Ms Helen Daniels
Assistant Secretary
Copyright Law Branch
Attorney-General's Department
BARTON ACT 2600

21 September 2006

Dear Ms Daniels,

I wish to express my qualified support for the new exposure draft legislation that the Attorney-General's Department has prepared in relation to Australia's remaining obligations under the Australia-United States Free Trade Agreement (AUSFTA). In my submission I will address the issue of compliance with the provisions of the AUSFTA in regards to article 17.4.7 and the access right. I will also make comment on the policy issues relating to the access right.

AUSFTA Compliance

At the outset I wish to make clear that the views expressed in this section are not my final views, but merely my preliminary views on AUSFTA compliance.

Australia has always made a good faith attempt to comply with its treaty obligations. However, in my view there is an argument that the draft legislation does not comply with the terms of the AUSFTA. Whether this argument is to be regarded as persuasive, falls to a consideration of the views expressed by Mr Mark Jennings, Senior Counsel, Office of International Law of the Attorney-General's Department in his testimony to the House of Representatives Legal and Constitutional Affairs Committee in 2005.[1] It would appear that the views of Mr Jennings has informed the drafting of the proposed legislation in so far as the definition of an access control technological protection measure is confined to operation in connection with copyright protection.

In testimony before the LACA Committee, Mr Jennings stated:

> 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.
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> 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.[2]

[1] Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, pp25-26 Legal and Constitutional Affairs Committee Review of Technological Protection Measures Exceptions.
[2] Ibid.

The view of Mr Jennings is important in that it influenced the LACA Committee to recommend that the definition of technology protection measures (TPMs) should require a direct link between access controls and copyright protection.[3] It would appear that this view (the narrow view) has also influenced the drafting of the proposed legislation. In his testimony Mr Jennings argued that the broader context of article 17.4 supports a reading that would restrict the rights discussed in the chapeau only to copyright rights. In support of this proposition it was suggested that article 17.4 refers only to copyright. It was also suggested that the definition of an effective technological measure (ETM) refers to technology that protects any copyright, as opposed to any right.

Article 17.4.7

The text of the chapeau of article 17.4.7 provides:

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 ……

The conjunctive "and" joins together two concepts. The first is the exercise of intellectual property rights and the second is an authorisation right. It would appear to be the view of the Attorney-General's Department that the authorisation right is to be limited only to authorising acts that relate to copyright. That is, if the act does not involve something that includes a right comprised within the copyright, then it does not fall within the parameters of the authorisation right contained within article 17.4.7.

However, whilst the conjunctive joins together the two concepts discussed above it does not equate them with each other. The authorisation right is not necessarily limited in its scope by being joined together with the term "rights". As will be discussed below, "authorisation" is an essential component of the operation of access controls. The chapeau should also be read together with the definition of effective technological protection measure in article 17.4.7(b).

Effective Technological Protection Measure

The definition of effective technological protection measure in the AUSFTA is:

(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.

The AUSFTA uses the term ETM instead of TPM to mirror the language in the WIPO Copyright Treaty (WCT). There are four elements to the AUSFTA definition in that an ETM is (i) a technology, device or component that (ii) in the normal course of its operation, (iii) controls access to a protected work, performance, phonogram or other

[3] Legal and Constitutional Affairs Committee Review of Technological Protection Measures Exceptions Report at paragraph 2.55.

protected subject matter, (iv) or protects any copyright. The fact that the fourth element "protects any copyright" is prefaced by the disjunctive "or" indicates a clear delineation between the access right referred to in the third element and the copyright protection referred to in the fourth element. The interpretation by Senior Counsel Mark Jennings ignores this delineation between the two elements.

The first element of the definition of an ETM also raises the possibility that if an ETM in the normal course of its operation controls access or protects any copyright, it might still be an ETM even if it does something else outside of the normal course of its operation.

The draft legislation

The definition of an access control technological protection measure (ACTPM) in the draft legislation is:

> ***access control technological protection measure*** means a device, product or component (including a computer program) that:
>
> (a) is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and
>
> (b) is designed, in the normal course of its operation, to prevent or inhibit the doing of an act:
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> (i) that is comprised in the copyright; and
>
> (ii) that would infringe the copyright;
>
> by preventing those who do not have the permission of the owner or exclusive licensee from gaining access to the work or other subject-matter.
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> Note: To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not an access control technological protection measure.

It is notable from this definition that there is a direct link between the access control and copyright protection. Given the discussion above, it is clear that the AUSFTA required that the TPM control access to a copyrighted work in the normal course of its operation. In contrast the draft legislation requires that the access control protect copyright in the normal course of its operation by preventing access. This is a narrow construction of the article 17.4.7 obligation and, as will be discussed below, it would appear to deny the copyright owner the full scope of the access right contemplated by the AUSFTA. The degree of inconsistency between the ACTPM and the AUSFTA ETM will likely be highlighted if and when the new provisions are brought before a court. This is a particularly crucial issue because if a court further reads down the ACTPM once it is brought into the Copyright Act, particularly given the constitutional issues raised by Kirby J in *Stevens v Sony*,[4] then the issue of AUSFTA compliance may be further enlivened.

[4] *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/case/cth/HCA/2005/58.html>.

The Access Right

Before considering the question of AUSFTA compliance it is necessary to consider the breadth of what might be considered the access right and its overall position within copyright law. This is a necessary step because there is a variety of devices and technologies that might conceivably be considered to be access controls and there is a risk that lawyers and commentators might have very different understandings of the term "access right" thereby obscuring any meaningful debate on the topic.

The first issue to consider is how the access right would exist within copyright law. In my view the access right under the AUSFTA, and arguably under the DMCA, is to operate as a neighbouring and related right to copyright. That is, it would exist within copyright law in the same way that performer's rights and moral rights currently exist. To this end, the existence of an access right would be dependant upon copyright subsisting in the work or other subject matter for which protection is sought but the operation of the access right would be almost independent of copyright.

That there may have been no coherent view as to how the access right should function as a neighbouring right to copyright in the digital era is not helpful to my argument but neither is it fatal. The emergence of neighbouring rights is invariably incremental and indeed there may come a time where the encroachment of the neighbouring right upon the traditional territory of copyright law is so complete as to the two types of rights ceasing to be meaningfully distinct from one and another. For example, there are aspects of performer's rights which are almost indistinct from copyright rights such as the right against unauthorised broadcasting.

Having given consideration to how an access right would exist within the realm of copyright law it is pertinent to give consideration as to how it might function as a general legal concept. In this regard, the concepts of access and authorisation are fundamentally linked to each other. It is this link that the draft legislation both obscures and reads down. An access control is fundamentally concerned with giving technical effect to the desired level of authorised use that a copyright owner wishes a user to have with respect of his product. That access may be withheld in order to prevent illegitimate copying is a central aspect to the authorisation right but it does not constitute the entire breadth of the right. Copying remains of fundamental importance in the digital era but the ability to perceive content in the digital environment is where the fundamental market value of "copyright" exists. Without this market value, copyright law would be uncontroversial.

The viewing or listening right is the ability to control whether or how a user perceives a particular work or subject matter. This is the substance of what the access right in its broader reach could legitimately capture. It follows that when we speak of an access right, what we are really concerned with is an authorization right at law which is given practical effect by access controls.

The type of authorisation right that US content industries would have been seeking would probably have been broader. I would speculate that such an authorisation right might have included acts that relate directly to copyright protection but would also include non-copyright acts such as by-passing region coding and also temporarily accessing material that has been locked off by a TPM.

Having discussed both the access right within copyright law and its operation as a basic legal concept, I turn now to the type of technologies and devices that might be considered to be access controls. Kimberlee Weatherall has written a quite insightful consideration of the draft legislation on her blog and I rely on her discussion of various access controls in detailing my argument on this point. Ms Weatherall lists six types of potential access controls; (i) an access code or password system for an online database, (ii) the content scrambling system (CSS), (iii) Apple's Fair Play system, (iv) "a system which would allow only authorised and authenticated copies of games to be used in an online multiplayer gaming environment", (v) the program from the Lexmark case and (vi) 'the legacy data issue.'[5]

To this list I would add the example of a DVD which has two levels of content, content A and content B, where content A is readily accessible to a lawful purchaser but content B can only be accessed after the purchaser goes online and buys an access key. For the purposes of this example let us assume that the purchaser was made aware of the different levels of access and their requirements in the terms of sale. If the purchaser circumvents the access control to merely view content B this neither is unlikely to be a violation of the draft legislation because the DVD is not an infringing copy nor is an infringing copy made during the viewing. The unauthorised viewing would not likely be captured by section 111B(2)(b) of the Copyright Act because the copy of the DVD is already in the lawful possession of the purchaser and none of the exclusive rights in section 86 are performed by the purchaser.

It is clear that there are a number of devices and technologies that might conceivably be regarded as access control measures. These devices are employed by copyright owners to protect their investment in content and to successfully pursue their business operations in the digital environment. Whilst it is unnecessary to consider policy arguments at this stage, it is difficult to see how a free trade agreement, negotiated with the concerns of industry in mind, could not have intended to protect these investments. In this regard, I think it uncontroversial to note the influence of industry upon the Office of the US Trade Representative (USTR)[6] and also that the Australian Government would have been aware of the concerns of industry when the AUSFTA was signed. However, this point does not advance the legal interpretation of the text.

AUSFTA Compliance

As discussed above Mr Jennings argued that the broader context of article 17.4 supported a reading that would restrict the rights discussed in the chapeau only to copyright rights. In support of this proposition he suggested that article 17.4 refers only to copyright and that the definition of an ETM refers to technology that protects any copyright, as opposed to any right.

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[5] Kimberlee Weatherall, "The TPM (OzDMCA) Exposure Draft: Some comments" available online at < http://weatherall.blogspot.com/> Monday 18 September 2006.

[6] See further Peter Drahos, "Securing the Future of Intellectual Property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid,' *Case Western Reserve Journal of International Law* Volume 36 No.1 Winter 2004.

As a necessary first step we should consider what may be gained by demonstrating that article 17.4 refers to rights other than copyright. The answer to this question can be determined in the negative. If article 17.4 is concerned only with copyright then the authorisation right can be confined to operation only in relation to copyright. However, if article 17.4 does refer to rights other than copyright it opens up the possibility that the authorisation right contemplated in relation to access in the chapeau is broader in its scope than just ordinary copyright rights. It would then be pertinent to consider what this discovery would prove. It would prove that there is scope for constructing the authorisation right as applying to acts other than those involving only rights comprised in copyright. However, it would also undermine the basis for the narrow construction of the authorisation right thereby questioning whether the draft legislation is fully AUSFTA compliant. If there is no sound basis at law for the narrow view, then regardless of any compelling policy arguments in its favour, the broader construction, for which there are also some very compelling policy arguments, should be preferred.

In determining the issue of compliance there are two steps that must be undertaken: the first is to analyse the definition of effective technological measure and the second is to either find reference in article 17.4 to rights other than those normally considered copyright rights or find textual evidence that 17.4 is to be considered as separate from copyright.

As discussed above, there is a clear delineation in the definition of ETM between a device that controls access to a protected work or subject matter and a device that protects any copyright. This would appear to set a very simple test for determining whether a TPM can be regarded as an ETM for the purposes of the AUSFTA. That is, to be an ETM under the AUSFTA the device or technology need only control access to the work or subject matter. There is no further requirement that the device or technology protect copyright by preventing access. The significance of this further requirement, which is imposed by the draft legislation, is that it narrows the range of devices or technologies that might be regarded as an ACTPM under the Copyright Act.

Indeed, the ACTPM in the draft legislation is narrower in its scope than the ETM in the AUSFTA. On a prima facie level this is non-compliance with the terms of article 17.4.7 of the AUSFTA. It follows that if the definition of an ACTPM is unduly narrow then the authorisation right itself, which corresponds to the breadth of devices that may be regarded as an ACTPM, is also narrower than required by the AUSFTA. Whether this is permissible depends upon the legal foundation of the narrow view which has informed the draft legislation.

The foregoing analysis of the AUSFTA definition of an ETM does not appear to support the basis for the narrow view. From my analysis of the definition of an ETM it is clear that there is a separation between the access right and copyright protection. Accordingly, it is difficult to see how Mr Jenning's contention that the definition of an ETM refers to technology that protects any copyright, as opposed to any right can be supported.

This still leaves for consideration the contention that article 17.4 refers only to copyright. There is textual evidence that the provisions of article 17.4 are to be

considered as separate from copyright. Indeed, even if 17.4 were to be read in isolation, article 17.4.7(d) clearly separates civil and criminal liability under article 17.4.7 from liability for infringement under each Party's copyright law. That is, liability under 17.4.7 is a separate issue from liability under copyright law. This is a very clear indication that liability under article 17.4.7 need not be directly related to copyright infringement but can attach to a violation of the access right.

It is possible that there is an argument that article 17.4.7(d) should be construed quite strictly so as to mean only that liability under 17.4.7 does not depend upon actual copyright infringement. But at its strongest point this argument does not defeat my overall view of 17.4.7 nor does it advance the narrow view. If anything, it weakens one of the fundamental assumptions of the narrow view – that there be a direct connection between copyright protection and the employment of the access control. For, it does beg the question of how a legal measure can be directly connected to copyright protection if liability for its violation does not depend upon copyright infringement. The connection between the legal measure (the access control right) can only be indirectly connected to copyright protection. Ultimately, the strict view of article 17.4.7(d) does not weaken the neighbouring rights argument and there is nothing to compel the strict view when the terms of 17.4.7(d) are quite plain. That is, a violation of a measure implementing 17.4.7 is a separate civil and criminal offence and independent of any infringement that might occur under the treaty party's copyright law.

There is also some evidence, though admittedly less compelling, that article 17.4 refers to rights other than copyright. In this context, article 17.4.10 refers articles 17.4, 17.5 and 17.6, of which 17.6 is concerned with performer's rights. This is significant because performer's rights are not copyright, they are a neighbouring and related right. Similarly, if 17.4.7 is read within the context of Chapter 17 then this would necessitate consideration of the Berne Convention and the WIPO Performances and Phonograms Treaty (WPPT).

The Berne Convention includes article 6bis which is concerned with moral rights. Like performer's rights, moral rights are not copyright, but rather they are a related and neighbouring right to copyright. This would give impetus to the suggestion that the access right in article 17.4.7 is not one which stems directly from copyright but is rather a neighbouring and related right. That is, as with moral rights, and to an extent performer's rights, there is a pre-condition that before the right can exist there must be copyright in some material, but the exercise of the right is not directly tied to copyright infringement.

On the basis of the reasoning above I am of the view that the narrow view, which presumably has informed the draft legislation, is flawed. It is clear that the ACTPM in the draft legislation is narrower than the ETM in the AUSFTA. It follows then that if the ACTPM in the former is narrower than contemplated by the AUSFTA that the authorisation right in the latter is also not given its proper effect. I have not dealt with the policy arguments in favour of the narrow view because if the narrow view can be undermined at law then there is no reason to consider policy. But as this is merely my preliminary view it does not preclude that the article 17.4.7 implementation may be a contest between two competing legal interpretations to be decided upon on policy grounds.

In my view the proper construction of article 17.4.7 is that the access right operates as a neighbouring and related right to copyright. That is, the proper implementation of 17.4.7 would involve giving effect to an access right that depends upon there being copyright in the underlying material but whose operation is almost independent and different in its nature to copyright. Put simply, an access right would be a right to prevent access to copyright protected material, but would not depend upon the user infringing copyright nor upon the access control itself being designed to prevent or inhibit copyright infringement in the normal course of its operation.

Policy Issues

In my view, extending the scope of the access right without any corresponding competition law safeguards would be a folly. The potential problem that this would pose has been demonstrated in the United States with the series of cases relating to aftermarket industries and the DMCA. These cases show the potential for copyright laws to be used to stifle competition. Within this context, I think it perfectly understandable and laudable from a policy perspective to prefer the narrow view of the access right where no corresponding competition law safeguards can be found.

However, this is in some respects an instance of negative policy-making rather than policy that is pro-active and designed to support the legitimate aspirations of industry. Accordingly, from a policy perspective the AUSFTA implementation might be seen as a half-way measure rather than a complete end in itself. As digital markets develop and products and uses diversify we will need to revisit these issues. I think it better to have a neighbouring right that is governed by competition law principles than to have a clear law that suits the technology we have today but runs the risk of being rapidly outmoded.

I have had the advantage of reading the submission of Professor Brian Fitzgerald and others in draft form. I would join with them in expressing concern in relation to the market segmentation notes. It is a valid point that few if any TPMs would be employed for a sole purpose rather than for a primary purpose. I would go further and suggest that it is necessary to define what is meant by the term "market segmentation." The risk is that the term could mean different things to different people. If the term is directed towards region coding then it is usefully employed. But that would be because region coding does not sensibly segment markets.

There is nothing intrinsically wrong with market segmentation. Different customers have different capacities to pay and copyright law may be usefully employed in protecting business models based on market segmentation because meaningful copyright protection is central to the success of the emerging market models. Similarly, the type of right that the copyright owner is now seeking to exploit in the digital environment, a listening or viewing right, might not fall easily into the traditional categories of copyright.

In general access controls do not of themselves directly prevent copyright infringement. The most fundamental purpose for which an access control measure is implemented is to protect a business model that is based on market segmentation. They do this by preventing unauthorised access to copyright protected material (or

other materials) and as an incident to that they may prevent or inhibit copyright infringement. To talk of a direct link between controlling access and protecting copyright does not make sense given the rights that we currently grant to copyright owners.

For example, a user circumventing an access control to engage in a temporary unauthorised viewing of a DVD would be unlikely to be an infringement under the draft legislation. Simply viewing or listening to copyright protected works is unlikely to be an infringement unless a copy is made. But in the current market it is the listening right or the viewing right that is most important. This was the right that would have been protected for copyright owners under the AUSFTA.

In a free market copyright owners may well wish to give different users access to different levels of content as per their willingness to pay. This market freedom deserves to be protected. It should also be governed by competition law but it is worth protecting because copyright does not exist in a vacuum. Rather copyright law and practice is so controversial because of its role and function in the marketplace. In my view it stands to reason that the law should protect market freedom.

If the copyright owners over protect the market will react accordingly and the owners will need to re-evaluate their business models and conduct. If copyright law is too narrow in its scope then there is possibly less scope for owners to engage with the market and we may see less diversity in the types of copyright and related products that are offered to consumers.

Having read the other parts of the draft legislation I support them and I commend you and your Branch for the hard work that has undoubtedly gone into preparing the proposed legislation.

I trust that my comments will be of assistance.

Kind regards,

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