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HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS

ATTORNEY-GENERAL'S DEPARTMENT – SECOND SUPPLEMENTARY SUBMISSION

The following responses represent the Department's answers to questions 4, 6 11, 12 and 13 arising from the inquiry into technological protection measures exceptions public hearing on 5 December 2005.

Questions taken on notice

4. With regard to Article 17.4.7(e)(viii), the Committee notes that there is no corresponding exception for dealing in devices and service provision to circumvent access control TPMs. The same is true for the circumvention exceptions available under 17.4.7(e)(v) (collection of personal information) and (e)(vii) (acquisition decisions of libraries, archives and educational institutions).

- *How does the Department envisage that a party with an exception under these provisions will be able to utilise their exception if the manufacture and provision of circumvention devices and services is prohibited? Is this an error in the AUSFTA?*
- *Has the Department formulated a solution to avoid this situation?*

Article 17.4.7(f) governs the interaction of Article 17.4.7(a) and (e). Article 17.4.7(f)(i) permits all exceptions identified in (e) to be made to measures implementing Article 17.4.7(a)(i), which establishes liability for circumventing access control ETMs. Article 17.4.7(f)(ii) and (iii) address Article 17.4.7(a)(ii), which establishes liability for the provision of circumvention devices and services. Article 17.4.7(f)(ii) operates in relation to devices and services linked to the circumvention of access control ETMs. Where the exceptions to liability listed in (e)(i), (ii), (iii), (iv) and (vi) apply, then (f)(ii) allows the provision of circumvention devices and services in those cases to be excepted from liability under a(ii).

As noted by the Committee, the exceptions under (e)(v), (vii) and (viii) are excluded from the scope of (f)(ii). This exclusion does impact on the means available to persons or organisations seeking to make use of those exceptions. That said, (f)(ii) cannot operate to render (e)(v), (vii) and (viii) ineffective. Effect must be given to all provisions of a treaty.

To give effect to the exceptions under (e)(v), (vii) and (viii), persons or organisations will need to have access to devices or services that do not fall within the scope of (a)(ii). Persons or organisations can create their own circumvention devices or import a circumvention device for a non-commercial purpose.

- *Does the Department consider that allowing third parties to perform circumvention on behalf of those with exceptions will be permitted under the AUSFTA provisions as implemented in the new scheme?*

The position of third parties is governed by the operation of Article 17.4.7(a)(ii) and (f)(ii) and (iii). If the actions of third parties would attract liability under (a)(ii), their capacity to assist:

- persons or organisations seeking to make use of exceptions in (e) in circumventing access control ETMs will be governed by the application of (f)(ii),
- persons or organisations seeking to circumvent copy control ETMs will be governed by the application of (f)(iii).

- *How will people undertake circumvention of copy control TPMs (which does not appear to be an infringing activity under the AUSFTA) if they cannot access devices to circumvent such TPMs?*

Persons or organisations can create their own circumvention devices or import a circumvention device for a non-commercial purpose. Under the AUSFTA, the activity of circumventing an ETM that protects copyright is not prohibited. As is the case with access control ETMs, persons or organisations seeking to circumvent ETMs that protect copyright will need to have access to devices or services that do not fall within the scope of (a)(ii).

Article 17.4.7(f)(ii) operates to provide exceptions in relation to devices and services linked to the circumvention of ETMs that control access. Article (f)(iii) operates to provide exceptions in relation to devices and services linked to the circumvention of ETMs that protect copyright. Exceptions to the provision of devices and services that circumvent an ETM that protects copyright are available for the activities set out in (e)(i) and (e)(vi).

6. The Committee has heard evidence that in some cases copyright owners choose to bundle copy protection TPMs with TPMs related to market control/competition prevention rather than such bundling being necessary.

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

The development of digital technologies allows copyright owners to implement a range of protection measures over their material allowing that information to be conveyed in varying proprietary formats. Digital technologies allow some technological measures to be aimed at protection against copyright infringement while other measures have broader market protection purposes. Detailed information on the technology behind technological measures and market control measures can be difficult to obtain from copyright owners.

The Department is aware that complications may arise where ETMs falling within the scope of Article 17.4.7 are bundled with competition control measures. However, the means chosen by copyright owners to implement technological measures over their material is not a matter the Department can influence. It may be open to the Australian Competition and Consumer Commission to investigate anti-competitive conduct if it arises out of the bundling of ETMs.

- *Does the Department intend to address this issue in the implementing legislation?*

The Department will provide briefing to the Government on options for responding to this issue.

Other questions arising from the public hearing

11. The Committee notes that, while Article 17.4.7 of the AUSFTA requires that liability attach to circumvention of access control measures, it does not seem to require that liability attach to circumvention of copy protection measures as well. The Committee understands that there is an increasing tendency for access and copy protection measures to be combined.

- *What is the Department's view on the combined TPMs of this nature? Does the Department have any plans to address this issue under the AUSFTA provisions as implemented in the new scheme?*
- *How will access and copy protection measures be distinguished under the new scheme?*

Both measures are within the definition of an ETM. In terms of liability it will be a question of fact in each case and will depend on the particular characteristics of the technology used by the copyright owner.

The definitions of an ETM and a TPM under the current Copyright Act do not distinguish between copy control and access control measures. Implementation of Article 17.4.7 will require a distinction to be made because liability for circumvention is imposed only in relation to those ETMs that control access and not those that protect copyright. This will be addressed in the drafting of implementing legislation.

- *Will circumvention of a TPM that controls both access and copying attract more severe penalties under the new scheme than a circumvention of a TPM with one of these functions only?*

No criminal penalties will be imposed for circumventing a copy control ETM. Penalties will only be applied to the circumvention of access control ETMs, where the exceptions provided for in Article 17.4.7(e) do not apply. The Department does not see any justification for making criminal penalties more severe where an ETM is circumvented that controls both access and copying.

12. At p.9 (paras 31-33) of its submission, the Department outlines the limitations on liability for non-profit libraries, archives, educational institutions and public non-commercial broadcasting entities. The Department notes the ability of Australia to exempt those institutions from criminal penalties as well as possible exemptions from civil damages in certain circumstances.

- *Can the Department indicate to the Committee the part of the AUSFTA that will enable Australia to exempt these institutions from civil damages?*

Damages may be excluded from the remedies available against non-profit libraries, archives, educational institutions etc under Article 17.11.13(b) of the AUSFTA. These bodies would continue to be subject to the remedies in Article 17.11.13(a) being:

- provisional measures, including the seizure of devices and products suspected of being involved in the proscribed activity
- payment to the prevailing party of court costs and fees and reasonable attorney's fees, and
- destruction of devices and products found to be involved in the proscribed activity.

- *Does the Department consider that these liability limitations will be sufficient to ensure that educational institutions have the continuing ability to circumvent for the purposes of Part VA and Part VB statutory licences?*

The limitations on civil liability will only apply in narrow circumstances where an educational institution can prove that it was not aware or had no reason to believe that its acts constituted a proscribed activity. In general, an educational institution that was circumventing an access control TPM for the purpose of a statutory licence would be aware that its acts constituted a proscribed activity.

If the Committee were to recommend an exception for these statutory licences and that exception is adopted in the legislative scheme, then the issue of liability for circumvention of an ETM that controls access will not arise.

13. As the Department would be aware, Article 17.4.7(a) indicates that the TPM provisions will apply to TPMs that restrict unauthorised acts.

- *In the Department's view, if a person has a right to copy a work, for example by virtue of a statutory licence, will accessing the work still qualify as an unauthorised act under the AUSFTA provisions as implemented in the new scheme?*

The statutory licence scheme in Part VB allows educational and other institutions to exercise the exclusive rights of the copyright owner in relation to copyright material upon payment of equitable remuneration. Copying under a statutory licence would not be an unauthorised act. However, accessing a work that is subject to an ETM would require the authority of the copyright owner unless it is covered by a specific exception. The statutory licence scheme only applies to copyright material that can be accessed. The scheme itself does not allow circumvention.

- *What would the Department's view be on the proposition that legitimately purchasing a work gives the purchaser an implied licence to access that work for its intended purpose, e.g. viewing a DVD or reading an online journal article?*

Copyright owners may release their material in whatever form they choose. A purchaser of that material would normally have the right to access it and use it for the intended purpose. Copyright owners do not have an exclusive right to control access under copyright. However, a purchaser's right to access material may be made subject to certain conditions or limited in various ways. First, it may be limited by law. Secondly, conditions or limitations can be agreed to in a licence agreement between the copyright owner and the purchaser.

While copyright owners may employ a range of end user license agreements or other contractual terms, these may not necessarily fall under the realm of copyright law. The enforcement of contract is a private matter between the parties involved.