regional Restrictions*, 19 September 2001 (provided by Professor J Gans)
- 2 Interactive Entertainment Association of Australia, *Video and Computer Game Piracy – FACTS*, and *Computer and Video Game Technological Protection Measures – FACTS*, 8 November 2005 (provided by Interactive Entertainment Association of Australia)
- 3 *Spyware Sony seem violate copyright*, (copy of online article dated 10 November 2005, from [www.webwereld.nl/articles/38285](http://www.webwereld.nl/articles/38285)) (provided by Cybersource Pty Ltd)
- 4 Copies of on-line articles provided by Cybersource Pty Ltd:
  - Krebs, B, *DHS Official Weighs in on Sony*, (from [www.blogs/washingtonpost.com](http://www.blogs/washingtonpost.com))
  - Leyden, J, *First Trojan using Sony DRM spotted* (from [www.theregister.co.uk](http://www.theregister.co.uk)), 10 November 2005
  - *Backdoor.IRC.Snyd.A*, from [www.bitdefender.com](http://www.bitdefender.com), 11 November 2005
- 5 *Finnish/EU Copyright Virus FAQ*, 10 November 2005 (provided by Cybersource Pty Ltd)
- 6 Burgess, M and Evans, L, *Parallel Importation and Service Quality: An Empirical Investigation*, July 2005 (provided by the Intellectual Property Committee of the Business Law Section of the Law Council of Australia)

- 7 *Contemporary Learning: Learning in an Online World* (provided by the Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education, Training and Youth Affairs)
- 8 BSA and IDC, *Expanding Global Economies: The Benefits of Reducing Software Piracy*, 2 April 2003 (provided by the Business Software Association of Australia)
- 9 BSA and IDC, *Second Annual BSA and IDC Global Software Piracy Study*, May 2005 (provided by the Business Software Association of Australia)
- 10 *Microsoft Windows Genuine Advantage Program and Product Activation* (provided by the Business Software Association of Australia)
- 11 Electronic Frontier Foundation, *DMCA Triennial Rulemaking: Failing the Digital Consumer* (provided by Electronic Frontiers Australia)



## Appendix D: Article 17.4.7 of the Australia-United States Free Trade Agreement

7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

- (i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or
- (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
  - (A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
  - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
  - (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

(b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.

(c) In implementing sub-paragraph (a), neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing sub-paragraph (a).

(d) Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.

(e) Each Party shall confine exceptions to any measures implementing sub-paragraph (a) to the following activities, which shall be applied to relevant measures in accordance with sub-paragraph (f):

- (i) non-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 the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
- (ii) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorisation for such activities, to the extent necessary for the sole purpose of identifying and analysing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
- (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a



- technology, product, service, or device that itself is not prohibited under the measures implementing sub-paragraph (a)(ii);
- (iv) non-infringing good faith activities that are authorised by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;
  - (v) non-infringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;
  - (vi) lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes;
  - (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; and
  - (viii) non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.
- (f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (e) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:
- (i) any measures implementing sub-paragraph (a)(i) may be subject to exceptions with respect to each activity set forth in sub-paragraph (e);
  - (ii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions with respect to activities set forth in sub-paragraph (e)(i), (ii), (iii), (iv), and (vi); and (iii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that protect any

copyright, may be subject to exceptions with respect to the activities set forth in subparagraph (e)(i) and (vi).