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**HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS - INQUIRY INTO TECHNOLOGICAL
PROTECTION MEASURES EXCEPTIONS**

ATTORNEY-GENERAL'S DEPARTMENT SUBMISSION

Overview

This submission is structured in three parts:

- Part 1 provides background information to assist the Committee's inquiry. This part describes the current provisions in the *Copyright Act 1968* (Copyright Act) regarding technological protection measures. These provisions are targeted towards the commercial manufacture and supply of circumvention devices or services, rather than the use of circumvention devices. It also discusses the recent High Court interpretation of these provisions in the case *Stevens v Kabushiki Kaisha Sony Computer Entertainment*.¹
- Part 2 outlines obligations relating to effective technological measures in the Australia-United States Free Trade Agreement (AUSFTA). Under the AUSFTA, Australia is required to implement a new liability scheme for the circumvention of effective technological measures by 1 January 2007. As a result of the AUSFTA substantial changes to the current technological protection measure scheme in the Copyright Act will be required.
- Part 3 focuses on the specific issues that the Committee has been asked to consider in the current inquiry. Article 17.4.7(e)(viii) of the AUSFTA provides Australia with the option of identifying additional exceptions to the liability scheme provided they meet certain criteria. The Committee's task is to consider whether there are additional exceptions to circumvention liability that would be appropriate for Australia to create. Part 3 provides guidance on how the relevant provisions in the AUSFTA could be interpreted.

¹ [2005] HCA 58

PART 1 – BACKGROUND

1.1 *Technological protection of copyright material*

2. Copyright owners sometimes use technological measures to prevent users from doing acts with copyright material that the copyright owner has not authorised or that are contrary to law. Some technological measures prevent all or some access to copyright material. For example, access to some material on a website may be prevented to all but authorised users by means of a password or some mechanism requiring payment to permit access to the material. Other technological measures protect copyright material more directly against copyright infringement. For example, a music file may be protected in a manner that prevents it from being copied or from being e-mailed indiscriminately to other people (the latter being an exercise of the copyright owner's communication right).

3. Technological measures on copyright material operate as a second practical level of protection for copyright owners in addition to the bundle of exclusive rights provided to copyright owners under the *Copyright Act 1968* (Copyright Act).² However, technological measures designed to protect copyright material can usually be overcome or defeated by other technological measures. The technology or service that breaks through the protecting technological measures placed on copyright material by a copyright owner is referred to as a 'circumvention device' or 'circumvention service' respectively.

1.2 *International recognition of technological measures protecting copyright material*

4. The World Intellectual Property Organisation's (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (together known as the WIPO Internet Treaties) prescribe a minimum level of protection against circumvention of technological measures that parties to the Treaties must implement. Article 11 of the WCT provides that:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.³

5. Australia is obligated to become a party to the WIPO Internet Treaties under Article 17.1.4 of the AUSFTA.⁴

1.3 *Australian recognition of technological measures protecting copyright material*

6. The current regime for protection against circumvention of technological measures protecting copyright material in the Copyright Act was introduced by the *Copyright Amendment (Digital*

² See section 31 for the nature of exclusive rights in literary, dramatic, musical or artistic works and sections 85-88 for the nature of exclusive rights in sound recordings, cinematograph films, broadcasts and published editions of works.

³ Article 18 of the WPPT provides a similar obligation where technological measures are used by producers of phonograms and performers.

⁴ This obligation is subject to the fulfilment of necessary internal requirements.

Agenda) Act 2000 (Digital Agenda amendments) which came into effect in 2001. The Digital Agenda amendments were designed to implement the WIPO Internet Treaties requirements regarding liability for circumvention of technological measures protecting copyright material. 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.

7. The term 'effective technological measure' (ETM) is used in the wording of Article 11 of the WCT and Article 18 of the WPPT. Currently, the Copyright Act does not require a technological measure to be 'effective'. Due to the difficulty of defining when a technological measure would be 'effective', the Digital Agenda amendments did not include that term. The Copyright Act uses the term 'technological protection measure' (TPM). This term is discussed further below.

1.4 Current Copyright Act Approach

8. The current provisions in the Copyright Act regarding TPMs are targeted towards the activities of commercial manufacture and supply of circumvention devices or services rather than the use of circumvention devices.

1.4.1 Definition of Technological Protection Measure

9. 'Technological protection measure' is defined in the Copyright Act as:

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 mechanism.⁵

The Copyright Act defines 'circumvention device' or 'circumvention service' as a device or service that has only a limited commercially significant purpose or use, or no purpose or use, other than the circumvention or facilitating the circumvention of a TPM.⁶ Neither the term 'circumvention' nor the act of 'circumventing' is defined in the Copyright Act.

1.4.2 Liability for dealings with TPMs

10. The Copyright Act currently provides for civil actions by copyright owners and prosecutions for criminal offences where a person:

- (a) makes a circumvention device
- (b) sells, lets for hire or promotes, advertises or markets a circumvention device
- (c) distributes a circumvention device for trade purposes or a purpose that will prejudicially affect the copyright owner
- (d) exhibits a circumvention device for trade

⁵ Section 10.

⁶ Section 10.

- (e) imports a circumvention device for the purpose of any of the activities in (b) to (d) above
- (f) makes a circumvention device available online to an extent that will prejudicially affect the copyright owner, or
- (g) provides, or by way of trade promotes, advertises or markets, a circumvention service.⁷

11. 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.⁸ The requisite level of intent in criminal proceedings is knowledge or recklessness.⁹

1.4.3 Permitted purpose exceptions

12. Exceptions to liability for both civil actions and criminal proceedings are available if the circumvention device is to be used for a 'permitted purpose',¹⁰ subject to compliance with strict procedural requirements.¹¹ The permitted purposes are:

- (a) reproducing computer programs to make interoperable products (s47D)
- (b) reproducing computer programs to correct errors (s47E)
- (c) reproducing computer programs for security testing (s47F)
- (d) copying by Parliamentary libraries for members of Parliament (s48A)
- (e) reproducing and communicating works by libraries and archives for users (s49)
- (f) reproducing and communicating works by libraries and archives for other libraries and archives (s50)
- (g) reproducing and communicating works for preservation and other purposes (s51A)
- (h) use of copyright material for the services of the Crown (s183), and
- (i) reproducing and communicating works etc by educational and other institutions (Part VB).

13. These permitted purpose exceptions were developed following consultations with copyright stakeholders. The limited exceptions to the circumvention provisions balance the interests of users to access material with the interests of copyright owners to protect their material from copyright infringement in the online environment.

14. The permitted purpose exceptions are different to the general 'fair dealing' exceptions to copyright infringement in the Copyright Act. The fair dealing exceptions apply to copyright material and may be applicable once a TPM has been circumvented. For example, a person wanting to access copyright material for the fair dealing purpose of research or study could not rely upon the fair dealing exceptions to make, supply or import a circumvention device in order to access the material protected by a TPM. However libraries wishing to reproduce or communicate material for their users would be able, for instance, to make a circumvention device under the permitted purpose

⁷ Section 116A(1) (civil remedies), sections 132(5A) and 132(5B) (criminal offences).

⁸ Section 116A(1)(c).

⁹ Sections 132(5A) and 132(5B).

¹⁰ Sections 116A (3) and 116A(4) (civil remedies); sections 132(5F) and 132(5G) (criminal offences).

¹¹ The procedural requirements are set out in sections 116A(3)(b) and 132(5F)(b).

covered in s49. Once the TPM protecting the material has been circumvented then the fair dealing exceptions would apply to the copyright material.

1.5 Judicial interpretation of the current TPM provisions

15. The only definitive decision concerning the TPM provisions is *Stevens v Kabushiki Kaisha Sony Computer Entertainment*¹² which was handed down by the High Court on 6 October 2005. The case concerned technology used by Sony in its home entertainment PlayStation products.

16. Sony PlayStation consoles contain a Boot ROM chip on their circuit board. PlayStation games, stored on a CD ROM disk, also contain an access code within the track of each game disk. An unauthorised copy of the game, such as one made using a CD burner, will not 'boot' or play on a PlayStation console because the access code cannot be copied using a CD burner. Games played on the console must also have the correct access code for the Boot ROM to accept them. This allows Sony to prevent unauthorised games being played, and also games purchased legitimately overseas that contain a different code to that used in players manufactured in Australia. This practice is known as region coding. Several vendors, such as Stevens, marketed the installation of a 'mod chip' in the console which enabled users to play copies of PlayStation games that lacked the access code Australian PlayStation consoles recognised.

17. The High Court held that 'mod chips' installed by Mr Stevens in Sony PlayStation consoles were not 'circumvention devices' under the Copyright Act. The High Court unanimously reversed the decision of the Full Federal Court¹³ and reinstated the decision of Justice Sackville, the Federal Court trial judge.

18. The High Court found that, for the purposes of s116A, a TPM must be a device that physically prevents or inhibits acts which if carried out would infringe copyright in the work. The fact that Sony's devices had only an anticipatory effect of inhibiting infringement was not sufficient to satisfy the definition of a TPM. Sony's devices did not prevent infringement, but only prevented access to the unauthorised game after an infringing reproduction had already been made. In supporting a narrow construction of a device designed to prevent or inhibit the infringement of copyright, the High Court noted that the effect of an overbroad interpretation would be "to extend the copyright monopoly by including within the definition not only technological protection measures which stop the infringement of copyright, but also devices which prevent the carrying out of conduct which does not infringe copyright and is not otherwise unlawful".¹⁴ Other public policy aspects of the decision were also noted. For instance, the reasoning of Kirby J referred to potential constitutional issues that might be raised if a broader interpretation of a TPM was to be adopted.

19. The High Court also considered whether an infringing copy of the game was reproduced in the random access memory (RAM) of the PlayStation console. The RAM of a PlayStation console

¹² [2005] HCA 58.

¹³ Prior to this decision, the Full Federal Court had taken a more expansive reading of the definition of a TPM. The Full Federal Court found it was sufficient that the protection measures used by Sony inhibited infringement by rendering unauthorised copies of games unusable, although the measures did not actually prevent the unauthorised copying of the games. Sony demonstrated to the Full Court that the protection devices prevented acts that were considered preparatory to infringement and were consequently designed to inhibit infringement within the definition of a TPM. This finding for the potential for copyright infringement was made despite the majority ruling that there had not been an infringing copy of the game made when an unauthorised game was reproduced in the random access memory (RAM) of the console. In this situation, the use of the circumvention device did not actually make the work or subject-matter capable of being infringed.

¹⁴ Judgment of Gleeson CJ, Gummow J, Hayne J and Heydon J at 47.

temporarily stores a specific portion of computer code while the game is played. The code is stored only until the console is shut down. Sony had argued that its technological measures prevented users from making infringing copies of games in the RAM of a PlayStation console consistent with Sony's exclusive right in s31(1)(a)(i) to reproduce the work in material form.

20. In determining this issue the High Court considered both the copyright in the CD ROM's computer code as a literary work and in the moving pictures of the game as a cinematograph film. Under the definition of 'material form' that applied at the time,¹⁵ the temporary reproduction of the PlayStation game in the console's RAM was held not to be sufficiently substantial to constitute a reproduction. The capacity of RAM in the console is limited to two megabytes. Since the computer code of a PlayStation game could consist of 580 megabytes, the two megabytes in RAM was only a small section of the entire literary work. Similarly the 'ephemeral embodiment' of a small proportion of moving images in the console's RAM lacked the sufficient substance to be considered a reproduction of the cinematograph film. As no infringing copies were made, Sony's Boot ROM and access code did not prevent or inhibit copyright infringement under the definition of a TPM.

21. Amendments to the definition of 'material form' in the Copyright Act came into effect on 1 January 2005,¹⁶ after the case had commenced. The amended definition has the effect that a reproduction no longer needs to be in a form of storage from which the copyright material can be reproduced to be an infringement. An exception to infringement for temporary reproductions of works made as part of a technical process or use was also enacted.¹⁷ The exception does not apply to temporary copies of infringing works. The High Court did not comment on whether these changes would have had an impact on the decision if they had been in force at the time.

¹⁵ The (then) definition in section 10(1) was: **material form**, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage from which the work or adaptation, or a substantial part of the work of adaptation, can be reproduced.

¹⁶ *US Free Trade Agreement Implementation Act 2004*, Schedule 10, Items 186-187. The current definition in section 10(1) is: **material form**, in relation to a work or an adaptation of a work, includes any form (whether visible or not) of storage of the work or adaptation, or a substantial part of the work or adaptation, (whether or not the work or adaptation, or a substantial part of the work or adaptation, can be reproduced).

¹⁷ Section 43B.

PART 2 – AUSFTA OBLIGATIONS

22. Under the AUSFTA Australia is required to implement a new liability scheme for the circumvention of TPMs [referred to as ‘effective technological measures’(ETMs) in the AUSFTA] by 1 January 2007.

23. In comparison to the WIPO Internet Treaty obligations, the obligations in Article 17.4.7 of the AUSFTA are specific. Article 17.4.7 of the AUSFTA goes further than the Internet Treaty obligations by providing detailed requirements for Australia’s regime for protection against circumvention of ETMs. The current TPM scheme in the Copyright Act differs in many respects from the specific requirements of the AUSFTA. The Government will be proposing amendments to the Copyright Act to implement Australia’s obligations under Article 17.4.7.

2.1 Definition of Effective Technological Measure

24. An ETM is defined in the AUSFTA to mean ‘any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright’.¹⁸ The inclusion of ‘controls access ... or protects any copyright’ in this definition differs from and is effectively broader than the definition of TPM in the Copyright Act (which requires that the measure be designed to ‘prevent or inhibit infringement’).

2.2 Liability for acts of circumvention and dealings with TPMs

25. Article 17.4.7 of the AUSFTA requires Australia to provide legal remedies in relation to the following three categories of proscribed activity:

- (a) circumvention of ETMs that **control access** to copyrighted material
- (b) dealings with (manufacturing, selling etc) devices and the provision of services that are promoted, or mainly used or designed to circumvent an ETM that **controls access** to copyrighted material, and
- (c) dealings with devices and the provision of services that are promoted or mainly used or designed to circumvent an ETM that **protects copyright** other than by restricting access to copyrighted material.¹⁹

2.2.1 Category (a) - Acts of circumvention

26. The Copyright Act currently does not prohibit the act of circumventing a TPM that either controls access to, or protects, copyright material. Provisions in the Copyright Act provide for actions against the manufacture, sale and other dealings in circumvention devices in a trade context. The AUSFTA requires Australia to introduce liability for the act of circumventing an ETM that controls access to copyright material. There is no similar requirement to introduce liability for the act of circumventing an ETM that protects copyright.

¹⁸ Article 17.4.7(b).

¹⁹ Article 17.4.7(a)(i) and (ii).

27. Under the AUSFTA, for a person to be liable for an act of circumvention of an ETM that controls access to copyrighted material, certain factors must be established. These are:

- (a) the ETM must be used in the way described in Article 17.4.7(a) – that is, used by copyright owners in connection with the exercise of their rights and that restrict unauthorised acts in respect of their copyright material, and
- (b) the person circumventing the ETM must know, or have reasonable grounds to know, that they are circumventing an access control measure on protected copyright material without authority.

2.2.2 Categories (b) and (c) - Dealings with circumvention devices or services

28. Although the AUSFTA does not define ‘circumvention device’ or ‘circumvention service’, it does require that liability and remedies be provided in respect of a device, product, component or service that:

- (a) is promoted, advertised or marketed for the purpose of circumvention of an ETM
- (b) has only limited commercially significant purpose or use other than to circumvent any ETM, or
- (c) is primarily designed, produced or performed for the purpose of enabling or facilitating the circumvention of any ETM²⁰

where the ETM used by copyright owners in connection with the exercise of their rights and that restrict unauthorised acts in respect of their copyright material.

29. Although the Copyright Act currently provides for actions against persons dealing with circumvention devices or services, as outlined paragraph 10 above, the concept of a circumvention device or service under the AUSFTA is wider than the definitions currently provided by the Copyright Act. The definition of circumvention device and circumvention service in the Copyright Act only picks up aspects of paragraphs (b) and (c) above. In contrast, the AUSFTA also includes an alternative limb in paragraph (a) under which something is considered to be a circumvention device where the item is promoted, advertised or marketed for the purpose of circumvention of an ETM.

2.3 Criminal and Civil Remedies

2.3.1 Civil Remedies

30. Australia is obliged to provide the following civil remedies to copyright owners for contravention of the TPM provisions under Article 17.11.13 of the AUSFTA:

- (a) provisional measures, including the seizure of devices and products suspected of being involved in the proscribed activity
- (b) damages of the type available for infringement of copyright
- (c) payment to the prevailing party of court costs and fees and reasonable legal fees, and
- (d) destruction of devices and products found to be involved in the proscribed activity.

²⁰ Article 17.4.7(a)(ii).

31. The AUSFTA allows Australia to provide that damages may not be awarded against a non-profit library, archive or educational institution, or public non-commercial broadcasting entity provided that the institution can prove that it was not aware or had no reason to believe that its acts constituted a proscribed activity.

32. It is noted that Australia's current TPM scheme already provides a range of remedies for copyright owners and their exclusive licensees through s116D of the Copyright Act and the broad powers of the Federal Court and the Federal Magistrates Court.

2.3.2 Criminal procedures and penalties

33. The AUSFTA also obliges Australia to provide for criminal proceedings and penalties where a person has engaged wilfully and for purposes of commercial advantage or financial gain in any of the three categories of proscribed activity described in paragraph 25 above.²¹ The AUSFTA allows Australia to provide that criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

2.4 Exceptions

34. The AUSFTA only allows specific, limited exceptions to liability in relation to each of the three categories of liability set out in paragraph 25 above. The exceptions permitted under the AUSFTA are set out in Article 17.4.7(e). In considering possible amendments to the Copyright Act, the current 'permitted purposes' exceptions in the Act can only be retained if they fall within the parameters of exceptions in Article 17.4.7(e).

35. The exceptions allowed for by Article 17.4.7(e) can be broadly grouped into two categories:

- specific exceptions set out in Article 17.4.7(e)(i) to (vii), and
- other additional exceptions under Article 17.4.7(e)(viii) relating to non-infringing uses of copyright material where an actual or likely adverse impact on such non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.

36. The exceptions in AUSFTA do not apply uniformly across all three categories of proscribed activity. Articles 17.4.7(f)(i) to (iii) set out which exceptions apply in relation to particular categories of proscribed activity. The interrelationship between these exceptions and the three categories of liability required under the AUSFTA are summarised in the table below. In addition, Article 17.4.7(f) provides that exceptions are permitted only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of ETMs.

37. The Government is considering what changes are required to be made to the Copyright Act to implement the first category of exceptions, that is, the specific exceptions set out in Article 17.4.7(e)(i) to (vii). The determination of what exceptions should fall within the second category – possible additional exceptions under Article 17.4.7(e)(viii) – will be made by the Government and reflected in proposed amendments to the Copyright Act, taking into consideration the recommendations made by the Committee as a result of the current inquiry.

²¹ Article 17.4.7(a).

Activity that can be made an exception	Exceptions to liability for circumventing of access control measures	Exceptions to liability for <i>dealings with devices and provision of services</i> to circumvent access control measures	Exceptions to liability for <i>dealings with devices and provision of services</i> to circumvent copyright protection measures
Reverse engineering for the purposes of achieving interoperable software (Article 17.4.7(e)(i))	✓	✓	✓
Identifying and analysing flaws in encryption technology (Article 17.4.7(e)(ii))	✓	✓	
Including technology in a device or service that prevents the access of minors to inappropriate online content (Article 17.4.7(e)(iii))	✓	✓	
Testing, investigating, or correcting the security of computers or networks (Article 17.4.7(e)(iv))	✓	✓	
Identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting online activities of a person (Article 17.4.7(e)(v))	✓		
Activities carried out for law enforcement, intelligence, essential security or similar governmental purposes (Article 17.4.7(e)(vi))	✓	✓	✓
Access to works, etc by non-profit libraries, archives, educational institutions for making acquisition decisions (Article 17.4.7(e)(vii))	✓		
Other uses of works, etc identified under a legislative or administrative review or proceeding as addressing a credibly demonstrated actual or likely adverse effect on non-infringing use. (Article 17.4.7(e)(viii))	✓		

PART 3 – COMMITTEE INQUIRY

3.1 *Committee's role*

38. As stated in the Committee's terms of reference, the Committee's role is to consider whether Australia should include in the liability scheme any additional exceptions as permitted by Article 17.4.7(e)(viii).

3.2 *AUSFTA criteria for additional exceptions*

39. The following information is provided to assist the Committee in interpreting the criteria against which possible additional exceptions under Article 17.4.7(e)(viii) must be assessed.

40. Article 17.4.7(f) limits any additional exceptions made in reliance upon Article 17.4.7(e)(viii) to *acts of circumvention* - Article 17.4.7(e)(viii) does not apply to *dealings with circumvention devices or provision of services*. As can be seen from the table following paragraph 36 above, the AUSFTA allows more limited exceptions for dealings with circumvention devices or provision of services than it does for acts of circumvention of ETMs.²²

41. In the Department's view, one consequence of this might be to limit the availability of devices and services which may be used in acts of circumvention otherwise permitted under an additional exception based on Article 17.4.7(e)(viii). The practical result might be to further confine the application of such additional exceptions. It would appear that in order to perform an excepted act of circumvention with a circumvention device or service, the person would be required to produce that device or service themselves, or acquire it from whatever possible means. This might be difficult where prohibitions exist on the manufacture, importation, offering to the public, provision or otherwise trafficking in the relevant circumvention device or service.

3.3 *Treaty interpretation*

42. The Department notes that the Vienna Convention on the Law of Treaties²³ (the Vienna Convention) stipulates that the terms of a treaty are to be interpreted in good faith and given their ordinary meaning in the context and in light of the object and purpose of the treaty.²⁴ Where the AUSFTA does not define a particular term, the term should be interpreted with this requirement of the Vienna Convention in mind.

3.4 *Implications of AUSFTA exceptions for permitted purposes exceptions under the Copyright Act*

43. Some of the permitted purposes exceptions that currently exist in the Copyright Act (see paragraphs 12 to 14 above) are not consistent with the requirements of Article 17.4.7(e)(i) to (vii).

²² In this part, the term ETM is used in preference to TPM to avoid any confusion that may arise due to the current definition of TPM in the Copyright Act. It is likely that when the obligations in Article 17.4.7 are implemented, an amended definition of TPM will be retained in the Copyright Act instead of the AUSFTA ETM term.

²³ Vienna Convention on the Law of Treaties, 22 May 1969 United Nations, *Treaty Series*, vol. 1155, p331.

²⁴ Above, Vienna Convention Article 31(1).

The permitted purposes that do not appear to be within the scope of Article 17.4.7(e)(i) to (vii) are those permitted purpose exceptions relating to:

- (a) reverse engineering computer programs to create interoperable hardware (but not software)²⁵
- (b) reproducing computer programs to correct errors²⁶
- (c) copying for parliamentarians²⁷
- (d) the use of copyright material by the Crown other than for law-enforcement, intelligence, security and like purposes,²⁸ and
- (e) reproduction by educational and other institutions.²⁹

44. Likewise, the extensive library and archives exceptions in the Copyright Act (for example, the preservation of deteriorated or lost works,³⁰ reproducing and communicating works by libraries and archives for users,³¹ and reproducing and communicating works by libraries and archives for other libraries and archives³²), do not appear to be accommodated by Article 17.4.7(e)(i) to (vii) except in relation to the specific activity of accessing copyright material for the purpose of making acquisition decisions.

45. In relation to the permitted purpose exceptions under the Copyright Act that do not appear to be within the scope of Article 17.4.7(e)(i) to (vii), it is likely that persons currently relying on these permitted purpose exceptions will seek to have their activities considered by the Committee for inclusion under Article 17.4.7(e)(viii).

3.5 Requirements of Article 17.4.7(e)(viii)

46. Article 17.4.7(e)(viii) of the AUSFTA provides Australia with the option of identifying additional exceptions provided they meet certain criteria. An additional exception must be:

- (a) identified under a legislative or administrative review or proceeding
- (b) limited to activities where the prohibition on ETM circumvention has a credibly demonstrated actual or likely adverse impact on non-infringing uses of copyright material, and

²⁵ There is no copyright infringement in the reproduction or adaptation of a computer program where it is disassembled or decompiled to find out how the program interoperates with other programs. Certain restrictions are placed on the nature and purpose of the copying for the exception to be maintained (ie the purpose must be for the development of an independent program to be used with the original program).

²⁶ As in the above exception, the decompilation of a computer program will not infringe copyright where the reproduction is made for the purpose of correcting errors in the original program.

²⁷ This exception must be used by an authorised officer of a (Parliamentary) library for the sole purpose of assisting a member of Parliament in the performance of their duties.

²⁸ There is no definition of 'services of the Commonwealth or State' in the Copyright Act. In section 183(2), there is some discussion of areas that will be considered to be for the services of the Commonwealth' and in section 183(11) a reproduction, copy or communication of copyright materials by government schools is considered not to be an act done for the services of the Commonwealth or a State.

²⁹ Under Part VB of the Copyright Act educational and other institutions, such as those assisting persons with a print or intellectual disability, are exempted from copyright infringement through the reproduction and communication of works. Copyright owners are remunerated for this exception to copyright infringement through the institutions' contribution to a collecting society.

³⁰ Section 51A.

³¹ Section 49.

³² Section 50.

(c) limited to a particular class of copyright material.

47. These criteria are examined in more detail below.

3.5.1 Identified under a legislative or administrative review or proceeding

48. Article 17.4.7(e)(viii) requires exceptions to be 'identified in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding'. This obligation should be interpreted to require additional exceptions to be identified in a legislative or administrative review or proceeding.

49. The Committee's current inquiry is the first such 'review or proceeding' to be conducted. In the Department's view, this obligation does not prevent subsequent reviews or proceedings from being conducted at any time to identify more exceptions, provided any exceptions so identified are reviewed at least every four years.

3.5.2 Credibly demonstrated actual or likely adverse impact on non-infringing uses of copyright material

Credibly demonstrated

50. Article 17.4.7(e)(viii) requires a credible demonstration of an actual or likely adverse impact on non-infringing uses. The AUSFTA does not define what amounts to a credible demonstration so the words should be given their ordinary meaning. A credible demonstration would require that the Committee be satisfied that there is reasonable evidence to make the case in support of an exception. It will be up to the person or body seeking an exception to demonstrate the requisite impact to the satisfaction of the body conducting the legislative or administrative review or proceeding.

Non-infringing uses

51. Article 17.4.7(e)(viii) clearly requires that exceptions made under it only apply in relation to non-infringing uses of the copyright material protected by the ETM in question. That is, an exception to liability for circumvention of an ETM can only be made where the person seeking the exception can show that the use of the copyright material for which they are seeking an exception to circumvent the ETM will not infringe copyright. Thus, for example, any act that is the subject of an exception or statutory licence under the Copyright Act would be a non-infringing use of material. The Department is of the view that the term 'infringing' refers to infringing under Australian copyright law.

Actual or Likely

52. The person or body seeking the exception must demonstrate that the requisite impact is 'actual or likely' - that is, it is already happening or is reasonable foreseeable. As this is the first 'legislative or administrative review' to consider possible additional exceptions under Article 17.4.7(e)(viii) and the liability scheme required under Article 17.4.7 has yet to be implemented, it may be difficult to establish an 'actual' impact. For the purposes of the Committee's inquiry, a person or body seeking an exception should establish that an adverse impact is reasonably foreseeable when the prohibition on circumvention under Article 17.4.7 is implemented. Once the

legislative scheme is in place, actual adverse impacts may become apparent and prompt further requests for additional exceptions to be included in the scheme.

Adverse impacts

53. The term 'adverse impact' is not defined under the AUSFTA. In accordance with the Vienna Convention, the words should be given their ordinary meaning. Whether an adverse impact is demonstrated should be determined on a case-by-case basis.

3.5.3 *Particular class of works, performances or phonograms*

54. Article 17.4.7(e)(viii) requires that any additional exception must be limited to a 'particular class of works, performances or phonograms'. The terminology 'works, performances or phonograms' reflects the terms used in international conventions on copyright, such as the Berne Convention and the WPPT. In these conventions, 'works' refer to, in Copyright Act terms, literary, musical, dramatic and artistic works, and cinematograph films.³³ 'Phonograms' refer to sound recordings.³⁴ 'Performances' refer to performances fixed in phonograms.³⁵

55. When considering what constitutes a 'particular class of those materials' for the purposes of Article 17.4.7(e)(viii), the AUSFTA does not provide guidance on how the word 'class' must be interpreted, aside from precluding an exception that would apply to all works (including cinematograph films), sound recordings or recorded performances. In accordance with the Vienna Convention, these words should also be given their ordinary meaning.

³³ See Article 2(1) of the Berne Convention.

³⁴ See Article 2(b) of the WPPT.

³⁵ Protection in Part IV of the Copyright Act protects performances that are embodied in a sound recording. See also footnote 17-17 in Chapter 17 of the AUSFTA.