

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).¹ 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.² 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

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*³ (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.

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.⁴ 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):

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.⁵

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,⁶ 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.

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...⁷

- 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

⁷ 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.