

Overview: technological protection measures, copyright in Australia, the Australia-United States Free Trade Agreement, regulation in the United States, and region coding

- 2.1 This Chapter provides an overview of the following:
- The nature of technological protection measures (TPMs) and related issues;
 - Copyright regulation in Australia;
 - Article 17.4.7 of the Australia-United States Free Trade Agreement (AUSFTA): interpretation and differences with the *Copyright Act* 1968; and
 - The regulatory framework in the United States.
- 2.2 The Chapter also examines an issue which gained particular prominence during the course of the inquiry: region coding of digital versatile discs (DVDs) and computer games.

The nature of technological protection measures and related issues

TPM basics

- 2.3 In general terms, TPMs are software, components and other devices that copyright owners use to protect copyright material. Examples of TPMs include encryption of software, passwords, and access codes. While copyright owners seek to protect their work from unauthorised access and use by means of TPMs, TPMs can also be disabled or circumvented through a range of means, including the use of computer programs or devices such as microchips. TPMs are a valid response by copyright owners seeking to protect their intellectual property from infringement.
- 2.4 There are two main types of TPMs: access control TPMs and copyright protection TPMs. Access control TPMs allow the copyright owner to control access to the copyrighted material – for example, password protections, file permissions, and encryption. Copyright protection measures are designed to control activities such as reproduction of copyright material, for example by limiting the number of copies that a consumer might make of an item. One of the main differences between the two types of TPM is that an access control TPM will block access generally, while a copyright protection TPM will operate at the point where there is an attempt to do an act protected by the copyright, for example make a copy of the material. In its 1999 advisory report on the Copyright Amendment (Digital Agenda) Bill 1999, the then House of Representatives Standing Committee on Legal and Constitutional affairs observed that:
- Copy control measures are more closely allied with copyright, and the infringement of copyright, than access control measures. Access control measures seek to prevent all access to copyright material, not only that access which is unlawful.¹
- 2.5 In practice, many current TPMs contain both access and copy control elements. The decision of copyright holders to combine or ‘bundle’ such elements into the one TPM can result in difficulty when determining the exact nature and purpose of a TPM containing both
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1 House of Representatives Standing Committee on Legal and Constitutional Affairs, *Advisory Report on the Copyright Amendment (Digital Agenda) Bill 1999*, November 1999, p. 60.

elements. While advocates of stronger protection for copyright owners have argued that, in relation to the AUSFTA, the precise nature of a given TPM is irrelevant and that all access TPMs require protection under the Agreement, the Committee is not convinced that this issue is quite as straightforward as some would suggest. For this reason, the Committee sought advice on the interpretation of the AUSFTA and examined the policy intent of the Australian Government in negotiating the copyright section of the Agreement. This issue is discussed further at paragraphs 2.36 to 2.52 below.

TPMs under the *Copyright Act 1968*

2.6 Under the *Copyright Act 1968*, a TPM is currently defined as being:

a device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to **prevent or inhibit the infringement of copyright** in a work or other subject-matter by either or both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject-matter) with the authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanisms.² (emphasis added)

2.7 During the course of the Committee's inquiry, the High Court handed down its decision in the case of *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 (*Stevens v Sony*).³ This case illustrates some of the issues surrounding the definition of TPM and the question of the appropriate levels of statutory protection to be afforded to TPMs. Central to the case was the question of what exactly constitutes a TPM under the *Copyright Act 1968*.

2 *Copyright Act 1968*, s. 10.

3 The decision is available on-line at:
<http://www.austlii.edu.au/au/cases/cth/HCA/2005/58.html>.

Stevens v Sony

2.8 The case reached the High Court on appeal from the full Federal Court; the appeal was allowed in favour of the applicant (Stevens). The facts of the case concerned an alleged infringement of copyright due to the circumvention of an access TPM on Sony PlayStation game consoles. The TPM in question did not prevent the copying of PlayStation games but did prevent the playing of infringing copies of PlayStation games. At the time of the case it was not an infringement of copyright to play an infringing copy of a game (although it was of course a copyright infringement to make an unauthorised copy of a game). The High Court found that the TPM access device used by Sony in the consoles did not actually constitute a TPM within the definition of the *Copyright Act 1968*, as it did not prevent copyright infringement *per se* but prevented access only after infringement had already occurred.⁴

2.9 The Court also clearly indicated that the definition of TPM in the Act should not be construed too broadly:

in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it.⁵

2.10 Kirby J noted that one possible effect of an expansive interpretation of the TPM definition would be a broad access control which would allow 'the achievement of economic ends additional to, but different from, those ordinarily protected by copyright law'.⁶ Kirby J also stated that:

If the present case is taken as an illustration, Sony's interpretation would permit the effective enforcement, through a technological measure, of the division of global markets designated by Sony. It would have the effect of imposing, at least potentially, differential price structures in those separate markets. In short, it would give Sony broader powers over pricing of its products in its self-designated markets than the Copyright Act in Australia would ordinarily allow.⁷

4 See para. 46 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

5 See para. 47 per Gleeson CJ, Gummow, Hayne and Heydon JJ.

6 Para. 211.

7 Para. 211.

2.11 The decision of the High Court was based on copyright law as it existed at the time the alleged offences occurred (i.e. March 2001).⁸ Subsequent amendments to the *Copyright Act 1968*, including those contained in the *US Free Trade Agreement Implementation Act 2004*, were not applied to the final decision. The Court nevertheless recognised the future impact of the AUSFTA on this area of Australian copyright law:

In the Australian context, the inevitability of further legislation on the protection of technology with TPMs was made clear by reference to the provisions of, and some legislation already enacted for, the Australia-United States Free Trade Agreement. Provisions in that Agreement, and likely future legislation, impinge upon the subject matters of this appeal. Almost certainly they will require the attention of the Australian Parliament in the foreseeable future.⁹

2.12 The Committee notes that the *Stevens v Sony* decision has policy implications for the Government in terms of implementing Article 17.4.7. On the one hand, the decision will be superseded to some degree due to the broad definition of ‘effective technological measure’ (ETM) that is required by Article 17.4.7 of the AUSFTA. On the other hand, the High Court has clearly flagged its concerns regarding a broad construction of TPMs. One academic has observed that:

The Federal Government... is in a right pickle. The Government has to adopt a broad definition of technological protection measures and narrow exceptions as part of the Australia-United States Free Trade Agreement 2004. However, the Federal Government will also have to comply with the High Court’s demands that any future laws on technological protection measures be drafted with precision and clarity. The government will also need to take into account wider policy concerns that there are not inadvertent detrimental impacts for competition, access to information, and fundamental freedoms.¹⁰

2.13 The definition of ETM specified in Article 17.4.7 of the AUSFTA is considered below at paragraphs 2.51 – 2.61 below.

8 Para. 10

9 Para. 223 per Kirby J.

10 Dr Matthew Rimmer, *The High Court rejects ‘übercopyright’ in Stevens v Sony*, p. 7.

The protection afforded to TPMs by anti-circumvention laws – copyright or ‘übercopyright’?

2.14 The logical extension of TPMs, as reflected by the existence of anti-circumvention laws, is to reduce the potential for TPMs themselves to be disabled, circumvented, or removed. However, it has been argued that anti-circumvention laws often go beyond the basic premise of protecting copyright. From this perspective, anti-circumvention laws have been dubbed ‘paracopyright’ or ‘übercopyright’. One submission to the inquiry contended that:

Three factors take anti-circumvention laws beyond simple ‘copyright enforcement’:

1. In practice, technological measures may not just prevent copyright infringement, but many other, non-infringing uses of digital material...
2. Copyright owners have used technology for commercial purposes well beyond, and even unrelated to those provided by copyright law. For example, technological measures have been used to enforce geographical segmentation of markets, or ensure control over a technological platform;
3. Anti-circumvention laws ban certain technologies. As a result, these laws may impact on – and inhibit – both innovation, and competition in technology markets.¹¹

Copyright regulation in Australia

The regulatory environment

2.15 Australian copyright law reflects not only domestic policy considerations but also Australia’s obligations under a range of international agreements including the AUSFTA. The nature of copyright protection in the digital age can be somewhat daunting, made up as it is by highly technical concepts and terms that are difficult for the non-specialist.

2.16 Under current Australian copyright law copyright owners have significant rights, including the right to copy, publish, communicate

¹¹ Ms Kimberlee Weatherall, *Submission No. 38*, pp. 8-9.

and publicly perform their copyright material. However, the rights of copyright holders have always been balanced against the need of the public to have access to copyright material. Consequently, the *Copyright Act 1968* contains a number of exceptions to the suite of rules regarding infringement of copyright.

- 2.17 A number of submissions likened copyright protection to placing a fence around goods, the fence, in the digital environment, being a TPM, and circumvention of the TPM being ‘no different to taking the bolt cutters to the security fence, breaking in and stealing the goods’.¹² This analogy is limited, however, and does not acknowledge the balancing of rights between copyright holders and users. As one submission observed:

Copyright cannot be understood in... simplistic, property-based terms. The statutory monopoly delivered to owners under the Copyright Act 1968 has always been subject to limitations and exceptions... which are intended to operate as a limitation on the rights of copyright owners to control use of their works. Those exceptions are central to the so-called ‘copyright balance’: the balance between the rights of copyright owners and users which the legislature has deemed appropriate.¹³

- 2.18 The analogy was also clarified in these terms:

If you are in the United Kingdom and seeking to exercise property rights over a property that you have a full private title over but across which there is a traditional pathway known as a footpath, if you were to place an impenetrable barrier across that footpath denying the right of entry of all United Kingdom residents to transgress, you would be required to remove that barrier because you had inappropriately allowed your rights to interfere with someone else’s rights. That is exactly the case we are dealing with at the moment only it is a much stronger case in that we are not dealing here... with a conflict between statutory rights of property and traditional rights of access; we are instead dealing with statutory rights throughout.¹⁴

12 Copyright Agency Limited (CAL), *Submission No. 16*, Introduction, p. 1.

13 Flexible Learning Advisory Group (FLAG), *Submission No. 34*, p. 2.

14 Dr Evan Arthur, *Transcript of Evidence*, 5 December 2005, p. 13.

2.19 A number of submissions to the inquiry argued that the provisions of the AUSFTA will significantly alter the balance between copyright holders and users by extending the copyright holder's ability to restrict access to copyright works for non-infringing uses. The Department of Education, Science and Training (DEST), for example, submitted that the AUSFTA 'will shift the existing balance significantly in favour of copyright owners, and against institutional and other users'.¹⁵ A contrary view was put by the Business Software Association of Australia (BSAA):

Most of the provisions with regard to strengthening the copyright law have been in relation to enforcement. I am not sure that that necessarily affects the balance of rights as between users and owners. It is merely intended to assist in enforcement of the existing rights.¹⁶

2.20 The Committee is strongly supportive of the balance struck by the *Copyright Act 1968* between copyright holders and users of copyright material.

Recommendation 1

2.21 **The Committee recommends that the balance between copyright owners and copyright users achieved by the *Copyright Act 1968* should be maintained upon implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement.**

Recent developments

The 1996 WIPO treaties and the *Copyright Amendment (Digital Agenda) Act 2000*

2.22 In 1996 two treaties were agreed to by a number of countries, including Australia, at the World Intellectual Property Organisation (WIPO) Diplomatic Conference – the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT).¹⁷ Both treaties require countries to provide adequate legal protection and effective legal remedies against ETMs.¹⁸ Australia is

15 DEST, Submission No 48, p. 2.

16 Mr Maurice Gonsalves, *Transcript of Evidence*, 14 November 2005, p. 30.

17 The WPPT and the WCT are collectively known as the WIPO Internet Treaties. See AGD, *Submission No. 52*, p. 2.

18 Article 11 of the WCT and Article 18 of the WPPT.

currently in the process of acceding to the WCT. The Attorney-General's Department (AGD) noted that 'as is the case with most multilateral treaties, the obligations in the WIPO Internet Treaty are broadly stated and give some flexibility for implementation at a national level'.¹⁹

2.23 Partly to meet Australia's WIPO obligations, the *Copyright Amendment (Digital Agenda) Act 2000* made a number of amendments to the *Copyright Act 1968* by introducing a regime for protection against circumvention of technological measures protecting copyright material. In his second reading speech, the then Attorney-General noted that the proposed reforms:

update Australia's copyright standards to meet the challenges posed by rapid developments in communications technology, in particular the huge expansion of the Internet. This extraordinary pace of development threatens the delicate balance which has existed between the rights of copyright owners and the rights of copyright users. The central aim of the bill, therefore, is to ensure that copyright law continues to promote creative endeavour and, at the same time, allows reasonable access to copyright material in the digital environment.²⁰

2.24 The then Attorney-General made it clear that while the amendments improved protection for industries that publish or distribute material electronically, there were also complementary exceptions to that right, replicating as far as possible 'the balance that has been struck in the print environment between the rights of owners of copyright and the rights of users'.²¹

2.25 The level of protection provided by the *Copyright Amendment (Digital Agenda) Act 2000* was not seen as adequate by all copyright owners. For some it was 'perceived as providing less security to rightsholders than that contained in comparable overseas jurisdictions' and was 'a

19 AGD, *Submission No. 52*, p. 3.

20 Hon Daryl Williams MP, Attorney-General, *House of Representatives Hansard*, 2 September 1999, p. 9748.

21 Hon Daryl Williams MP, Attorney-General, *House of Representatives Hansard*, 2 September 1999, p. 9748.

key reason for the slow development of a digital publishing industry in Australia'.²²

2.26 Countering this view, others argued that in implementing digital agenda laws, Australia

did a good job. It adopted the approach that it should put these new laws in place in a way that is about enforcing copyright but with balancing provisions and exceptions to recognise that these locks and new ways of protecting things could take away the rights of general, ordinary people who have rights under copyright as well.²³

2.27 A review of the amendments contained in the *Copyright Amendment (Digital Agenda) Act* 2000 commenced in April 2003. The law firm of Phillips Fox conducted the review at the request of the Attorney-General and reported to Government in February 2004. During the course of the review the Government negotiated and subsequently signed the AUSFTA. Phillips Fox noted that:

In some areas, the copyright provisions of the Free Trade Agreement supersede the recommendations made in the Phillips Fox report. Where relevant the Phillips Fox report is being used to inform the Government's implementation of the Free Trade Agreement obligations.

Following the implementation of the Free Trade Agreement obligations, the Government will conclude its broader review of the Digital Agenda reforms.²⁴

2.28 The Phillips Fox review recommended that the *Copyright Act* 1968 be amended to expand the definition of 'permitted purpose' to include 'fair dealing and access to a legitimately acquired non-pirated product', and that the supply or use of a circumvention device or service be allowed for any use or exception allowed under the Act.²⁵ The Government is currently considering its response to this and other recommendations of the review.

22 CAL, *Submission No. 16*, para. 14.

23 Mr Jamie Wodetzki, *Transcript of Evidence*, 15 November 2005, p. 1.

24 For further details see:

<http://www.ag.gov.au/agd/WWW/agdhome.nsf/Page/RWP59973CB8E5C96506CA2570660014DE7E> (accessed 19/12/2005).

25 Phillips Fox, *Digital Agenda Review: Report and recommendations*, January 2004, recommendation 17.

Review of the *Copyright Act 1968* – fair dealing provisions

- 2.29 As noted in Chapter 1, the task of this Committee was to consider if additional exceptions to access TPMs are warranted, beyond those already specified in the AUSFTA. The inquiry was not focused on broader copyright issues. Concurrent with the Committee's inquiry, the AGD has been examining whether the current 'fair dealing' exceptions²⁶ contained in the *Copyright Act 1968* are adequate, and whether a new general exception based on 'fair dealing' or new specific exceptions might be appropriate.
- 2.30 Following receipt of public submissions an options paper was developed and further consultations held. As at December 2005 the AGD was working on options for consideration by the Attorney-General.²⁷
- 2.31 Media reports have indicated that the government may seek to legalise format (or space) shifting (e.g. purchasing a CD and copying it on to an MP3 player) and time shifting (e.g. recording a radio or television program for listening or watching at a later time) by including them under 'fair dealing' provisions in the *Copyright Act 1968*.²⁸ The Attorney-General has been quoted as saying 'We should not treat everyday Australians who want to use technology to enjoy copyright material they have obtained legally as infringers where this does not cause harm to our copyright industries'.²⁹
- 2.32 It has been argued that such changes would more closely resemble the United States' open-ended defence of fair dealing, and would 'counter the effects of the extension of copyright protection and... correct the legal anomaly of time shifting and space shifting that is currently absent'.³⁰ However, should such an extension to fair dealing eventuate in Australia, the ability of users to take advantage of those exceptions might well be limited depending on whether access TPMs

26 These are currently confined to four purposes: research of study; criticism or review; reporting of news; and professional advice given by a legal practitioner, patent attorney or trade marks attorney. (see: AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 11.)

27 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 37.

28 See for example, *Herald Sun*, 28 December 2005, p. 9, 'Video, iPod cheats come in from cold'; *Adelaide Advertiser*, 28 December 2005, p. 2, 'You will no longer be CD, tape pirate'.

29 *Adelaide Advertiser*, 28 December 2005, p. 2.

30 Joint Standing Committee on Treaties, quoted in AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, p. 17.

placed on material can be legally circumvented. In the United States, the Digital Millennium Copyright Act of 1998 (DMCA) does not permit users to interfere with access control TPMs to exercise a fair use.³¹

- 2.33 As both format shifting and time shifting are currently infringing uses, it is not within the ability of this Committee to recommend an exception for such purposes at this time, although it would support such a proposal in future. This issue is discussed further in Chapter 4.

Current liabilities and exceptions relating to TPMs and circumvention

- 2.34 Current copyright law in Australia does not prohibit the act of circumventing a TPM, regardless of whether that TPM controls access to or protects copyright material. Rather, the *Copyright Act 1968* provides for civil actions by copyright owners and prosecutions for criminal offences where a person makes, sells, imports, markets, distributes or otherwise deals in a circumvention device. However:

to be liable under a civil action for any of the above, the person must have known, or be reasonably expected to have known, that the device or service in question would be used to circumvent or facilitate the circumvention of the TPM. The requisite level of intent in criminal proceedings is knowledge or recklessness.³²

- 2.35 Under the *Copyright Act 1968* also, 'exceptions to liability for both civil actions and criminal proceedings are available if the circumvention device is to be used for a 'permitted purpose', subject to compliance with strict procedural requirements'. The permitted purposes are:

- Reproducing computer programs to make interoperable products (s47D)
- Reproducing computer programs to correct errors (s47E)
- Reproducing computer programs for security testing (s47F)
- Copying by Parliamentary libraries for members of Parliament (s48A)
- Reproducing and communicating works by libraries and archives for users (s49)

31 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, pp.23-24.

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

- Reproducing and communicating works by libraries and archives for other libraries and archives (s50)
- Reproducing and communicating works for preservation and other purposes (s51A)
- Use of copyright material for the services of the Crown (s183)
- Reproducing and communicating works etc by education and other institutions (Part VB).³³

Article 17.4.7 of the AUSFTA: interpretation and differences with the *Copyright Act 1968*

Interpretation of Article 17.4.7

2.36 The Committee was very conscious throughout its investigation that it was not the purpose of the inquiry to re-examine the arguments for and against the AUSFTA. The Committee took as its starting point the fact that Australia is committed to the provisions in Article 17.4.7 and that these provisions must be given effect in Australian law. As a first step to understanding the provisions of Article 17.4.7 in the Agreement, therefore, the Committee considered the Government's policy intent in negotiating the agreed text of Article 17.4.7.

The Government's policy intent

2.37 The Committee sought to clarify the intent of the Government in its negotiation of the intellectual property provisions of the AUSFTA by examining public comments by Ministers and officials during and after the negotiation process.

Ministerial statements

2.38 In his second reading speech on the US Free Trade Agreement Implementation Bill 2004, the Minister for Trade, the Hon Mark Vaile MP, made the following statements in regard to amendments to the *Copyright Act 1968* proposed in the Bill:

it is important to be clear that these amendments do not represent the wholesale adoption of the US intellectual

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

property regime. We have not stepped back from best practice elements of Australia's copyright regime – but we have strengthened protection in certain circumstances – providing a platform for Australia to attract and incubate greater creativity and innovation.³⁴

Review by parliamentary committees

- 2.39 Prior to the initial implementation of the AUSFTA, two parliamentary inquiries were held into the many and varied provisions of the draft Agreement. The Joint Standing Committee on Treaties (JSCOT) tabled its report on 23 June 2004.³⁵ The second inquiry, by the Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, resulted in the release of an interim report on 24 June 2004 and a final report on 5 August 2005.³⁶
- 2.40 Intellectual property rights, including effective TPMs, were among the many issues examined by both Committees. In evidence to the Senate Committee, officials from the Department of Foreign Affairs and Trade (DFAT) stressed that, under the AUSFTA, Australia retains the ability to create appropriate exceptions to suit its own circumstances:

The anti-circumvention provisions ... include a list of specific exceptions that we can take advantage of and a mechanism for us to make further exceptions that we consider to be appropriate for the Australian circumstances. ...

[While] it is correct to characterise it as having strength in copyright in the FTA... we have also been very careful to ensure that we maintain the ability to put in place exceptions where we regard those to be appropriate to the Australian circumstances.

...the point that I would like to make in relation to all of these issues is that the provisions are designed to assist copyright owners to enforce their copyright and target piracy, not to

34 Hon Mark Vaile MP, *House of Representatives Hansard*, 23 June 2004, p. 31218.

35 JSCOT, *Report 61: The Australia-United States Free Trade Agreement*. This report is available at: <http://www.aph.gov.au/house/committee/jsct/usafra/report.htm>.

36 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America. The interim and final reports can be accessed at: http://www.aph.gov.au/senate/committee/freetrade_ctte/index.htm.

stop people from doing legitimate things with legitimate copyright material.³⁷

2.41 In response to concerns raised regarding TPMs, JSCOT recommended that steps be taken to:

ensure that exceptions will be available to provide for the legitimate use and application of all legally purchased or acquired audio, video and software items on components, equipment and hardware, regardless of the place of acquisition.³⁸

2.42 The Senate Select Committee also expressed concern that the:

AUSFTA goes too far. TPM circumvention may be done for legitimate, non-infringing purposes, not simply piracy. A ban on TPM circumvention, while possibly assisting to curb some piracy, may also prevent many legitimate uses.³⁹

2.43 It is plain from the above and other public comments during the examination of the AUSFTA that the Government had a clear intention of permitting exceptions to circumvention liability for non-infringing purposes. As one submission to this Committee's inquiry observed:

The indications from the government negotiators are that the language was understood broadly at the time of the negotiations.⁴⁰

2.44 The Committee also agrees with further comment from this submission that 'the AUSFTA is not a statute, but a treaty which should be interpreted, and implemented, in accordance with Australian public policy'.⁴¹ The Committee has taken notice of the stated policy objectives of the Government when assessing requests for exceptions in Chapter 4.

37 Ms Harmer quoted in Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, pp. 87-88.

38 JSCOT, *Report 61: The Australia-United States Free Trade Agreement*, p. 241.

39 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, *Final Report on the Free Trade Agreement between Australia and the United States of America*, p. 90.

40 Ms Kimberlee Weatherall, *Submission No. 38*, p. 18.

41 Ms Kimberlee Weatherall, *Submission No. 38*, p. 18.

The text of Article 17.4.7

- 2.45 The language of Article 17.4.7 does not lend itself to a clear and immediate understanding of the details of the TPM circumvention liability scheme contained therein. As acknowledged by the AGD, the Committee needed to ‘interpret treaty language that is complex’.⁴²
- 2.46 Supporters of Interoperable Systems in Australia (SISA) remarked that:
- the key point is that all the interpretation of this language, in effect, becomes a very academic exercise and one at which people are probably torturing the meaning of language to arrive at the conclusion that they want to arrive at. Given that scenario, the best way to approach this is to accept that these words could mean anything. They are all quickly cobbled together in many respects and the subject of different levels of debate. The ultimate goal should be to look at what is a good policy outcome and what the language of these provisions allows for.⁴³
- 2.47 While officers of the AGD did not feel that it was appropriate to provide the Committee with legal advice as to the meaning of the various provisions of Article 17.4.7, they did make a number of general observations about interpretation of treaty text generally. According to article 31(1) of the Vienna Convention of the Law of Treaties, a treaty is:
- to be interpreted in good faith; the treaty’s terms are to be given their ordinary meaning; the meaning is not to be established in isolation from the context of those terms; and account is to be taken of the object and purpose of the treaty.⁴⁴
- 2.48 The Committee has had recourse to this principle of the Vienna Convention in its consideration of the criteria for exceptions under Article 17.4.7(e)(viii) in Chapter 3. The Committee’s attention was also drawn to the important role of the introductory paragraph, or chapeau, to Article 17.4.7 in providing the essential context for the interpretation of the provisions, and, in particular, the reference to ETMs. As the AGD explained:

42 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 23.

43 Mr Jamie Wodetzki, *Transcript of Evidence*, 15 November 2005, pp. 6-7.

44 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, pp. 23-24.

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.

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.⁴⁵

- 2.49 Others were of a similar view. The Intellectual Property Committee of the Law Council of Australia (IPC) noted that it is important to assess the:

extent to which primary liability should require a nexus to exist between the protection of a technological measure and an exercise of a right attached to copyright. This is relevant to the separate matter of drafting and judicial interpretation of what access controls will comprise an 'effective technological protection measure' as required by FTA article 17.4.7(b).⁴⁶

- 2.50 The Committee also notes the existence of a significant flaw in Article 17.4.7 – namely, that any party with an exception permitted under Article 17.4.7(e)(v), (vii) and (viii) will not be able to use the corresponding exceptions to liability for the manufacturing or trafficking or dealing in circumvention devices or services. This issue is discussed in detail in Chapter 3.

The definition of ETM

- 2.51 Under Article 17.4.7 of the AUSFTA an ETM is defined as:

any technology, device, or component that, in the normal course of its operation, **controls access to a protected work,**

45 Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, pp. 25-26.

46 IPC, *Submission No. 15*, p. 5.

performance, phonogram, or other protected subject matter, or **protects any copyright**.⁴⁷ (emphasis added)

2.52 The term 'access' is not defined in the AUSFTA.

Differences between Article 17.4.7 and the *Copyright Act 1968*

2.53 There are three main differences between Article 17.4.7 and the relevant areas of the *Copyright Act 1968*. These are:

- The definition of TPM in the Act and the definition of ETM in Article 17.4.7;
- Liability regarding the provision of circumvention devices and the act of circumvention; and
- The scope of the specified exceptions in Article 17.4.7(e)(i) – (vii) and the scope of the permitted purposes in the Act.

TPM and ETM

2.54 Although it might seem so at first glance, the difference between the definition of TPM in the *Copyright Act 1968* (see paragraphs 2.6 – 2.12 above) and the definition of ETM in Article 17.4.7 is not merely one of semantics. Unlike the statutory definition of TPM, the AUSFTA definition of ETM is not limited to devices that 'prevent or inhibit the infringement of copyright', but also includes devices that 'controls access' to protected copyright material. This raises clear implications for the current definition of TPM in the *Copyright Act 1968* upon implementation of Article 17.4.7. The US-based International Intellectual Property Alliance (IIPA) noted that:

the current definition of 'technological protection measure' in s10 of the Copyright Act does not appear to be coextensive with the definition of 'effective technological measure' provided in Art. 17.4.7b of the AUSFTA. A change to this definition may be needed if Australia's new prohibition is to meet its FTA obligations. Simply put, Australia does not currently protect a broad enough category of access controls to be able to comply simply by prohibiting circumvention of those access controls.⁴⁸

47 Australia-United States Free Trade Agreement, Article 17.4.7 (b).

48 IIPA, *Submission No. 10*, p. 3.

2.55 The AGD, as part of its implementation of the AUSFTA, will no doubt consider how to best implement the definition of ETM in Article 17.4.7 into Australian law. The Committee notes that, should the definition of an ETM in the AUSFTA be formulated in conjunction with the chapeau (see paragraph 2.48 above), the difference between the two definitions may well not be as significant as first appears. In terms of this Committee's inquiry, however, the lack of a final definition of TPM/ETM in the implementing legislation has given rise to uncertainty and concern as to what may or may not come within the scope of the term, and hence what may or may not require an exception from the liability scheme. Professor Brian Fitzgerald stated that:

If the definition of a TPM is to move from 'prevent or inhibit copyright infringement' to 'controls access' meaning 'controls use' then we have not only legislated an access right in our copyright law but we have also legislated a far reaching right to control and define consumer use.⁴⁹

2.56 DEST submitted that the definition of a TPM is an 'issue of overwhelming importance',⁵⁰ and contended that the final definition of TPM should confine the term to preventing copyright infringement:

In DEST's view there are strong arguments to confine the concept of a TPM to measures or mechanisms that protect copyright from being infringed, and not to allow the concept to be broadened to cover devices that serve extraneous purposes, such as regional playback control, controlling after-markets for computer accessories or otherwise inhibiting competition.⁵¹

2.57 In its submission, the Australian Digital Alliance/Australian Libraries Copyright Committee (ADA/ALCC) also raised the issue of 'unintentional TPMs' – devices that act as TPMs but were not intended to so act by the author:

For example, devices that act as 'TPMs' as a result of technological advancement or obsolescence. Such devices

49 Professor Brian Fitzgerald, *Submission No. 29.1*, p.5.

50 DEST, *Submission No. 48*, p. 17.

51 DEST, *Submission No. 48*, p. 17.

may for example constitute software or hardware that effectively prevents access to a protected work, and may indeed prevent all access to that software or hardware. It is assumed that such devices are not 'effective TPMs' as they are not used 'by authors in connection with the exercise of their rights' as required by the WCT, and thus exceptions to circumvention of such devices are not required to be sought in the course of this review.

If this is not the case, the ADA and ALCC necessarily submit that an exception is required which exempts circumvention of devices that effectively act as 'TPMs' but do so only by reason of technological obsolescence.⁵²

- 2.58 Professor Brian Fitzgerald and Mr Nicolas Suzor proposed a draft definition for ETM that restricts the application of access control over copyright material once access has been lawfully obtained, and also introduces an element of consumer welfare protection with reference to the *Trade Practices Act 1974*.⁵³
- 2.59 While the Committee is not in a position to endorse any one proposed definition, the Committee does believe that the concerns detailed above indicate the types of issues that the AGD will need to address in settling the key definition of TPM/ETM in the implementing legislation. Much will rest on the way in which this crucial term is defined.
- 2.60 The Committee is of the view that, for access control TPMs to be granted protection from circumvention in Australian domestic legislation, there should be a direct link between the access control TPM and the protection of copyright.

Recommendation 2

- 2.61 **The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the definition of technological protection measure/effective technological measure clearly require a direct link between access control and copyright protection.**

52 ADA/ALCC, *Submission No. 49*, p. 23.

53 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29.2*, p. 1.

Provision of circumvention devices and the act of circumvention

2.62 Currently, the *Copyright Act 1968* stipulates that the provision of a circumvention device is illegal, but the **use** of such a device – the act of circumvention – is not. While the term ‘circumvention’ itself is not defined in the Act, a ‘circumvention device’ is defined to be:

a device (including a computer program) having only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention, or facilitating the circumvention, of a technological protection measure.⁵⁴

2.63 Under article 17.4.7, however, both the provision of a circumvention devices or service **and** the act of circumvention, will be prohibited. As the AGD noted:

the agreement provides liability for the **act** of circumventing effective technological measures that control access, **in addition** to the sale and dealing of devices and services that circumvent effective technological measures.⁵⁵ (emphasis added)

2.64 The terms ‘circumvention device’ or ‘circumvention service’ are not used in Article 17.4.7 let alone defined, although the Article requires that liability and remedies be provided in respect of such devices.⁵⁶ Specifically, liability will attach where a person:

- Knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or
- Manufactures, imports, distributes, offers to the public, provides or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:
 - ⇒ (A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;
 - ⇒ (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

54 *Copyright Act 1968*, section 10.

55 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 23.

56 AGD, *Submission No. 52*, p. 8.

⇒ (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure.⁵⁷

2.65 While the exact nature of this liability under Article 17.4.7 of the AUSFTA is still uncertain, each party to the AUSFTA will be required to:

provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage of financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.⁵⁸

Scope of the exceptions specified in Article 17.4.7(e)(i) – (vii) and the scope of the permitted purposes in the Act

2.66 The scope of the particular exceptions specified in Article 17.4.7(e)(i) – (vii) is narrow in comparison to the range of permitted purposes currently available in the *Copyright Act 1968*. The AGD noted that:

the exceptions to both the sale and dealing of circumvention devices and services and acts of circumvention are more narrowly confined than those currently existing in the *Copyright Act*.⁵⁹

2.67 The specified exceptions in Article 17.4.7(e)(i) – (vii) are set out and discussed further in Chapter 3.

The regulatory framework in the United States

Relevant US legislation

2.68 The Committee notes that Article 17.4.7 broadly replicates some of the content of section 1201 of the US Copyright Act 1976, as amended by the Digital Millennium Copyright Act of 1998 (DMCA).

57 AUSFTA, Article 17.4.7 (a) (i) and (ii).

58 Article 17.4.7 (a).

59 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 23.

2.69 Enacted in 1998, the DMCA was part of the US implementation of the WIPO Internet Treaties and amended the US copyright legislation. In also contains additional provisions addressing a number of copyright issues including the prescription of liability for TPM circumvention. The provisions of the DMCA have not been without their domestic critics within the US, including at the parliamentary level. The US Congressional Committee on Energy and Commerce is currently examining fair dealing and its effects on consumers and industry. In commenting on the operations of the DMCA, one member of this Committee stated that:

The Digital Millennium Copyright Act (DMCA)... created civil and criminal penalties for 'circumventing' encryption and other technology designed to prevent tampering or 'hacking' into copyrighted material. But it can also prevent fair use. I believe the affects of the DMCA to lock out consumers from the proper and fair use of material is a perverse result of the law.⁶⁰

2.70 The Chairman of this US Committee also expressed his concern that 'some attempts to protect content may overstep reasonable boundaries and limit consumers' legal options'.⁶¹ The Chairman went on to state that:

It boils down to this: I believe that when I buy a music album or movie, it should be mine once I leave the store...Does it mean I have unlimited rights? Of course not. But the law should not restrict my fair-use right to use my own property.

Current law provides that I am liable for anything I do that amounts to infringement, but current law also prevents me from making legal use of content that is technologically 'locked', even if I have the key. This doesn't seem to make sense. In defending this conflict, some say that fair use leads

60 Congressman Cliff Stearns (R-Florida), Member, Committee on Energy and Commerce, 16 November 2005. Text available at: <http://energycommerce.house.gov/108/Hearings/11162005hearing1716/hearing.htm> (accessed 10/01/2006).

61 Congressman Joe Barton (R-Texas), Chairman, US House of Representatives Committee on Energy and Commerce, 16 November 2005. Text available at: <http://energycommerce.house.gov/108/Hearings/11162005hearing1716/hearing.htm> (accessed 10/01/2006).

to piracy, or that it is piracy. No, it isn't. By definition, 'fair-use' is a use that DOES NOT infringe on owners' rights.⁶²

2.71 The Committee's attention was also drawn to US case law that has indicated that, even within the operation of the DMCA:

if the uses that an access control prevents are not related to the exclusive rights of copyright, then the access control is not one that the regime can recognise or protect.⁶³

2.72 This has been most apparent in cases where access controls have been used to prevent competition in the area of non-copyright goods and services – for example:

- Printer ink cartridges (Lexmark v static controls Corp);
- Automatic garage doors (Chamberlain Group v Skylink Technologies); and
- Computer equipment repair (Storage Tech v Custom Hardware).⁶⁴

2.73 The Committee agrees with the view of the IPC here:

this dichotomous treatment in US to the issue of primary circumvention liability and connection to copyright reflects sound public policy. Liability for circumvention should not provide incentive for the use of access controls for the collateral reason of restricting competition in markets for non-copyright goods and services.⁶⁵

2.74 The Committee believes it would be inequitable if, in translating the AUSFTA into domestic legislation, copyright owners be given greater protection than exists in the US through extension of the liability scheme to protect access TPMs which are not related to protection of copyright, but may in fact restrict competition.

62 Congressman Joe Barton (R-Texas), Chairman, US House of Representatives Committee on Energy and Commerce, 16 November 2005. Text available at: <http://energycommerce.house.gov/108/Hearings/11162005hearing1716/hearing.htm>; accessed 10/01/2006.

63 IPC, *Submission No. 15*, p. 6. See also Ms Kimberlee Weatherall, *Submission No. 38*, p. 10.

64 See for example, IPC, *Submission No. 15*, p. 6; Open Source Industry Association Ltd, *Submission No. 17*, para. 6.2; Mr Andrew Lang, *Submission No. 8*, pp. 2-3.

65 IPC, *Submission No. 15*, p. 6.

Recommendation 3

- 2.75 **The Committee recommends that, in the legislation implementing the Australia-United States Free Trade Agreement, the Government ensure that access control measures should be related to the protection of copyright, rather than to the restriction of competition in markets for non-copyright goods and services.**

The US rule making process

- 2.76 The Committee was urged in a number of submissions to examine the US process for considering exceptions to its liability scheme.
- 2.77 The DMCA requires that a regular rule making process be conducted for determining whether there should be exceptions to circumvention liability. An inquiry is held by the Register of Copyrights every three years involving public submissions and hearings. Following the inquiry, the Register of Copyrights makes recommendations to the Librarian of Congress. The Librarian of Congress, based on those recommendations, then issues determinations through the United States Copyright Office (USCO) specifying exemptions to circumvention liability, which last for a three year period. The exemptions expire at the end of that period and the Librarian is required to make a new determination on potential new exemptions. There have been two rule making processes so far, in 2000 and 2003, and a third is currently underway.⁶⁶
- 2.78 These rule making operations were criticised in evidence to the inquiry including on the grounds of fairness, complexity, accessibility and the standards of proof required.⁶⁷ The Special Broadcasting Service Corporation (SBS) noted that

the approach taken by the US Copyright Office has been overly narrow, technical and unsympathetic to the genuine practical concerns of users. In particular, the Copyright

⁶⁶ Australian Copyright Council (ACC), *Submission No. 7*, p. 3. See also 'Copyright Office: Exemption to Prohibition on Circumvention of Copyright protection Systems for Access Control Technologies', in Library of Congress, *Federal Register*, Vol 68, No. 211, October 31, 2003, pp. 62011ff.

⁶⁷ Electronic Frontiers Australia, *Submission No. 36.1*, p. 4; also Ms Kimberlee Weatherall, *Transcript of Evidence*, 15 November 2005, p. 25.

Office has required a very high standard of evidence of harm to *justify* an exception to be proven by users, while accepting largely hypothetical evidence of harm to oppose an exception from copyright owners.⁶⁸

- 2.79 The Committee notes that in the first (2000) round of rule making, two exceptions were granted. In the second (2003) round, those two exceptions (with some modifications) were again accepted, and a further two were included.⁶⁹ The extensive list of exemptions rejected by the USCO illustrates the range of exceptions sought but ultimately rejected by the USCO against the very specific criteria they use.
- 2.80 A number of submissions contended that the Committee should adopt the approach of the USCO in its deliberations.⁷⁰ Other submissions, however, argued that the role of the Committee is not analogous to that of the USCO, and that the Committee is not under the same constraints as the USCO.⁷¹ The Committee considers these matters, along with specific elements of the USCO rule making process, further in Chapter 3.

Region coding

- 2.81 The Terms of Reference for the Committee's inquiry noted six particular areas of activity that the Committee could consider in assessing further exceptions to circumvention liability under Article 17.4.7(e)(viii). One of these was region coding of digital technologies. Perhaps not surprisingly, region coding emerged as a prominent issue in the inquiry, and it is also illustrative of some of the issues surrounding combined TPMs and the level of protection that should be extended to access TPMs.
- 2.82 Regional coding was raised as a concern by a wide range of groups which submitted evidence to the inquiry – educational institutions, broadcasters, libraries and archives, cultural institutions and members of the general public. Much of the evidence focused on region coding of DVDs, although region coding of electronic games was also raised. As the circumstances and rationale for region coding

68 SBS, *Submission No. 37*, section 4.

69 See www.copyright.gov/1201/docs/librarian_statement_01.html

70 See for example IIPA, *Submission No. 10*; ARIA, *Submission No. 32*.

71 See for example Ms Kimberlee Weatherall, *Submission No. 38*, p. 14.

is somewhat different in each of these media they are dealt with separately in the following sections.

Region coding of electronic games

- 2.83 Piracy of computer and video games is a significant problem in Australia. In 2004 the Australian interactive entertainment industry generated sales of \$787 million. According to a study by the Allen Consulting Group, game piracy in Australia costs the industry around \$100 million in lost sales (or approximately 19% of all sales) per annum.⁷²

Rationale for region coding of electronic games

- 2.84 The Interactive Entertainment Association of Australia (IEAA) informed the Committee of the various types of TPMs used by the games industry to protect their copyright material. There is a form of region coding included in the various TPMs used for console games. The IEAA advised that the format of games consoles and games CD-ROMs are set to comply with international television standards (NTSC, used primarily in North America, Japan and South East Asia; and PAL, used in parts of Europe and Australia).⁷³ With advances in technology, this distinction is becoming less important and the 'introduction of HDTV (high-definition television) over the next few ...[years]... will see this issue disappear'.⁷⁴ This suggests that this form of region coding used in electronic games will no longer be necessary once the technology has overcome the NTSC/PAL distinction.
- 2.85 The Committee was informed that handheld electronic game devices that do not plug into televisions (i.e. non-console games) do not have region coding.⁷⁵ Parallel importation of games is permitted in Australia, and console games imported from other PAL countries can be imported and played on Australian consoles.⁷⁶

72 Quoted in IEAA, *Submission No. 43*, pp. 15-16; see also IEAA, *Exhibit No. 2*.

73 A third TV format, SECAM, is used in some parts of Europe, including France and Russia.

74 IEAA, *Submission No. 43.1*, p. 1.

75 IEAA, *Exhibit No. 2*.

76 IEAA, *Submission No. 43.1*, p. 4.

- 2.86 In addition to the technical television standard requirements for console games, the IEAA contended that region coding is used for other reasons, including:
- Assisting in the classification of games;
 - The matching of content to the cultural tastes of particular markets; and
 - Facilitating compliance with licensing agreements for third party intellectual property used in games.⁷⁷

- 2.87 The IEAA also argued that the class of consumers who purchase legitimate game console media overseas but are unable to play them on return to Australia is extremely small:

The only class of consumers who may be affected in this regard would be those who have travelled to a region which uses the NTSC television standards. As games consoles are coded in relation to the television standard used in the territory, there will be some limited impact for purchases made in these territories. The IEAA notes that there is also nothing to prevent consumers from purchasing hardware from jurisdictions to enable the discs to be played.⁷⁸

- 2.88 The IEAA noted that:

the majority of people who install mod chips do so to by-pass the 'legitimate product' embedded codes, to enable pirated discs to be played on the console. The IEAA is not aware of any significant percentage of mod chip users who do so to bypass purely the secondary 'territory' embedded codes.⁷⁹

- 2.89 The Committee notes concerns expressed elsewhere by the Australian Competition and Consumer Commission (ACCC):

the main concern of RPC[regional playback control], as distinguished from playback control, is to prevent parallel importation of competing software, not to prevent infringement as alleged by Sony.⁸⁰

77 IEAA, *Exhibit No. 2*.

78 IEAA, *Submission No. 43*, p. 12. The status of such machines under the new liability scheme is not clear. See discussion of multi-region DVD players at paragraphs 2.128 – 2.136 below.

79 IEAA, *Submission No. 43*, p. 6.

80 ACCC, *Submission to Digital Agenda Review*, October 2003, para. 4.

2.90 The Committee also notes that international factors may also affect the use of such region coding rather than domestic factors. The IEAA stated that:

The access controls used by companies in the Australian games industry are created by their overseas parent companies to suit the international market, not just Australia. The Australian companies cannot dictate the type of technology used to protect IP rights.⁸¹

Combined electronic game TPMs

2.91 The IEAA submission went into considerable detail about the various types of TPMs used by the industry and the interaction between media and game consoles.⁸² The IEAA stated that ‘Access controls used to enforce region coding are tightly coupled with additional and inseparable access controls that distinguish genuine from pirated games’, but did not detail how important the region coding aspect was as part of the suite of TPMs deployed to protect its products.⁸³

2.92 Indeed, the IEAA referred to ‘secondary ‘territory’ embedded codes’,⁸⁴ there was also some indication that that the region coding component *per se* is not necessarily integral to establishing the legitimacy of the disc. Regarding the automated verification process that takes place between the game console and the media, the IEAA stated that:

The majority of questions asked of the disc are designed to identify its legitimacy. There are some questions which also ‘question’ the disc in relation to the territory for which it was manufactured.⁸⁵

2.93 The clear implication here is that the region coding element is not identical with legitimacy verification, but involves a separate authentication sequence.

2.94 The IEAA contended that it would not be practically possible to formulate an exception regarding region coding that was limited

81 IEAA, *Exhibit No. 2*.

82 IEAA, *Submission No. 43*, pp. 5-6.

83 IEAA, *Exhibit No. 2*, p. 2.

84 IEAA, *Submission No. 43*, pp. 5-6.

85 IEAA, *Submission No. 43*, pp. 5, 6.

‘purely to region coding elements of the TPM’.⁸⁶ The IEAA indicated elsewhere, however, that it is a myth that ‘there is only one type of TPM used by the games industry’, and that there are different TPMs ‘used for different products/distribution platforms’.⁸⁷ Further, the IEAA stated that ‘it is not possible to identify *the* TPM used by the games industry.’⁸⁸ If this level of technical variation is possible with TPMs, then the Committee is not convinced that it is impossible to isolate the region coding element, or that doing so would inevitably render all other elements of console TPMs ineffective. The position that it is practically impossible to isolate the region coding element of TPMs is also inconsistent with the IEAA’s statement cited above implying that the automated verification process has two distinct elements – legitimacy verification and territory (i.e. region) verification.

Conclusion regarding electronic game region coding

- 2.95 While the Committee does support the protection of console game TPMs that are genuinely designed to prevent piracy and other infringing acts, there seems to be little substance to the argument that the region coding element of TPMs must be combined with other types of TPMs. There is doubt also as to whether the region coding element of console game TPMs is purely for television standard compliance, or whether, as stated by the ACCC, there is a significant element of market control involved.
- 2.96 The Committee recognises that regional differentiation for non-console games does not exist and accepts the statement by IEAA that ‘the only purpose of non-console TPMs is to control legitimate access and prevent piracy’.⁸⁹

Region coding of DVDs

- 2.97 The region coding system for DVDs is based on 8 international regions. Individual DVDs are coded for use in one region or, in some cases, two regions, and DVD players themselves are generally set to play DVDs from a single region. Thus both the DVD and the player restrict the ability of the consumer to play DVDs from regions outside of his/her own. For example, a DVD player set to Region 4 will not
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86 IEAA, *Submission No. 43*, p. 13.

87 IEAA, *Submission No. 43.1*, pp. 1, 2.

88 IEAA, *Submission No. 43.1*, p. 2.

89 IEAA, *Submission No. 43.1*, p. 7.

play a DVD coded for Region 1. This region coding – or Regional Playback Control (RPC) – is part of the DVD Content Scrambling System (CSS) used by all DVD manufacturers.

2.98 The regions are as follows:

- Region 1: United States, Canada and US Territories
- Region 2: United Kingdom, Europe, Japan, South Africa and Middle East
- Region 3: Southeast and East Asia
- Region 4: Australia, New Zealand, Pacific Islands, Central and South America
- Region 5: Former Soviet Union, Indian sub-continent, Africa, North Korea and Mongolia
- Region 6: China
- Region 7: Reserved for future use
- Region 8: International territories (cruise ships, aircraft etc)⁹⁰

2.99 It is important to note that Region 0 (or ‘region free’) coded machines are widely available in Australia. Such machines will play DVDs from any region.

2.100 Region coding is much less of an issue from the US perspective given that the US produces much of the material that consumers wish to access, and the size of its market means that most material will be released there.⁹¹ This is a quite different situation to Australia.

2.101 The Committee notes that requests for exemptions relating to region coding were made in both the 2000 and 2003 USCO rule making processes. On both occasions these requests were rejected by the USCO. Noting that ‘region coding of audiovisual works on DVDs serves legitimate purposes as an access control’, the USCO concluded that the prohibition on circumvention of regional coding had only a minor adverse impact on non-infringing use ‘because there are

90 Gilchrist, S, and Strasser, S, Full Federal Court rules that PlayStation ‘mod-chipping’ infringes copyright law’, in New South Wales Society for computers and the Law Journal, September 2003 (accessed online at www.nswscl.org.au/journal/53/GilchristStrass.html as at 23/08/2005).

91 It is interesting to note that the USCO in its 2003 Rulemaking indicated that it had ‘received more comments on this proposed exception than any other’ (see USCO, Recommendation of the Register of copyrights, October 27, 2003, p. 124.)

numerous options available to individuals seeking access to this foreign content'.⁹²

Rationale for region coding of DVDs

2.102 The Australian Visual Software Distributors Association Ltd (AVSDA) submitted that:

TPMs are part of the strategies copyright owners use to control piracy and manage their rights, including who can lawfully access film products and in what territories those products can be sold.

[R]egional coding protects the windows based release system of film from theatrical release through its life cycle to DVD, pay TV, internet and free-to-air.⁹³

2.103 AVSDA also stated that region coding is 'a key weapon in fighting piracy through the easy identification of pirated product as well as non-classified films'.⁹⁴

2.104 The Committee has no doubt that film piracy is a significant issue facing the film and television industry. Film industry estimates put the cost of movie piracy in Australia in excess of \$400 million in lost potential revenue in 2004. The industry estimates that illegal distribution of unauthorized copies of movies rose from 4% of the legitimate market in 2000 to around 10% in 2004. Pirated optical discs seized by customs in 2004 numbered approximately 40,000 in 2004, up from 14,000 in 2003. Physical seizure of unauthorised copies of films has risen from 61,550 in 2003 to 148,937 in 2004.⁹⁵

2.105 Region coding was described as 'a simple, effective device for Police and Customs officials to identify and seize infringing copies of films entering Australia and/or distributed for sale in Australia'.⁹⁶ Given that TPM circumvention of a region coded DVD will occur within Australia after importation, however, it is not clear to the Committee how this circumvention could endanger the ability of Police and Customs to identify non-legitimate DVDs at the border. Surely the presence and integrity of a TPM at this critical juncture cannot be affected by an action that takes place much later.

92 USCO, quoted in IIPA, *Submission No. 10*, p. 10.

93 Mr Simon Bush, *Transcript of Evidence*, 14 November 2005, p. 20.

94 AVSDA, *Submission No. 25*, p. 4.

95 AFACT, *Submission No. 39*, pp. 15-16.

96 AVSDA, *Submission No. 25*, p. 3.

2.106 The Committee also received evidence from the Australian Federation Against Copyright Theft (AFACT) that, over the past year, '80 per cent of the discs being seized in police raids are manufactured in Australia and they are DVD-R copies, in other words, burnt locally'.⁹⁷ It would appear from this evidence that there is some question over whether the presence of a region coding is an effective tool against copying of DVDs once in Australia. It may well be that legitimate copies of DVDs, regionally coded for Australia, are as likely as non-region coded DVDs to be the 'master' used for subsequent copying within the country.

2.107 One submission questioned the necessity of region coding on DVDs that are traded between countries with effective copyright regimes, and suggested that, for infringing material, seizure of itself should be sufficient:

This does not explain why the TPMs in DVDs prevents [*sic*] the use of DVDs sold in countries with strong copyright laws (including the USA) in Australian DVD players. It is also unclear why seizure at point of entry into Australia would not be a sufficient mechanism to address piracy of DVDs from countries with weaker copyright laws or laxer enforcement of those laws.

The primary effect of region coding in respect of Zone 1 DVDs (USA) is that price competition between Australian and US retailers and wholesalers is prevented. This either is, or should be, a serious breach of the *Trade Practices Act*.⁹⁸

2.108 AFACT argued strongly against any diminution of protection of region coding TPMs, seeing it as 'vitaly important that the copyright owner has the necessary control over access to their works, in order to protect their copyright. In this context, access control and copyright protection are synonymous'.⁹⁹ AFACT contended that:

A TPM which operates to prevent the unauthorised copying, communication, or redistribution of a film made available to a consumer in a particular format... protects copyright. However, it is also designed to prevent **unauthorised** access -

97 Ms Adrienne Pecotic, *Transcript of Evidence*, 14 November 2005, p. 39.

98 Mr Alex Andrews, *Submission No. 23*, p. 1.

99 AFACT, *Submission No. 39*, p. 5.

a fundamental prerequisite to the protection of copyright. A TPM which prevents access (such as...a DVD which contains regional coding) also protects copyright – as any breach of the access code to obtain unauthorised access will also generally infringe Film Copyright Rights.¹⁰⁰ (emphasis added)

- 2.109 For the Committee, this argument – that a measure taken by a copyright holder which regulates **all** uses of copyright material is straightforward copyright protection because it will also inhibit the possibility of infringement – is suspect. It does not take into account the non-infringing uses currently allowable under Australian copyright legislation, and seems to extend the zone of preventive control too far into the rights of copyright users. The subsequent statement by AFACT that ‘TPMs are not designed to prevent legitimate uses of copyright material’¹⁰¹ does not present a good fit with the fact that such prevention can be their very effect, particularly in the case of region coding.

Combined region coding TPMs

- 2.110 Similar to evidence received from IEAA concerning region coding of electronic games, the Committee was informed by AVSDA that the region playback is part of CSS and ‘is inextricably linked, so you cannot remove region coding without destroying the whole content scrambling system protection’.¹⁰² The Committee also notes, however, evidence from a representative of the US Motion Picture Association of America to the USCO during its 2003 rule making process:

To me, 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. Some owners of works will say I don’t care. All players can play my content. Others will say no, I only want it to be play on Region I layers or Region II players and so forth.

100 AFACT, *Submission No. 39*, p. 6. Film Copyright Rights were listed by AFACT as being the right to exclusively control copying, communication and public performance of their films; prevent and control infringement by sale and distribution of pirated and counterfeited products; and the right to control the importation of film products into Australia, including the right to determine the territories and timeframes in which films are distributed, p. 3.

101 AFACT, *Submission No. 39*, p. 10.

102 Mr Simon Bush, *Transcript of Evidence*, 14 November 2005, p. 21.

...In the case of movie companies, we do it sequentially for marketing reasons.¹⁰³

- 2.111 At the same hearing, a witness representing the American DVD Copy Control Association made the following statement:

The region code is not a required feature under CSS or the DVD format licenses. It is something which is available to motion picture companies to use if they wish. It's also usable in combination.

...region code is in fact independent from the technology of CSS.¹⁰⁴

- 2.112 Subsequent questioning during the rule making process confirmed the view that, in the US, the region code itself was considered a technological measure that controls access, but that it was **not** an essential component without which CSS would not operate. The decision to bundle both CSS and region coding is a decision taken by copyright owners to serve a range of purposes, but the driving force behind region coding appears to be that of market segmentation.

The status of region coding TPMs under the liability regime

- 2.113 An important factor regarding the issue of region coding TPMs is their status under the liability regime once Article 17.4.7 is passed into Australia law. When asked to comment on this, AVSDA submitted that, as part of the CSS, region code TPMs would be treated as TPMs. While noting that under current Australian law (and the *Stevens v Sony* case), as region coding does not 'directly prevent an infringing copy of a film from being made', it is unclear whether region coding would be protected in its own right. AVSDA also stated that:

However, RPC will be required to be protected as a TPM in its own right under Australia's FTA obligations, as RPC will be covered by the FTA definition of an 'effective technological protection measure' (i.e., it is a technology, device or

103 Mr Fritz Attaway, Evidence to Rulemaking hearing, USCO, May 2, 2003, p. 82. Full transcript available at: www.copyright.gov./1201/2003/hearings/transcript-may2.pdf (accessed 10/01/2006).

104 Mr Bruce Turnbull, Evidence to Rulemaking hearing, Copyright Office, May 2, 2003, pp.113, 116. Full transcript available at: www.copyright.gov./1201/2003/hearings/transcript-may2.pdf (accessed 10/01/2006).

component that controls access to a copyright work or other subject-matter).¹⁰⁵

2.114 The Committee also sought advice from the AGD on this issue. The Department responded in the affirmative, explaining that:

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.¹⁰⁶

2.115 However, the Department also stated that:

whether region coding measures fall within the scope of the liability scheme depend [*sic*] on the particular components of the technology itself. ...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.¹⁰⁷

2.116 The AGD further indicated that:

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’.¹⁰⁸

2.117 The following exchange from one of the Committee’s public hearings also indicates that the ultimate status of region coding TPMs may be something of a live issue for the Government:

MR TURNBULL: The reality is that a regional access control TPM is really not regional access control at all; it is device access control. If I buy my DVD in New York and I come back to Australia with an American DVD player that is capable of playing that DVD, I can play it in Australia or anywhere I like in the world. This comes back to the Sony case. It is really related to a type of device. I would put it to

105 AVSDA, *Submission No. 25.1*, p. 1.

106 AGD, *Submission No. 52.1*, p. 5.

107 AGD, *Submission No. 52.1*, p. 4.

108 AGD, *Submission No. 52.1*, p. 5.

you that has got nothing to do with copyright. The restriction relates to the device rather than the region.

Ms Daniels: And it is whether the device is an ETM, which our obligations under the agreement require us to bring into the liability regime.

MR TURNBULL: Do we say it is illegal for someone who is moving from America to live in Australia to bring their DVD player with them? Is that the case?

Ms Daniels: No

MR TURNBULL: If that is not the case, then if it is legal to have a US DVD player here then it is perfectly possible to play a US DVD here. I just do not see what this has got to do with protecting copyright.

Ms Daniels: I think that is right. Most ETMs are directed to antipiracy measures, which is what copyright owners are most concerned about, but the region-coding issues gets merged with the access issue and it is hard to disentangle them.¹⁰⁹

2.118 The IPC argued that regional access controls are:

best dealt with not in the context of exceptions to liability, but the way in which liability is properly characterised. It might be that a regional access control which does no more than control access (and not related to copying or some other exercise of copyright within Australia) and which is applied to an importable, should not be treated as an access control capable of legal protection, on the basis that it is unrelated to any exercise of a right in copyright.

This outcome seems to be in harmony with the US jurisprudence relating to use of access controls for non-copyright objectives...¹¹⁰

Non-infringing use

2.119 The Committee notes that, under Australian copyright law, it is currently illegal to parallel import DVDs into Australia for

109 Mr Malcolm Turnbull MP and Ms Daniels, *Transcript of Evidence*, 5 December 2005, p. 35.

110 IPC, *Submission No. 15*, p. 8.

commercial purposes. However, the law does not prohibit individuals purchasing DVDs from overseas, either over the internet or when visiting that country, for their own personal use.

- 2.120 At the heart of any discussion about region coding lies the issue of the consumer's right to use genuine copyright material that has been lawfully obtained. Genuine DVDs lawfully purchased overseas by Australian consumers and brought back into Australia for private use only are not infringing copyright as it currently stands in Australia. Although speaking in connection with region coding devices used by Sony in PlayStation games, the comments by Justice Kirby in *Stevens v Sony* are also pertinent for DVDs generally:

In effect, and apparently intentionally, those restrictions reduce global market competition. They inhibit rights ordinarily acquired by Australian owners of chattels to use and adapt the same, once acquired, to their advantage and for their use as they see fit...

The right of the individual to enjoy lawfully acquired private property... would ordinarily be a right inherent in Australian law upon the acquisition of such a chattel.¹¹¹

- 2.121 For Australian consumers wishing to play DVDs coded other than region 4, AVSDA stated that region specific machines can be changed up to 5 times, thus allowing some limited playing of DVDs from other regions.¹¹² It was also suggested elsewhere that a consumer could purchase additional DVD players, encrypted for various regions:

You can have a DVD player that you keep for your [for example] Japanese films. DVD players are now cheaper than DVDs in a lot of instances... There is no financial disincentive. But I would argue, even if there was a financial disincentive, that what we are talking about is the capacity to buy a DVD player that will play it... versus the harm against providing the consumer the right to decrypt the playback card.¹¹³

- 2.122 While such an approach may be possible, the Committee seriously doubts that Australian consumers would see the purchase and importation of multiple DVD players to deal with region coding, or only having a small number of opportunities to view a DVD on their pre-existing machine, as reasonable solutions. This therefore leaves
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111 Paras 175, 215 per Kirby J.

112 See for example, Mr Simon Bush, *Transcript of Evidence*, 14 November 2005, p. 28.

113 Ms Adrienne Pecotic, *Transcript of Evidence*, 14 November 2005, p. 49.

consumers and others wishing to access legitimately acquired DVDs coded for other regions with having to use modified DVD players. However, there is considerable doubt as to whether such machines will be legal under the AUSFTA. The issue of modified DVD players is discussed further below.

2.123 AFACT did acknowledge that:

the use of TPMs that include an aspect of region coding functionality may have some limited impact on consumers who wish to import legitimate products for private, non-commercial purposes from places outside Australia.¹¹⁴

2.124 However, AFACT also argued that this group of consumers is numerically small in relation to the overall size of the Australian market, and that:

any inconvenience for a small class of consumers must be compared to the significant and serious harm posed to copyright owners if the primary technology used to control Distribution and Importation Rights were able to be circumvented.¹¹⁵

2.125 AFACT went on to observe that the policy balance struck by the *Copyright Amendment (Digital Agenda) Act 2000* can be distilled into a number of principles, including that 'enabling private citizens to have general access to circumvention devices and services would make the TPM provisions in copyright legislation inoperable'.¹¹⁶

2.126 The Committee is not convinced that the number of people impacted by region coding is as limited as claimed. In addition to ordinary consumers, the educational sector, cultural institutions, parliamentary libraries, and public broadcasters all attested to the likely impact of region coding on their operations should it be covered by the liability scheme and no exceptions granted.¹¹⁷

114 AFACT, *Submission No. 39*, p. 10.

115 AFACT, *Submission No. 39*, p. 10.

116 AFACT, *Submission No. 39*, p. 9.

117 See for example, National Gallery of Australia (NGA), *Submission No. 18*, p. 3; Department of Parliamentary Services, Parliament of Australia, *Submission No. 24*, p. 4; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission No. 46*, p. 10; Copyright Advisory Group of the Ministerial Council on Employment, Education Training and Youth Affairs (CAG), *Submission No. 40*, p. 13.

- 2.127 Both public broadcasters, the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS), raised problems associated with using regional coded DVDs. The ABC noted that it currently uses technology that allows it to use DVDs from around the world, but that 'if regional coding is considered a TPM, the ABC will need a legitimate exception in order to circumvent the regional coding for fair dealing purposes'.¹¹⁸ Similarly, SBS noted that it is already encountering problems with regional coding of DVDs which cannot be played on machines or computers coded for the Australian market.¹¹⁹

The status of multi-region DVD players under the liability scheme

- 2.128 Although many DVD players are set to play DVDs from one region only, different modification options are possible. These include modifying the player to play DVDs from all regions (all region setting); programming of the DVD so that it changes its region depending on the region of the DVD inserted (region switching); and changing the region code setting using a hidden menu (manual region setting).¹²⁰ Not all players can be modified in the same way.
- 2.129 It is estimated that, in early 2001, there were some 500,000 DVD players in Australia,¹²¹ and that figure is likely to have increased exponentially with the increasing affordability of such units. While there are no current statistics on how many of the players may have been modified, a rough estimate can be made, based on 2001 figures for the United Kingdom, which indicated up to 60% of all players had been modified to play all regions.¹²²
- 2.130 In rejecting any proposal for an exception for region coding, AVDSA submitted that:

the current ready availability of multi-region DVD players in Australia gives the Australian consumer the ability to play region coded DVD's other than region 4. The consequences on consumers are very small in this context.¹²³

118 ABC, *Submission No. 14*, p. 9.

119 SBS, *Submission No. 37*, p. 1.

120 Professor Joshua Gans, *Exhibit No. 1*, p. 5.

121 Professor Joshua Gans, *Exhibit No. 1*, p. 14.

122 Professor Joshua Gans, *Exhibit No. 1*, p. 14.

123 AVDSA, *Submission No. 25*, p. 5.

2.131 It is not clear to the Committee, however, that multi-region DVD players will be permitted under the AUSFTA, as there will be liability attached to the provision of devices to overcome TPMs.

2.132 AVSDA went on to submit that in its view a DVD player is not a circumvention device:

DVD players have a lawfully commercially significant purpose of playing DVD discs that have been zoned for the region in which the owner of the DVD player resides. As a result, they cannot be considered to be circumvention devices under the Act.¹²⁴

2.133 However, AVSDA added that:

This does not mean that it is lawful to modify a DVD player to circumvent or ignore RPC coding, to operate as a multi-zoned DVD player. These activities and devices would be prohibited under the Act and by the FTA...¹²⁵

2.134 Despite the view the effect on owners of legitimately acquired DVDs will be reduced through access to multi-region DVDs, it appears that such players could very well be prohibited under Article 17.4.7. The Committee believes it is ludicrous to envisage a situation where an individual's only option to use legally acquired genuine non-zone 4 DVDs will be to purchase a DVD player tuned to each of the other regions, rather than have the ability to modify a DVD player to access all regions.

2.135 It is also relevant to note here that in a side letter to the United States-Singapore Free Trade Agreement, dated 6 May 2003, the parties agreed to the following:

Nothing in this agreement shall require Singapore to restrict the importation or domestic sale of a device that does not render effective a technological measure whose sole purpose is to control market segmentation for legitimate copies of motion pictures, and is not otherwise a violation of law.¹²⁶

2.136 It is difficult to envisage that circumstances in Singapore are so radically different from those in Australia as to warrant such a

124 AVSDA, *Submission No. 25.1*, p. 2.

125 AVSDA, *Submission No. 25.1*, p. 2.

126 Quoted in Ms Kimberlee Weatherall, *Submission No. 38*, p. 31.

different treatment of such devices, where in both instances the uses are non-infringing.

Conclusion

- 2.137 For this Committee at least, the arguments that region coding TPMs are an essential tool in preventing piracy, that they cannot be separated from other varieties of TPM, and that they are actually copyright protection because they inhibit the possibility of infringement, are not at all persuasive. Nor does the Committee see why a legitimate DVD, lawfully purchased overseas, should not be able to be played on a DVD machine set for any region. The Committee is of the view that region coding TPMs should not come within the compass of the meaning of ETM in the new liability scheme. Ultimately, however, it will be a decision for the Government, based on revised definitions in the *Copyright Act 1968*, as to whether region coding should come within the scheme. The Committee is not aware at this stage of what will be the final policy decision on this matter.
- 2.138 Should regional coding TPMs be included within the meaning of ETM under the new liability scheme, the Committee is of the view that exceptions to circumvention liability regarding region coding TPMs should be permitted under Article 17.4.7 wherever the criteria are met.

Recommendation 4

- 2.139 **The Committee recommends that region coding TPMs be specifically excluded from the definition of 'effective technological measure' in the legislation implementing the Australia-United States Free Trade Agreement.**

Should the government include region coding TPMs within the definition of 'effective technological measure', the Committee recommends that exceptions proposed for region coding TPM circumvention under Article 17.4.7(e)(viii) be granted wherever the criteria for further exceptions under Article 17.4.7(e)(viii) are met.

The task ahead

- 2.140 It is clear from the policy statements by Government ministers and officials that the AUSFTA was negotiated in the expectation that Australia could provide certain exceptions to the liability scheme for circumvention of TPMs that reflect Australia's domestic copyright regime and history. In addition, it was clearly not the intention of the Government that US domestic copyright law, and in particular provisions of the DMCA, be adopted wholesale into Australian law.
- 2.141 The task facing the government in translating the AUSFTA provisions into law, and in particular in setting out clear and concise definitions of key terms, should not be minimised. The Committee has been at a considerable disadvantage in not knowing the final format of proposed legislation and the approach that will be adopted by the Government. It is clear, however, that just as in the past compromise has been an essential part of copyright amendments to date, such compromise will also be necessary in this instance.