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BY: LACA

The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2503
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Dear Ms Towner

Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs—Review of technological protection measures exceptions

1 The Parliamentary Library, within the Department of Parliamentary Services is responsible for the provision of information and research services for Members, Senators, their staff, Parliamentary Committees and parliamentary staff. The Library supports the parliamentary process by providing clients with quality information services, and policy analysis and advice.

2 The Parliamentary Library notes the standing committee's terms of reference to review the technological protection measure (TPM) exceptions that should be included in the new liability scheme required under Article 17.4.7(e)(viii) of the Australia-United States Free Trade Agreement (AUSFTA). The Library also notes the criteria for these exceptions to be granted as set out in Article 17.4.7(e)(viii) and (f) and makes its request based on those criteria.

TPMs and AUSFTA

3 Under Australia's copyright law, making and trafficking in devices whose purpose is the circumvention of TPMs is prohibited, but the circumvention itself is not (s 116A, *Copyright Act 1968*, for civil liability and s 132(5A) and (5B) for criminal liability).

4 The Parliamentary Library understands that under the AUSFTA, Australia is required to implement a new liability scheme for circumventing TPMs. The current scheme will be repealed and replaced with civil and criminal remedies in relation to:

- (a) acts of circumvention of TPMs that control access to copyright material; and
- (b) dealings with (including manufacturing and selling) devices and services that may be used to circumvent TPMs that control access to copyright material or protect copyright material in other ways.

AUSFTA allows specific limited exceptions or defences to liability in relation to these categories of liability (Article 17.4.7(e)(i) to (vii)).

Parliamentary libraries and TPMs

5 Under Australia's copyright law parliamentary libraries (like all other end users) are not prohibited from using TPM circumvention devices.

6 In addition, the Copyright Act provides that the prohibitions relating to the manufacturing and the trafficking of circumvention devices do not apply for certain "permitted purposes" (subsections 116A(3) and (7)). These permitted purposes include the supply of such devices to parliamentary libraries for their non-infringing use of copyright material under sections 48A and 50 (see paragraphs 12 to 14).

7 Under the liability scheme required by the AUSFTA, the Parliamentary Library will be affected in two ways. It will be prohibited from using TPM circumvention devices with respect to accessing copyright material and it will lose the benefit of the special exception in relation to supply of circumvention devices.

Request for exception

8 The submission notes that under the AUSFTA Australia is allowed to create its own exceptions but that these exceptions must be confined to use of circumvention devices and comply with Article 17.4.7(e)(viii) and 17.4.7(f).

9 In this context, the Parliamentary Library therefore submits that it should be granted an exception to liability for acts of circumvention of TPMs in relation to its non-infringing uses of copyright materials. The reasons for this request together with the classes of material to be exempted are set out below.

10 In relation to the liability for "dealing" in TPM circumvention devices the Library is concerned about the proposed loss of the current parliamentary library statutory exception (s 116A(3) and (7)) but understands exceptions to "dealing" offences are beyond the scope of the parliamentary inquiry and should be raised with the Attorney-General's Department. However in this regard the Library does wish to point to the significant practical problem that may arise under the AUSFTA scheme in granting special exceptions for use of circumvention devices but not for "dealing". Therefore, although an exception may be allowed for non-infringing uses of TPMs, it may be illegal to sell devices allowing such use, which would potentially nullify the effect of the exception. The Parliamentary Library submits that there is at least a possibility that the provisions of AUSFTA are too restrictive to develop a regime that allows the lawful sale of devices that allow circumvention of TPMs.

Background—Copyright and parliamentary libraries

11 The importance of the need of Parliament and parliamentarians for unimpeded access to information is recognised by the parliamentary library exceptions in the Copyright Act. Without the exceptions, the Parliamentary Library would be compromised in its capacity to respond to confidential, time dependent requests, to create critical databases and to monitor developments in the print and electronic media.

12 Sections 48A and 104A of the Copyright Act contain exceptions to the rights of copyright owners for the exclusive benefit of parliamentary libraries in

Australia when staff in those libraries are responding to requests from serving parliamentarians. Section 48A provides that "the copyright in a work is not infringed by anything done, for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorised officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament." Section 104A, similar to section 48A, deals with uses made by parliamentary libraries of subject matter other than works such as sound recordings, films, television and radio broadcasts.

13 Protection afforded by sections 48A and 104A is extremely broad. The reference to "anything done" would encompass printing, downloading, saving to disk, e-mailing and long term electronic storage.

14 Further protection is provided by section 50 of the Copyright Act which permits other libraries to supply (including by electronic means) parliamentary libraries copies of published copyright works held by them, when the copies are supplied for the purpose of assisting members of a parliament in performing their duties as a member.

15 These exceptions are critical for the provision of affordable and timely services for parliament and parliamentarians. In practical terms they mean that parliamentary libraries are not required to keep extensive document copying records, seek signed declarations from clients, or seek permission from copyright owners prior to copying.

Review of technological protection measures exceptions

16 The Parliamentary Library submits that the proposed prohibition on circumvention of TPMs required under the AUSFTA will have an adverse impact on its exceptions to infringement of copyright as set out in sections 48A, 104A and 50 of the Copyright Act. The prohibition would effectively ban otherwise legitimate non-infringing uses of copyright material.

17 The parliamentary library exceptions are at risk of becoming redundant in their function of providing members of parliament with unimpeded access to quality information if they have no application to TPMs. The parliamentary library exceptions should not be restricted to applying in the print environment. Consistent with the objectives of the digital agenda reforms of 2001, the exceptions to infringement must equally apply to the digital environment.

18 If a technological protection device prevents access to a work then any access rights that parliamentary libraries have under the copyright exceptions would effectively be extinguished.

19 The rapid pace of technological developments increasingly enables rights holders to utilise technology to block not only the ability of a work to be copied, but the ability of that work to be accessed for purposes such as browsing or reading. This frustrates public policy as reflected in copyright legislation which until now has favoured unimpeded access to information for members of parliament.

20 Parliamentary libraries should be allowed to circumvent TPMs for the parliamentary library copyright exceptions. Restricting parliamentary libraries' ability to do this will increasingly frustrate their functions in an environment where technologies are becoming more sophisticated and are enabling rights holders to more easily "lock up" their works.

21 The Parliamentary Library is not at present using any circumvention devices, however it is noticing an increasing trend for publishers to place tighter technological protection controls on copyrighted materials.

22 The regional coding of digital technologies is another concern for the Parliamentary Library. A prohibition on circumvention devices in this area would effectively deny the Library access to digital material acquired legitimately overseas.

23 On a related issue, the Parliamentary Library draws the attention of the committee to the very recent High Court decision, Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (6 October 2005) dealing with the TPM provisions of the Copyright Act. The supplier of circumvention devices, Eddie Stevens, won the appeal against the decision of the Full Federal Court. This decision (with all 6 High Court judges in agreement) was based on the proper interpretation of the TPM provisions in the Copyright Act and provides useful comments on the importance of TPMs not undermining fair dealing provisions. Kirby J in seeking to clarify the meaning of TPMs in the Copyright Act set out a number of considerations that may need to be given weight. Such considerations include:

the proper protection of fair dealing in works or other subject matters entitled to protection against infringement of copyright; proper protection of the rights of owners of chattels in the use and reasonable enjoyment of such chattels; the preservation of fair copying by purchasers for personal purposes; and the need to protect and uphold technological innovation which an over rigid definition of TPMs might discourage. These considerations are essential attributes of copyright law as it applies in Australia. They are integrated in the protection which that law offers to the copyright owner's interest in its intellectual property. (at paragraph 224).

Classes of material to be exempted

24 The Parliamentary Library notes that AUSFTA does not allow a blanket exception for non-infringing uses of circumvention devices but rather the circumvention exceptions must relate to only one particular class of copyright material (Article 17.4.7(e)(viii)). The Library therefore seeks separate exceptions for each of the following classes of materials:

- (a) In the case of "works" as defined in the Copyright Act, the Parliamentary Library seeks an exception in relation to its non-infringing use of "literary works".
- (b) In the case of "subject matter other than works" the Library seeks an exception in relation to its non-infringing use of "sound recordings", and an exception in relation to its non-infringing use of "cinematograph films".

25 The Parliamentary Library submits that these exceptions would not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of TPMs. The exceptions do not contravene the spirit of the AUSFTA, because they are narrowly defined and required for the specific purpose of providing Parliament and parliamentarians unimpeded access to information.

Yours sincerely

Hilary Penfold QC
Secretary

Tremble, Kate (REPS)

From: Watt, David (DPS)
Sent: Thursday, 13 October 2005 4:24 PM
To: Committee, LACA (REPS)
Subject: Submission to the Review of technological protection measures

Please find attached a submission from the Department of Parliamentary Services to the inquiry into technological protection measures exemptions. A signed copy of the submission has been sent through the internal mail.



copyright
Submission 13 Oct.

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Executive Officer to the Secretary
Department of Parliamentary Services
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