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House Standing Committee on Legal and Constitutional Affairs

Inquiry into technological protection measures (TPM) exceptions

Submission of NSW Attorney General's Department

October 2005

The NSW Attorney General's Department appreciates the opportunity to make this submission to the House Standing Committee on Legal and Constitutional Affairs on the issue of identifying additional exceptions to Article 17.4.7 of the Australia-United States Free Trade Agreement (AUSFTA). This submission is offered from the perspective of the NSW Attorney General's Department, which plays a key role in administering copyright law at the State level. This does not reflect a formal position of the NSW Government.

Article 17.4.7 of the AUSFTA constructs a liability scheme relating to the circumvention of technological protection measures. This liability scheme differs in important ways from the one currently in place under s 116A of the *Copyright Act 1968*. The Committee seeks submissions on the narrow issue of whether Australia should include in the new liability scheme any exceptions based on Article 17.4.7(e)(viii). The NSW Attorney General's Department submits that the new scheme should include all the exceptions currently found in s 116A. Without such exceptions, Article 17.4.7 will render moot the many "free uses" contained within the *Copyright Act*.

**The current regime under s116A of the *Copyright Act 1968***

Technological protection measures and circumvention devices entered the Australian legislative copyright scene with the introduction of the *Copyright Amendment (Digital Agenda) Act 2000*. Section 116A of the *Copyright Act* prohibits the distribution of circumvention devices (by sale, let, hire, import etc).

Two important and very broad exceptions to this overall prohibition are set out in subsections (2), (3) and (4) of section 116A. First, in subsection (2), the prohibition "does not apply in relation to anything lawfully done for the purposes of law enforcement or national security by or on behalf of" the Commonwealth, or a State or Territory. Second, in subsections (3) and (4), the prohibition does not apply so long as the use of the circumvention device is for a "permitted purpose". Subsection (7) explains that a permitted purpose is an act that is not considered an infringement of copyright under the following sections of the *Copyright Act*:

- 47D – reproducing computer programs to make interoperable products
- 47E – reproducing computer programs to correct errors
- 47F – reproducing computer programs for security testing
- 48A – copying by Parliamentary libraries for members of Parliament
- 49 – reproducing and communicating works by libraries and archives for users
- 50 – reproducing and communicating works by libraries or archives for other libraries or archives
- 51A – reproducing and communicating works for preservation and other purposes

- 183 – use of copyright material for the services of the Crown
- Part VB – reproducing and communicating works by educational and other institutions

The first exception recognises that copyright law must give way to law enforcement and national security concerns, and therefore rightly provides a broad exception for these purposes. The second exception appreciates that the *Copyright Act* balances the rights between copyright owners and users and specifies certain acts as non-infringing (eg the library reproducing an article for the purpose of research or study). In order for s 116A to target copyright infringement and not broadly prohibit access to works, the listed non-infringing acts are excluded from the section. Thus, libraries, governments and other institutions are not currently prohibited from using circumvention devices for certain non-infringing uses.

### **The new prohibition under Article 17.4.7 of the AUSFTA**

Article 17.4.7 of the AUSFTA differs from s 116A of the *Copyright Act* in certain fundamental ways, most of which are beyond the scope of this submission. First, Article 17.4.7(a)(i) penalises users (not just distributors) of circumvention devices. Second, the definition of “effective technological measures” is extraordinarily broad and encompasses measures that restrict access to material as well as prevent copyright infringement. Third, and relevant to this submission, fewer exceptions are listed in Article 17.4.7(e); thus, most of the exceptions that currently exist under s 116A of the *Copyright Act* will disappear.

The exceptions set out in Article 17.4.7(e) of the AUSFTA are more restrictive in two ways: First, fewer specific exceptions are listed; and second, some of the exceptions apply to the use but not the distribution of circumvention devices.

The following chart highlights the differences between the current exceptions and the regime mandated by the AUSFTA:

<b>Exceptions under the Copyright Act</b>	<b>Treatment in the AUSFTA</b>
Purposes of law enforcement and national security	Included as exception to both use and distribution
Reproducing computer programs to make interoperable products	Included as exception to both use and distribution
Reproducing computer programs to correct errors	Included but limited to an “appropriately qualified researcher” for “scrambling and descrambling information”
Reproducing computer programs for security testing	Included as exception to both use and distribution
Copying by Parliamentary libraries for members of Parliament	Not included
Reproducing and communicating works by libraries and archives for users	Not included
Reproducing and communicating works by libraries or archives for other libraries or archives	Not included
Use of copyright material for the	Not included

services of the Crown	
Reproducing and communicating works by educational and other institutions	Not included

The only manner by which the Commonwealth Government may introduce additional exceptions into the new regime is via Article 17.4.7(e)(viii), which brings us to the work of the Committee and the purpose of this submission. Sub-paragraph (viii) allows for additional exceptions for non-infringing uses of a work only if the following conditions are met:

- (i) the exception is limited to a particular class of works, performances, or phonograms;
- (ii) an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; and
- (iii) such review or proceeding must be held at least once every four years

Any exception that is introduced via this sub-paragraph (viii) only applies to the ban on use. Therefore, even if the Commonwealth Government makes the finding that further exceptions are needed, it will not apply to the distribution of circumvention devices. The problem with such a limited exception was well explained by Kimberlee Weatherall in her submission to the Senate Select Committee on the AUSFTA:

[I]n some cases, there is an exception for the user, but no exception which will allow someone else to supply them with the necessary device to implement their exception. This is nonsense. It means that an individual will only be able to use the defence if they can make the circumvention device themselves! For example, under Article 17.4.7(v), users may protect their privacy; they may circumvent TPMs to prevent their equipment collecting or disseminating personal information. But there is no exception under Article 17.4.7(e) and (f) to allow any party to supply circumvention devices to users for that purpose. Only computer geeks, it appears, can protect their privacy.<sup>1</sup>

Even if the Commonwealth Government reaches the conclusion that additional exceptions are needed, their inclusion would be rendered moot unless individuals can be supplied with the circumvention devices needed to unlock the technological protection measures.

### **Interests of the NSW Attorney General's Department**

The NSW Attorney General's Department plays a key role in administering copyright law at the State level. This Department manages all the rights and obligations of the NSW government as both a copyright owner and user. As such, this Department wishes to ensure that the State Government's rights are protected under the new liability scheme that is implemented further to the AUSFTA.

The new "paracopyright" provisions contained in Article 17.4.7 of the AUSFTA go well beyond existing copyright law and provide new legal remedies against

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<sup>1</sup> Kimberlee Weatherall, "Submission to the Senate Select Committee on the Australia-United States Free Trade Agreement" at 25.

individuals who circumvent effective technological measures. While it might be sound policy to strengthen the *Copyright Act* to deter copyright infringement, it is unsound policy to amend the *Copyright Act* to prohibit access to copyright materials for the purpose of non-infringing uses. But this is exactly what Article 17.4.7 accomplishes: it prohibits the use of a circumvention device—and therefore prohibits access to works—by those who, according to the *Copyright Act*, would not otherwise infringe the copyright. As one scholar remarked in a discussion of similar provisions:

[T]he effect of the anti-circumvention provisions is to effectively replace copyright protection with access controls. This eviscerates fair use rights such as the right to copy portions of work for research or study purposes, since the blunt instrument of technology can be used to prevent all copying, even that which copyright law currently permits.<sup>2</sup>

Technological protection measures lock up the copyright material and make it accessible only to those who first pay in advance. Prohibiting the use or distribution of circumvention devices for all purposes eliminates the “free uses” under the *Copyright Act*, from fair use to library use to government use.

The *Copyright Amendment (Digital Agenda) Act 2000* understands the power of technological protection measures to lock-up copyright material and therefore includes specific exceptions that preserve the free uses that the *Copyright Act* recognises. The AUSFTA, however, ignores most of these non-infringing uses and severely limits the list of exceptions. Furthermore, in some cases, the AUSFTA renders even the limited exceptions moot by extending them to the *use* of circumvention devices, but not their *distribution*.

In order to preserve the rights currently enjoyed by the NSW Government under the *Copyright Act*, the NSW Attorney General’s Department submits that all of the exceptions contained in s 116A of the *Copyright Act* should appear in Article 17.4.7 of the AUSFTA. Specifically, most relevant to the NSW Government, Article 17.4.7 should not apply to acts which would not constitute an infringement of the copyright in the work under sections 48A (copying by Parliamentary libraries for members of Parliament), 50 (reproducing and communicating works by libraries and archives for users), 51 (reproducing and communicating works by libraries and archives for users), 51A (reproducing and communicating works by libraries or archives for other libraries or archives) and 183 (use of copyright material for the services of the Crown).

Under Article 17.4.7(e)(viii), any additional exception introduced by Australia must meet certain criteria in addition to it being a non-infringing use, namely that the exception is limited to a particular class of works, and that an actual or likely adverse impact on those non-infringing uses is credibly demonstrated.

#### **Limited class of works**

The class of works to which these exceptions should apply is difficult to pinpoint for purposes of this submission. First, “class of works” is not defined in the AUSFTA and

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<sup>2</sup> Michael Geist, “Anti-Circumvention Legislation and Competition Policy” in *In the Public Interest: The Future of Canadian Copyright Law* (2005), 211-250 at 233.

it is therefore unclear how broad or narrow this phrase should be read. Second, the many departments within the NSW Government must be canvassed for an understanding of what type of works are most necessary to the services of the government, including the library and archives. Furthermore, although technological protection measures are not widely used in all classes of works, that will change and thus the exception may have to apply to a broader class of works than imagined today.

### **Likely adverse impact**

Because the new regime is not yet implemented, the best we can demonstrate is a “likely” rather than “actual” adverse impact on the non-infringing uses. In addition, because technological protection measures are not yet widely used by the print media, there will be little immediate impact on uses of newspapers, books, journals or reports. It is, however, only a matter of time when hard-copy formats are replaced with online or digital delivery. There will come a day in the near future when the daily newspaper is delivered online, password protected, available only to those who pay in advance. Once technological protection measures are used widely across all classes of works and media, there will be a significant adverse impact on the operations of the government, including all departments and libraries and cultural institutions that currently enjoy the protection of the *Copyright Act* in their non-infringing uses.

### **Conclusion**

Australia introduced the *Copyright Amendment (Digital Agenda) Act 2000* and s 116A just five short years ago. Section 116A appreciates the power of technological protection measures to lock-up and prevent access to materials. It therefore includes exceptions for certain non-infringing uses to fall outside of the prohibition on circumvention devices. These exceptions acknowledge that any “free use” allowed under the *Copyright Act* assumes unhindered access to the copyright material. Without access, there is no “free use”.

Now, with Article 17.4.7 of the AUSFTA, Australia proposes to broaden the reach of technological protection measures. Most of the exceptions contained in s 116 do not appear in Article 17.4.7. In order for “free use”—as allowed under the *Copyright Act*—to continue, Australia must include additional exceptions as permitted under Article 17.4.7(e). The NSW Attorney General's Department urges the Committee to consider additional exceptions to Article 17.4.7 that mirror those already contained in s 116A.

The Hon Peter Slipper MP, Chair  
House of Representatives Standing Committee on  
Legal and Constitutional Affairs  
Parliament House  
CANBERRA ACT 2600

Sent via email to [laca.reps@aph.gov.au](mailto:laca.reps@aph.gov.au)

Dear Mr Slipper

Please find enclosed a submission related to the Committee's inquiry of technological protection measures (TPM) exceptions and whether Australia should include additional exceptions based on Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement.

The NSW Attorney General's Department plays a key role in administering copyright law at the State level. The Department manages all the rights and obligations of the NSW Government as both a copyright owner and user. This submission, however, does not reflect a formal position of the NSW Government.

If you have any questions about the submission, please contact Alison Shames (phone (02) 9228 7735; email [alison\\_shames@agd.nsw.gov.au](mailto:alison_shames@agd.nsw.gov.au)).

Yours faithfully

Laurie Glanfield  
**Director General**