HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS

ATTORNEY-GENERAL'S DEPARTMENT – SUPPLEMENTARY SUBMISSION

The following responses represent the Attorney-General's Department's answers to questions 1, 2, 3, 5, 7, 8, 9, 10, 14 and 15 that were taken on notice from the Committee at the public hearing on Monday 5 December 2005. Responses to the remaining questions will be provided in a further supplementary submission to the Committee.

Questions on notice

1. At p.14 (para 54) of its submission, the Department discusses the meaning of 'particular class of works, performances and phonograms'.[1] It appears there is a possible inconsistency in Article 17.4.7 as the first paragraph of that article refers to measures used in respect of works, performances and phonograms, while the definition of 'Effective technological measure' extends to measures that control access to a protected work, performance, phonogram or other protected subject matter.

   - *In the Department's view, what is meant by the term 'other protected subject matter'?*

The term 'subject matter' is not defined in the Australia-United States Free Trade Agreement (AUSFTA). The *Copyright Act 1968* (Copyright Act) separates copyright material into 'Works' in Part III and 'Subject-matter other than Works' in Part IV. However, the meanings of these terms as used in the Copyright Act are not identical to their meanings in international intellectual property treaties.

The definitions of 'works, performances and phonograms' are found in international copyright treaties. The Berne Convention[2] on copyright defines 'works' as 'literary and artistic works'. This includes every production in the literary, scientific and artistic domain, dramatic or dramatico-musical works, choreographic works and entertainments in dumb show, musical compositions, cinematographic works, works of drawing, painting, architecture, sculpture, engraving and lithography, photographic works, works of applied art, illustrations, maps, plans, sketches and three-dimensional works.[3] These works fall within the categories of literary, dramatic, musical and artistic works (ie works) and cinematograph films (ie subject-matter other than works) under the Copyright Act.

[1] This question also touches on the issue of how to define a 'particular class'. The Department will discuss this issue in a second supplementary submission to be provided in early 2006.
[2] Berne Convention for the Protection of Literary and Artistic Works (1971)
[3] Article 2

The WPPT[4] covers protection over phonograms and performances. Under the Copyright Act these are protected as sound recordings (ie subject-matter other than works) and performances fixed into sound recordings.

The definition of an 'effective technological measure' (ETM) in the AUSFTA should be read in conjunction with the chapeau to Article 17.4.7(a), which establishes how liability is to apply. The definition of an ETM itself is not an operative clause and does not, by itself, require liability to be imposed. Article 17.4.7(b) defines the set of devices known as 'ETMs' for the purposes of the AUSFTA. Article 17.4.7(a) then stipulates that liability will arise for circumvention activities involving *certain* types of ETMs. The chapeau refers only to works, performances and phonograms and omits any reference to 'other protected subject matter'. The liability scheme required under Article 17.4.7 is limited to only those ETMs that are used by authors, performers and producers of 'works, performances and phonograms'.

- *What categories of works and subject matter other than works will be protected under the AUSFTA provisions as implemented in the new scheme?*

Under Article 17.4.7 of the AUSFTA Australia is obligated to provide protection for 'works performances and phonograms'. As discussed in the previous response the terms 'works, performances and phonograms' cover the categories of literary, musical, artistic and dramatic works, cinematograph films and sound recordings protected under the Copyright Act.

- *Will TPMs on broadcasts and published editions come under the new scheme?*

No. There is no obligation under the AUSFTA to include published editions and broadcasts within the proposed liability scheme because they do not fall within the categories of protected works, performances or phonograms.

- *If yes, how will this intersect with the provisions in Part VAA of the Copyright Act that relate to broadcast decoding devices?*

Although there is no obligation under the AUSFTA, Australia currently provides separate protection for broadcasts under Part VAA of the Copyright Act. This part prohibits the commercial supply and dealing of devices used to gain unauthorised access to broadcasts. Part VAA does not apply to other types of copyright material.

The offences for unauthorised activities under this part have recently been reviewed. The Government announced on 30 June 2005 that additional offences will be enacted to deal with persons who dishonestly access subscription broadcasts without authorisation and payment. These offences concerning encoded broadcasts are separate to the offences for the circumvention of an ETM that will apply to other types of copyright material.

- *Does the Department have a view about the appropriateness of implementing an exception for educational institutions to circumvent TPMs on broadcasts for the purposes of Part VA of the Copyright Act?*

Part VA of the Copyright Act provides for a statutory licence scheme for the copying and communicating of broadcasts by educational and other institutions. As broadcasts are not covered under Article 17.4.7 it is unnecessary to consider the appropriateness of implementing an exception for Part VA.

[4] WIPO Performances and Phonograms Treaty (1996)

2. It has been suggested in a number of submissions that Australia should adopt the narrow approach taken by the USA regarding the criteria for proposed exceptions. However, other submissions have stated that there is no compulsion on Australia to adopt the same approach, particularly given Australia's different copyright framework, history, and position in the world market regarding the generation of copyright material and its consumption.

- *What is the Department's view on this issue?*

There is no obligation for Australia to follow the approach taken by the United States in determining additional exceptions that may be implemented in our law. The only limitations on how to determine which exceptions may be implemented are to be found in the text of the AUSFTA itself. It follows that the approach taken under the United States domestic legislation does not dictate the approach to be taken under the AUSFTA when implemented in Australian law.

3. Article 17.4.7(e)(vi) provides an exception for 'lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes'.

- *What is the Department's interpretation of this exception in terms of its coverage of the broad range of government activity?*

The scope of the term 'law enforcement' will be considered further by the Department when preparing our domestic legislation.

The words 'law enforcement, intelligence, essential security, or similar governmental purposes' provide guidance on the type of government activity covered by the exception in Article 17.4.7(e)(vi). 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 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.

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.[5] 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.

[5] For instance the equivalent provision in subsection 1201(e) of the US Copyright Act inserted by the DMCA refers to 'lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting pursuant to a contract with the United States, a State, or a political subdivision of a State.' The term 'information security' means 'activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.'

- *In the Department's opinion, will this exception cover the activities of government agencies such as the Australian Tax Office circumventing TPMs for the purpose of taking civil actions and the Office of Film and Literature Classification circumventing TPMs for classification purposes?*

To the extent that these activities might be considered to be 'law enforcement' then they would be covered by the exception outlined in 17.4.7(e)(vi). The scope of an exception for those Government activities that are not related to law enforcement, security or intelligence of similar governmental purposes is a matter for the Committee to consider.

5. The Special Broadcasting Service Corporation has informed the Committee that the USA copyright legislation provides an exception for broadcasters to circumvent TPMs on sound recordings for the purpose of making broadcast copies in certain cases.

- *Is the Department aware of this exception?*

Yes. The Department is aware of the exception allowing broadcasters to circumvent TPMs on sound recordings. The Department understands that exception is permitted for the purposes of making an ephemeral copy under subsections 112(a) & (b) of the United States Copyright Act.

- *In the Department's view, would such an exception be in compliance with the AUSFTA provisions as implemented in the new scheme?*

The case for such an exception in Australia will need to be made out under Article 17.4.7(e)(viii).

7. The Committee has heard differing views on whether region coding TPMs are basically a market strategy technology or whether they play a genuine part in copy protection.

- *What is the Department's view on this issue?*

The Department has no concluded view on the relationship between region coding as a copy protection measure and its use as a market strategy. Whether region coding measures fall within the scope of the liability scheme depend on the particular components of the technology itself. Copyright owners are choosing to employ a range of technological measures to control use of, and access to their material. 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.

The Department draws the Committee's attention to the comments of Mr Friz Attaway, a representative of the United States Motion Picture Industry, at the US Library of Congress Rulemaking Hearing on 2 May 2003. He has made comments that make it clear that the application of regional coding is a marketing decision for the motion picture industry:

> …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…In the case of movie

companies, we do it sequentially for marketing reasons. But its basically a marketing decision…[6]

- *In the Department's view, does region coding technology come within the definition of ETM in Article 17.4.7 of the AUSFTA?*

Yes. 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.

However, as stated by the Department in the public inquiry on 5 December 2005, 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'.

8. *Can the Department inform the Committee as to the progress of the fair dealing review? Can the Department indicate when the review might be concluded?*

The Department expects to complete its work on the review and provide advice to the Attorney-General in early 2006.

Other questions arising from the public hearing

9. A number of submissions have drawn the Committee's attention to the testimony of the Department of Foreign Affairs and Trade at the Joint Standing Committee on Treaties inquiry into the AUSFTA and the Senate Select Committee inquiry into the AUSFTA regarding Article 17.4.7 and its ramifications for Australia. In particular, the Committee notes this statement from a DFAT witness at the Senate Select Committee inquiry:

   ...the provisions are designed to assist copyright owners to enforce their copyright and target piracy, not to stop people from doing legitimate things with legitimate copyright material (final report, p.88)

   However, the Committee has received evidence to the effect that the TPM provisions in Article 17.4.7 will indeed prevent people from 'doing legitimate things with legitimate copyright material'.

- *In the Department's view, is the DFAT statement accurate?*

DFAT's views represented an agreed view of the Government that the copyright provisions of the AUSFTA are about the protection of copyright material.

[6] Library of Congress Copyright Office, Rulemaking Hearing, 2 May 2003 (Washington) URL: http://www.copyright.gov/1201/2003/hearings/transcript-may2.pdf

10. At p.7 (para 24) of its submission, the Department notes that the definition of effective technological measure (ETM) in Article 17.4.7 is broader than the current definition of technological protection measure (TPM) in the *Copyright Act* 1968 in that an ETM is envisaged as controlling access to protected material or protecting any copyright, whereas under the Act a TPM must be designed to prevent or inhibit infringement.

- *In the Department's view, will a TPM, in order to come within the scope of the AUSFTA provisions as implemented in the new scheme, have to be attached to a work protected by copyright?*

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.

- *Will the new scheme require protection for TPMs that are attached to material that is no longer protected by copyright?*

No. 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.

- *Can the Department inform the Committee whether the new scheme will require a TPM to be put in place by a copyright owner or exclusive licensee?*

The AUSFTA does not address who should put the ETM in place. It refers only to those technological measures used by copyright owners in connection with the exercise of their rights and to restrict unauthorised acts.

- *Will a person be liable for circumventing a TPM placed by a person other than the copyright owner or exclusive licensee?*

No protection is given to those technological measures that are applied by a subsequent user of the material, without the consent of the copyright owner or exclusive licensee. Consistent with the wording of the AUSFTA, liability for circumventing an ETM will only arise where the application of the ETM in question is placed on copyright material with the consent of the copyright owner or exclusive licensee.

- *Will the new scheme require a person to be liable when they circumvent a TPM that is placed on material unintentionally?*

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.

14. The Committee has heard that the AUSFTA is unique among the free trade agreements entered into by the US in that it does not specifically require exceptions to expire after a certain time period.

- *Can the Department inform the Committee whether this is the case?*

The wording of Article 17.4.7(e)(viii) does not require exceptions to expire after a certain time frame. Article 17.4.7(e)(viii) merely requires that the legislative or administrative review or proceeding responsible for credibly demonstrating an actual or likely adverse impact on non-infringing uses of copyright material, must be conducted 'at least once every four years'.

The wording in AUSFTA Article 17.4.7(e)(viii) is as follows:

> ...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.

The Department is aware that, as an example, the wording in the AUSFTA differs from that used in the Singapore-United States Free Trade Agreement (SUSFTA) where exceptions are time-limited. The SUSFTA states:

> ...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.[7]

15. The Committee has heard concerns over whether the exception for creating interoperable software in Article 17.4.7(e)(i) will cover circumvention for the purpose of creating a computer program that interoperates with data saved in proprietary formats.

- *In the Department's view, will the interoperable software exception in the new scheme cover such a circumvention?*

No. The exception in Article 17.4.7(e)(i) operates only 'for the sole purpose of achieving interoperability of an independently created computer program with other programs'. For instance, this would include the situation where a program is reverse-engineered to create another interoperable program. This would not appear to provide for the situation where a computer program is reverse-engineered for the purpose of creating a program that interoperates with data, unless that would first involve the decompilation of a computer program and subsequent creation of an independently created computer program. Whether such an exception should exist appears to fall within the terms of reference of the Committee inquiry.

[7] Article 16.4.7(f)(iii), Singapore-United States Free Trade Agreement