
The Parliament of the Commonwealth of Australia

Review of technological protection measures exceptions

House of Representatives
Standing Committee on Legal and Constitutional Affairs

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Foreword

Copyright is all about balancing competing interests – in particular, balancing the legitimate expectations of copyright owners that there should be appropriate copyright protection for material and the expectations of copyright users that there should be public access to material for legitimate public benefit reasons. Australia's system of copyright law is regarded as one of the fairest in the world, providing significant protections to copyright owners while allowing access to copyright material for specific purposes. Australia also has a well-established system of statutory licensing under which copyright owners are financially compensated for specific use of their material.

In the digital age, ever-increasing amounts of material are available in an expanding number of formats. The DVD player, home PC, MP3 music player, mobile phone, game platform and pay-TV system are features of many Australian homes. The need of copyright owners to protect their work in the digital context has seen the development of a range of technological protection measures (TPMs). These are recognised and protected by Australian domestic copyright law and, with the signing of the Australia-United States Free Trade Agreement (AUSFTA), Australia has given further undertakings to protect these TPMs from circumvention.

While the AUSFTA sets out for seven specific areas where circumvention of TPMs will be permitted, this Committee has been given the task of assessing whether any further exemptions should be considered by the Australian Government. The Committee was pleased to receive submissions from a wide range of groups and individuals on this quite technical subject and wishes to place on record its thanks to all who assisted the Committee in its deliberations. The Committee hopes that its findings will be of assistance to the Government as it works towards implementation of this component of the AUSFTA in the next 12 months.

I would like to thank all members of the Committee who gave of their time and expertise so generously in examining the issues raised during this inquiry. Many of the issues were highly technical and complex in nature, and Members applied themselves assiduously to understanding the issues raised. I would also like to thank the Committee Secretariat and Ms Kirsti Haipola from the Attorney-General's Department for their invaluable assistance during the course of the inquiry.

Hon Peter Slipper MP
Chairman



Membership of the Committee

Chair The Hon Peter Slipper MP

Deputy Chair Mr John Murphy MP

Members Mr Michael Ferguson MP
(from 09/02/2006)

Mrs Kay Hull MP

The Hon Duncan Kerr SC MP

Mr Daryl Melham MP

Ms Sophie Panopoulos MP

Ms Nicola Roxon MP

Mr Patrick Secker MP

Mr David Tollner MP

Mr Malcolm Turnbull MP
(to 09/02/2006)

Committee Secretariat

| | |
|------------------------|-------------------|
| Secretary | Ms Joanne Towner |
| Inquiry Secretary | Dr Nicholas Horne |
| Adviser | Ms Kirsti Haipola |
| Administrative Officer | Ms Kate Tremble |



Terms of reference

Chapter 17 of the Australia-United States Free Trade Agreement deals with intellectual property rights. Article 17.4 stipulates the parties' obligations in relation to copyright.

Article 17.4.7 requires the Parties to create a liability scheme for certain activities relating to the circumvention of 'effective technological measures'. The Parties may introduce exceptions in the liability scheme as specified in Article 17.4.7(e)(i) to (vii) or pursuant to Article 17.4.7(e)(viii).

The Committee is to review whether Australia should include in the liability scheme any exceptions based on Article 17.4.7(e)(viii), in addition to the specific exceptions in Article 17.4.7(e)(i) to (vii). The Committee must ensure any proposed exception complies with Article 17.4.7(e)(viii) and 17.4.7(f).

Particular activities which the Committee may examine for this purpose include:

- (a) the activities of libraries, archives and other cultural institutions
- (b) the activities of educational and research institutions
- (c) the use of databases by researchers (in particular those contemplated by recommendation 28.3 of the Australian Law Reform Commission Report on Gene Patenting)
- (d) activities conducted by, or on behalf of, people with disabilities
- (e) the activities of open source software developers, and
- (f) activities conducted in relation to regional coding of digital technologies.

(Referred by the Attorney-General 19 July 2005)



List of abbreviations

| | |
|--------------|---|
| ADA/ ALCC | Australian Digital Alliance Australian Libraries' Copyright Committee |
| AFACT | Australian Federation Against Copyright Theft |
| AFC | Australian Film Commission |
| AGD | Attorney-General's Department |
| AGLIN | Australian Government Libraries Information Network |
| AIATSIS | Australian Institute of Aboriginal and Torres Strait Islander Studies |
| ARIA | Australian Record Industry Association |
| ATO | Australian Tax Office |
| AUSFTA | Australia-United States Free Trade Agreement |
| AVCC | Australian Vice-Chancellors' Committee |
| AVSDA | Australian Visual Software Distributors Association Ltd |
| BSAA | Business Software Association of Australia |
| CAG | Copyright Advisory Group to the Schools Resourcing Taskforce of the Ministerial Council on Employment, Education Training and Youth Affairs |
| CAL | Copyright Agency Limited |

| | |
|-------|---|
| CD | Compact Disc |
| CSS | Content Scrambling System |
| DCITA | Department of Communications, Information Technology and the Arts |
| DEST | Department of Education, Science and Training |
| DFAT | Department of Foreign Affairs and Trade |
| DMCA | Digital Millennium Copyright Act (US) |
| DPS | Parliament of Australia, Department of Parliamentary Services |
| DVD | Digital Versatile Disc |
| EFA | Electronic Frontiers Australia |
| ETM | Effective Technological Measure |
| FLAG | Flexible Learning Advisory Group |
| IEAA | Interactive Entertainment Association of Australia |
| IIPA | International Intellectual Property Alliance |
| IPC | Intellectual Property Committee, Business Law Section, Law Council of Australia |
| JSCOT | Joint Standing Committee on Treaties |
| NGA | National Gallery of Australia |
| NLA | National Library of Australia |
| OFLC | Office of Film and Literature Classification |
| OSIA | Open Source Industry Australia Ltd |
| QPL | Parliament of Queensland, Parliamentary Library |
| RPC | Region Playback Control |
| SISA | Supporters of Interoperable Systems in Australia |
| STCG | States and Territories Copyright Group |

| | |
|------|--|
| TAFE | TAFE Libraries Australia |
| TPM | Technological Protection Measure |
| USCO | United States Copyright Office |
| WCT | WIPO Copyright Treaty |
| WIPO | World Intellectual Property Organisation |
| WPPT | WIPO Performances and Phonograms Treaty |



List of recommendations

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

Recommendation 1 (paragraph 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.

Recommendation 2 (paragraph 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.

Recommendation 3 (paragraph 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.

Recommendation 4 (paragraph 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.

3 The specified exceptions and the criteria for further exceptions

Recommendation 5 (paragraph 3.19)

The Committee recommends that, in the implementing legislation, Article 17.4.7(e)(vi) of the Australia-United States Free Trade Agreement should be interpreted so as to permit exceptions to liability for TPM circumvention for the government activities identified by the Australian Tax Office and the Office of Film and Literature Classification at paragraphs 3.10 – 3.14 of this report.

Recommendation 6 (paragraph 3.32)

The Committee recommends that the exceptions specified in Article 17.4.7(e)(i), (iv) and (v) of the Australia-United States Free Trade Agreement should be interpreted in the implementing legislation so as to permit exceptions to liability for the following TPM circumventions:

- Circumvention for reverse engineering of software for interoperability purposes;
- Circumvention for software installed involuntarily or without acceptance, or where the user has no awareness a TPM or no reasonable control over the presence of a TPM;
- Circumvention for security testing of software; and
- Circumvention for individual privacy online

examined at paragraphs 3.22 – 3.30 of this report.

Recommendation 7 (paragraph 3.34)

The Committee recommends that the form in the implementing legislation of the exceptions specified in Article 17.4.7(e)(i) – (vii) of the Australia-United States Free Trade Agreement should not narrow their scope, as delineated by the Agreement text, in any way.

Recommendation 8 (paragraph 3.66)

The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.55 – 3.64 of this report, to the 'particular class of works, performances, or phonograms' criterion in Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.

Recommendation 9 (paragraph 3.98)

The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.87 – 3.96 of this report, to the credibly demonstrated actual or likely adverse impact criterion in Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.

Recommendation 10 (paragraph 3.116)

The Committee recommends that the Government adopt the Committee's approach, set out in paragraphs 3.109 – 3.114 of this report, to the non-impairment of legal protection or legal remedies criterion in Article 17.4.7(f) of the Australia-United States Free Trade Agreement when preparing the implementing legislation.

Recommendation 11 (paragraph 3.125)

The Committee recommends that, as far as is possible within the confines of giving effect to the Australia-United States Free Trade Agreement, the implementing legislation should clarify the term 'manufactures' in Article 17.4.7(a)(ii) in order to permit the non-commercial creation of circumvention devices for the purpose of utilising exceptions permitted under Article 17.4.7(e)(v), (vii) and (viii).

Recommendation 12 (paragraph 3.131)

The Committee recommends that the Government devise a workable and adequate solution to the flaw in Article 17.4.7 of the Australia-United States Free Trade Agreement identified at paragraphs 3.117 – 3.119 of this report, for example a statutory licensing system or some other approval regime, to enable the proper exercise of exceptions under Article 17.4.7(e)(v), (vii) and (viii).

The Committee also recommends that the solution devised by the Government should be distinct from those identified at paragraphs 3.122 – 3.129 of this report.

4 Exceptions proposed to the Committee

Recommendation 13 (paragraph 4.4)

The Committee recommends that, in the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement, the Government maintain the existing permitted purposes and exceptions in the *Copyright Act 1968*.

Recommendation 14 (paragraph 4.15)

The Committee recommends that the proposed exception to liability for TPM circumvention for the investigation of copyright infringement of licensed computer programs examined at paragraphs 4.7 – 4.14 of this report be included as a permitted exception in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

This exception should only be available upon the order of a court where the court is satisfied that there are reasonable grounds for the investigation.

Recommendation 15 (paragraph 4.43)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- Making back-up copies of computer programs;
- The reproduction or adaptation of computer programs for interoperability between computer programs;
- The reproduction or adaptation of computer programs for correcting errors in computer programs; and
- Interoperability between computer programs and data

examined at paragraphs 4.16 – 4.42 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 16 (paragraph 4.51)

The Committee recommends that the Government monitor the potential adverse impact of threats of legal action being made against legitimate researchers in Australia conducting research into encryption, access, copy control measures, and other issues relating to computer security.

Recommendation 17 (paragraph 4.66)

The Committee recommends that the Government monitor the potential adverse impact in Australia of compilations of lists of websites being blocked by commercial filtering software.

Recommendation 18 (paragraph 4.74)

The Committee recommends that, should the tinkering, decompilation and exploitation of ‘abandonware’ become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

The Committee would also support any moves to render the use of ‘orphaned’ works non-infringing under the *Copyright Act 1968*.

Recommendation 19 (paragraph 4.89)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- The provision of copyright material to members of Parliament; and
- The use of copyright material for the services of the Crown

examined at paragraphs 4.75 – 4.86 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 20 (paragraph 4.90)

The Committee recommends that the Government ensure that the exception permitted for the use of copyright material for the services of the Crown integrates smoothly with the scope of the exception in Article 17.4.7(e)(vi) of the Australia-United States Free Trade Agreement, and that the coverage provided by both exceptions is sufficient for the full range of government activity.

Recommendation 21 (paragraph 4.99)

The Committee recommends that, if any activities for assisting students with disabilities outside of Part VB of the *Copyright Act 1968* become non-infringing in future and satisfy Article 17.4.7(e)(viii) and (f) of the Australia-United States Free Trade Agreement, the Government investigate the appropriateness of introducing a corresponding TPM circumvention exception for these activities.

Recommendation 22 (paragraph 4.107)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- The reproduction and communication of copyright material by educational and other institutions; and
- Those with a print disability and for the reproduction and communication of copyright material by institutions assisting those with a print disability

examined at paragraphs 4.91 – 4.105 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 23 (paragraph 4.109)

The Committee recommends that the Government examine the issue of the classification of devices used as accessibility aids by or for those with a print disability with a view to exempting such devices from the TPM liability scheme.

Recommendation 24 (paragraph 4.111)

The Committee recommends that, pending the outcome of its fair dealing review, the Government examine the adequacy of s.40 of the *Copyright Act* 1968 as a mechanism for those with a print disability and consider implementing a provision specifically allowing for the reproduction and communication of copyright material for private use by those with a print disability.

Recommendation 25 (paragraph 4.144)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- The reproduction and communication of copyright material by libraries, archives and cultural institutions for research and study purposes;
- The reproduction and communication of copyright material by libraries, archives and cultural institutions for other libraries, archives and cultural institutions; and
- The reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes

examined at paragraphs 4.126 – 4.143 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 26 (paragraph 4.152)

The Committee recommends that, in advance of the implementation of Article 17.4.7 of the Australia-United States Free Trade Agreement, the Government consult with the National Gallery of Australia and any other relevant institutions to identify an appropriate exception for TPM circumvention for the temporary reproduction of digital material for exhibition and preservation purposes.

Recommendation 27 (paragraph 4.169)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- Fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice; and
- The inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes

examined at paragraphs 4.157 – 4.168 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 28 (paragraph 4.190)

The Committee recommends that the proposed exceptions to liability for TPM circumvention for:

- Access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided; and
- Access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product

examined at paragraphs 4.175 – 4.188 of this report be included as permitted exceptions in the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 29 (paragraph 4.198)

The Committee recommends that, should the act of making back-up copies of copyright material other than computer programs become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

The Committee would also support any moves to render the making of back-up copies of copyright material other than computer programs non-infringing under the *Copyright Act 1968*.

Recommendation 30 (paragraph 4.204)

The Committee recommends that, should the format shifting of copyright material become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

The Committee would also support any moves to render the format shifting of copyright material non-infringing under the *Copyright Act 1968*.

Recommendation 31 (paragraph 4.212)

The Committee recommends that, should the reproduction and communication of 'orphaned' copyright material become a non-infringing act in future, the Government investigate the appropriateness of introducing a corresponding TPM exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement.

Recommendation 32 (paragraph 4.217)

The Committee recommends that the Government develop an exception under the scheme implementing Article 17.4.7 of the Australia-United States Free Trade Agreement to allow for circumvention of TPMs for access to mixed works consisting of both copyright material and non-copyright material where the amount of non-copyright material in the work is substantial.

Recommendation 33 (paragraph 4.239)

The Committee recommends that the legislation implementing Article 17.4.7 of the Australia-United States Free Trade Agreement should nullify any agreements purporting to exclude or limit the application of permitted exceptions under the liability scheme.

5 Future reviews

Recommendation 34 (paragraph 5.27)

The Committee recommends that future administrative reviews required under Article 17.4.7(e)(viii) be conducted by the Attorney-General's Department.

Recommendation 35 (paragraph 5.37)

The Committee recommends that the Attorney-General consider *ad hoc* requests for exceptions under the TPM liability scheme according to a statutorily defined process.

Recommendation 36 (paragraph 5.41)

The Committee recommends that existing and proposed exceptions be reviewed every four years through a statutorily defined, public administrative review conducted by the Attorney-General's Department.

Recommendation 37 (paragraph 5.47)

The Committee recommends that any exceptions to the liability regime under Article 17.4.7(e)(viii) should be promulgated as subordinate legislation, rather than through amendments to the *Copyright Act 1968*.

