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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.[1]

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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1 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. [2]

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.[3]

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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 (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'.[4] 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

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

to be maintained.[5] 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 [6]

5.12 This misunderstanding appears to have arisen because of the US process, where exceptions are granted for a specific period. [7] 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'.[8] 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 (accessed 17/01/2006).

> whether, in four years time, those resources will become unavailable.[9]

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'.[10]

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.[11]

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

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.[12]

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'.[13] 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.[14]

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.[15]

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.[16]

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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 be 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.[17]

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.[18]

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.**

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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.[19]

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

19 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.[20]

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.[21]

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 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'.[22]

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 be 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.[23]

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.[24]

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.

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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.[25]

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

25 See: www.frli.gov.au.