

**GOVERNMENT RESPONSE TO THE HOUSE OF
REPRESENTATIVES STANDING COMMITTEE ON LEGAL
AND CONSTITUTIONAL AFFAIRS REPORT “REVIEW OF
TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS”**

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EXCEPTIONS"**

Introduction

The Government recognises that technological protection measures (TPMs) are an essential tool for the protection of copyright material, especially in the online environment. TPMs provide an effective means for copyright owners to protect their material against the threat of piracy. By providing this protection TPMs also encourage distribution of copyright material online. This, in turn, fosters the development of new business models which provide a greater choice for consumers.

Implementation of the Australia-United States Free Trade Agreement (AUSFTA) TPM obligations will strengthen Australia's present TPM liability scheme. The TPM liability scheme will target people who circumvent TPMs in addition to those who manufacture or supply them. The TPM liability scheme will also provide exceptions to liability for circumventing TPMs, for example, where it is in the public interest or where a special case has been made out. However, any additional exceptions cannot be granted where they would undermine the adequacy and effectiveness of the legal remedies provided under the scheme.

The Government welcomes the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on its reference relating to Technological Protection Measures exceptions under the AUSFTA. The reference arose from Australia's obligations under the AUSFTA to create a new liability scheme for certain activities relating to the circumvention of technological protection measures. The Committee was asked to examine whether Australia should include in the liability scheme any exceptions based on Article 17.4.7(e)(viii), in addition to those exceptions in Article 17.4.7(e)(i) to (e)(vii). The issues raised by the review were both complex and technical.

The Government also acknowledges that the Committee's task was made especially difficult by the fact that the liability regime had not yet commenced. The Committee had to consider possible additional exceptions to that regime without practical knowledge of how the liability regime and the specific exceptions allowed under Article 17.4.7 (e)(i) to (e)(vii) would operate once implemented.

In responding to the Committee's recommendations the Government reaffirms its commitment to implement Australia's obligations under the AUSFTA. The Government also notes that a number of the recommendations fall outside the Committee's terms of reference. While acknowledging the close connection of those recommendations with the terms of reference, many stakeholders did not consider it necessary to address issues falling outside the Committee's terms of reference. Those issues were not fully argued before the Committee. For this reason, the Government, while mindful of the Committee's comments and concerns, does not consider it appropriate to respond to those recommendations.

The Government notes the Committee's findings that it did not consider itself in a position to formulate firm definitions of the criteria for determining additional exceptions. As a result, the Committee recommended possible approaches to determining each criterion. The Government has considered these possible approaches and has also drawn on its own legal advice on the application of AUSFTA in accordance with relevant principles of international law. As a result, the criteria the Government has applied to determine additional exceptions reflect some, but not all aspects of the Committee's approach.

Applying those criteria consistently with the AUSFTA, the Government has accepted some of the Committee's recommendations for additional exceptions. A number of additional exceptions, which were recommended by the Committee, have not been accepted. With respect to some of these recommendations no existing need was established.

After the legislation is in place the Government will move as quickly as possible to put in place a mechanism for further reviews. These further reviews will occur on an ad hoc and periodic basis. This approach will ensure adequate opportunity to consider new additional exceptions that are appropriate to the needs of copyright users and owners in the changing technological environment.

The Government will continue to monitor the operation of the TPM scheme, and the exceptions that may be granted under it, once the necessary amendments to the *Copyright Act 1968* and Copyright Regulations have commenced.

In summary the Government's response to the report is as follows:

- (a) The Government accepts recommendations:
 - (i) 1, 2, 3, and 4 (which limit the scope of the liability scheme to ensure it balances user and owner interests, maintain a link to copyright and exclude measures that protect against competition such as region coding),
 - (ii) 7, 11 and 33 (which provide guidance as to how exceptions will operate),
 - (iii) 5, 6, 13, 15(ii), 22 and 25 (which maintain existing exceptions under the current TPM scheme),
 - (iv) 14, 15(iv), 27(ii) and 28 (which set out new exceptions),
 - (v) 16, 17 and 26 (which set out possible future exceptions which should be monitored by the Government), and
 - (vi) 34, 35, 36 and 37 (which relate to the conduct of future reviews);
- (b) The Government notes recommendations:
 - (i) 12 (which provide guidance as to how exceptions will operate), (ii) 20 (which relates to the Crown use exception), and
 - (iii) 18, 21, 24, 29, 30 and 31 (which set out possible future exceptions which should be examined by the Government); and
- (c) The Government does not accept recommendations:

- (i) 23 (which relates to classification of devices under the liability scheme),
- (ii) 8, 9 and 10 (which set out criteria for identifying exceptions),
- (iii) 15(i), 27(i) and 32 (which set out new exceptions which do not comply with the criteria under the AUSFTA for additional exceptions), and
- (iv) 15(iii) and 19 (which seek to maintain existing exceptions under the current TPM scheme, but which do not comply with the criteria under the AUSFTA for additional exceptions).

The Government's response to the Committee's recommendations

The response to each recommendation made by the Committee is set out below.

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.

Response

The Government accepts this recommendation. The Government pays close attention to the balance between copyright owners' rights and the interests of users of copyright materials. However, the balance is not static. It is subject to a changing technological environment which makes it easier to exploit digital copies of material.

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.

Response

The Government accepts these recommendations. The Committee's discussion of these issues has been of assistance to the Government in developing the liability scheme.

Recommendation 4 (paragraph 2.139)

The Committee recommends:

- (i) 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.**
- (ii) 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.**

Response

The Government accepts recommendation 4(i). It is the Government's view that the AUSFTA limits liability for the activity of TPM circumvention to cases where TPMs are used by copyright owners in connection with the exercise of their rights. Under

the TPM liability scheme, when implemented, the circumvention of region coding technological measures will not be an offence.

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.

Response

The Government accepts this recommendation. The specific exception in Article 17.4.7(e)(vi) will enable these bodies to perform their necessary functions. Therefore the Government will ensure that these activities are covered in the implementing legislation.

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:

- (i) Circumvention for reverse engineering of software for interoperability purposes;**
 - (ii) 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;**
 - (iii) Circumvention for security testing of software; and**
 - (iv) Circumvention for individual privacy online**
- examined at paragraphs 3.22 – 3.30 of this report.**

Response

6 (i) Circumvention for reverse engineering of software for interoperability purposes

The Government accepts this recommendation in principle. Article 17.4.7(e)(i) allows circumvention for reverse engineering of software for the purpose of achieving interoperability with other software.

6 (ii) 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

The Government accepts this recommendation in principle. Article 17.4.7(a)(i) only requires liability where a person knows or has reasonable grounds to know that they are undertaking circumvention.

6 (iii) Circumvention for security testing of software: and

The Government accepts this recommendation. Article 17.4.7(e)(iv) allows circumvention for security testing of computers, computer systems or computer networks. This would necessarily include software on computers, computer systems or computer networks.

6 (iv) Circumvention for individual privacy online

The Government accepts this recommendation. Article 17.4.7(e)(v) allows circumvention for identifying or disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a person.

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.

Response

The Government accepts this recommendation. The legislation implementing the AUSFTA will give effect to its terms in accordance with relevant principles of international law. The Committee's discussion of these issues has been of assistance to the Government in implementing the exceptions provided for in Article 17.4.7(e).

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.

Response

The Government does not accept recommendations 8 and 9. The Government acknowledges the challenge faced by the Committee in interpreting and applying the criteria for additional exceptions. The Committee had recourse to the Vienna Convention on the Law of Treaties to provide the framework for its analysis. However, the Committee's analysis does not conform fully with that framework.

The Government has clarified the criteria for identification of additional exceptions. For future reviews, people seeking exceptions will be required to respond to the following questions.

(A) Is the work, performance or phonogram for which an exception is being sought protected under the Copyright Act?

If no, an exception is not required.

If yes, proceed to (B).

(B) Can the non-infringing use which is asserted be made of the work, performance or phonogram under the Copyright Act?

a Is the use an infringement under the Copyright Act?

i the answer is no, proceed to (C).

ii If yes, proceed to b.

b Does an exception exist?

i If the answer is yes, proceed to (C).

ii If no, proceed to c.

c Does a statutory licence exist?

i If the answer is yes proceed, to (C).

ii If the answer is no, the criterion is not met and an exception cannot be granted.

(C) Is the person or body seeking the exception able to make the non-infringing use of the work, performance or phonogram in question under the Copyright Act?

a Does the Copyright Act limit the non-infringing use to a certain type of user? (eg. Educational institutions)

i If the answer is yes, proceed to b.

ii If the answer is no, any person may seek the exception. Proceed to (D).

b Has the specific user or representative of the user sought an exception?

i If the answer is yes, proceed to (D).

ii If the answer is no, an exception cannot be granted.

(D) Has an access control TPM been applied to the work, performance or phonogram? (The person or body seeking an exception must show evidence that TPMs are currently being applied to the work, performance or phonogram that would be subject to the exception.)

i If the answer is yes, proceed to (E).

ii If the answer is no, an exception cannot be granted.

(E) Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact? (Reasonably believable evidence of such an impact needs to be shown to justify an exception.)

i If the answer is yes, proceed to (F).

ii If the answer is no, an exception cannot be granted.

(F) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?

i If the answer is yes, an exception cannot be granted.

ii If the answer is no, an exception could be granted.

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.

Response

The Committee's analysis of the requirement in Article 17.4.7(f) is partially correct. The Government considers that the non-impairment criterion is more amenable to a broader assessment of the total impact of the exceptions as applied against the full scope of protection under copyright law. Therefore, a close examination of the effect of individual exceptions should be accompanied by a wider assessment to determine whether the overall adequacy of the legal protection or the effectiveness of legal remedies has been compromised by the exception. For this reason the Government does not accept the recommendation.

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).

Response

The Government accepts this recommendation. The legislation implementing the AUSFTA will give effect to its terms in accordance with relevant principles of international law. The chapeau to Article 17.4.7(a)(ii) clearly contemplates dealing in devices and services on a commercial or some other basis with the public. Accordingly, its scope does not cover the actions of individuals or organisations benefiting from an exception under Article 17.4.7(e)(v), (vii) or (viii), that seek to create circumvention devices for their own use. There is no element of dealing with the public in these cases. The Committee's views on this issue have been of assistance to the Government in developing the liability scheme.

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.

Response

The Government notes this recommendation. This is not a drafting error. It is an intentional limitation on the availability of circumvention devices under the liability scheme. The Government notes that individuals and organisations will be able to take advantage of the exceptions granted under the AUSFTA by using existing devices in

their possession, making their own devices or importing devices. The legislation implementing the AUSFTA will give effect to its terms in accordance with relevant principles of international law. The Committee's discussion of this issue has been of assistance to the Government in developing the liability scheme.

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.

Response

The Government accepts this recommendation in part. The TPM scheme will not affect existing exceptions to copyright infringement in the Copyright Act. In relation to the existing permitted purposes under s.116A of the Copyright Act, each of these will need to satisfy the criteria in the AUSFTA if an exception to liability is to be granted. The activities covered by the existing permitted purposes are addressed in subsequent recommendations. Whether or not a case has been made out for those recommendations is considered in the context of those recommendations.

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.

Response

The Government accepts this recommendation in principle. Under Order 15A rule 6 of the Federal Court Rules, a copyright owner who suspects there has been an infringement of copyright in their licensed computer program can use the process of preliminary discovery to seek access to the source code of a respondent's computer program.

Recommendation 15 (paragraph 4.43)

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

- (i) Making back-up copies of computer programs;**
 - (ii) The reproduction or adaptation of computer programs for interoperability between computer programs;**
 - (iii) The reproduction or adaptation of computer programs for correcting errors in computer programs; and**
 - (iv) 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.**

15 (i) Making back-up copies of computer programs

Response

The Government does not accept this recommendation, as it considers the requirements of the AUSFTA have not been met. Although section 47C of the Copyright Act presently permits an owner or licensee of a computer program to make a back-up copy of that program, insufficient evidence was presented to the Committee that a TPM has been used to prevent the owner or licensee from doing this. The Attorney-General's Department is currently conducting a limited further review which is evaluating any further evidence provided in relation to an additional exception of making back-up copies of computer programs.

15 (ii) Reproduction or adaptation of computer programs for interoperability between computer programs

Response

The Government accepts this recommendation in principle. When addressing this issue the Government will ensure that the legislation implementing the AUSFTA gives full effect to its terms in accordance with relevant principles of international law. The Government acknowledges the arguments which form the basis for the Committee's recommendation. The Committee's discussion of this issue has been of assistance to the Government in developing the liability scheme.

15 (iii) The reproduction or adaptation of computer programs for correcting errors in computer programs

Response

The Government does not accept this recommendation. Although section 47E of the Copyright Act presently permits the reproduction of computer programs to correct errors, there is insufficient evidence in the Committee's report or in the submissions to the Committee to justify an exception for this purpose. The Attorney-General's Department is currently conducting a limited further review which is evaluating any further evidence provided in relation to an additional exception of correcting errors computer programs.

15 (iv) Interoperability between computer programs and data

Response:

The Government accepts this recommendation. Proponents of the exception have satisfied the criteria for determining additional exceptions under Article 17.4.7 (e)(viii). The proponents of this exception provided valid and convincing examples where the TPM liability scheme will adversely impact on their ability to access data where there is a TPM on the proprietary application program within which the data is stored for the purpose of developing an interoperable program to allow the owners of copyright in that data to use it in another program. The corresponding exceptions to liability for circumventing an access control measure should exist to enable these non-infringing activities.

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.

Response

The Government accepts this recommendation. The Government will monitor this issue as part of its general oversight of the TPM liability scheme. To address the Committee's concern, the Government proposes to introduce a provision similar to section 202 of the Copyright Act to discourage groundless threats of legal action against a person for the circumvention of a TPM.

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.

Response

The Government accepts this recommendation. The Government will monitor this issue as part of its general oversight of the TPM liability scheme.

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.

Response

The Government notes this recommendation. The issue of 'abandonware' will be considered in the context of any review of orphan works.

Recommendation 19 (paragraph 4.89)

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

- (i) The provision of copyright material to members of Parliament and**
 - (ii) 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.**

Response

The Government does not accept this recommendation at this stage. In evidence to the Committee, proponents of the exceptions indicated that they do not currently perform TPM circumvention, but anticipated that it will be necessary in the future. No evidence was provided of TPMs which are currently applied to works, or of works being unable to be made available to parliamentarians because of the application of TPMs. In the absence of this evidence, the case for exceptions to liability for circumvention of TPMs to enable libraries to provide copyright materials to members of Parliament and to enable the use of copyright material for the services of the

Government has not been made out. However, should this evidence become available, parliamentary libraries and the Government may seek an exception in a future ad hoc or periodic review. Those bodies seeking exceptions should ensure they address the criteria discussed at recommendations 8-9.

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.

Response

The Government notes that this recommendation does not need to be addressed as the Government has not accepted the previous recommendation. Should this become an exception in the future, the Government will take this recommendation into account.

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.

Response

The Government notes this recommendation. The Government will amend the Copyright Act to allow a flexible dealing provision for non-commercial uses of material for the benefit of people with disabilities. Following the commencement of these amendments, if there is an adverse impact on the new non-infringing uses, relevant users may seek an exception in a future ad hoc or periodic review. Those seeking an exception should ensure they address the criteria discussed at recommendations 8-9.

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.**

Response

The Government accepts this recommendation. Educational institutions and institutions assisting persons with a print disability operating under Part VB satisfy the criteria for determining additional exceptions under Article 17.4.7(e)(viii) outlined

in the response to recommendations 8 – 9. There is sufficient evidence adduced by these institutions and those with a print disability that the TPM liability scheme would have an adverse impact on the activities currently permissible under Part VB.

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.

Response:

The Government acknowledges the Committee's concerns underlying this recommendation. However, the scheme operates to provide exceptions to liability rather than to classify devices. It is not possible to reclassify devices without undermining the scheme. The legislation implementing the AUSFTA will give effect to its terms in accordance with relevant principles of international law. For this reason, the Government cannot accept this recommendation.

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.

Response

The Government notes this recommendation. The Government will make minor technical amendments to section 40 of the Copyright Act which may impact upon the ability of people with a print disability to use copyright material. Following the commencement of these amendments, if there is an adverse impact on the new non-infringing uses, relevant users may seek an exception at a future ad hoc or periodic review. Those seeking an exception should ensure they address the criteria discussed at recommendations 8-9.

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.

Response

The Government accepts this recommendation. The proponents of these exceptions provided valid examples in their submissions to the Committee that the TPM liability

scheme will adversely impact on activities currently permissible under sections 49, 50, 51A, 110A and 110B of the Copyright Act. Exceptions to liability for circumventing access control measures should exist for these provisions to enable libraries, archives and cultural institutions to fulfil their important functions of providing access to and preserving their collections.

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.

Response

The Government accepts this recommendation in principle. The collection held by the National Gallery of Australia (NGA) falls within the extended definition of an archive in section 10(4) of the Copyright Act. As an archive, the specific exceptions relating to libraries and archives under sections 49, 50, 51A, 110A and 110B of the Copyright Act apply to it. If additional exceptions are required the NGA can seek those exceptions in future ad hoc or periodic reviews. The NGA should ensure it addresses the criteria discussed at recommendations 8-9.

Recommendation 27 (paragraph 4.169)

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

- (i) Fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice; and**
 - (ii) 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.**

27 (i) Fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice

Response

The Government does not accept this recommendation, as it considers the requirements of Article 17.4.7(e)(viii) have not been met. Although exceptions for fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice were raised before the Committee, the proponents of the exception did not provide sufficient evidence in their submissions. While two submissions did provide evidence that TPMs would have an adverse impact on some activities, these activities would in substance be covered by recommendation 27(ii) discussed below. On balance, the case for the other more general exceptions (sections 103A, 103B and 104) has not been made out. When enacted the TPM scheme will provide a mechanism for the introduction of additional exceptions to liability. Should such evidence become available, a person

may seek an exception in a future ad hoc or periodic review. People seeking exceptions should ensure they address the criteria discussed at recommendations 8-9.

27 (ii) The inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes

Response

The Government accepts this recommendation. The proposed exceptions for the activities of broadcasters examined by the Committee satisfy the criteria for determining additional exceptions outlined in recommendations 8 – 9. The proponents of this exception provided valid and convincing examples in their submissions to the Committee that the TPM liability scheme will adversely impact on activities currently permissible under sections 107 and 109 of the Copyright Act. Proponents of the exception have satisfied the criteria for determining additional exceptions under Article 17.4.7(e)(viii). However, exceptions to circumvention for other purposes were not made out as no evidence was produced that TPMs were applied to material in these situations.

Recommendation 28 (paragraph 4.190)

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

- (i) 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
- (ii) 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.

28 (i) Where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided

Response

The Government accepts this recommendation. The proponents of the exception have satisfied the criteria for determining additional exceptions under Article 17.4.7 (e)(viii).

The proposal for an exception to liability for TPM circumvention, to enable access where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where technical support or a replacement TPM is unavailable, examined by the Committee, satisfies the criteria for determining additional exceptions outlined in recommendations 8–9. The submissions provided evidence of TPMs which have become obsolete, have been lost or damaged, are malfunctioning or are unusable prevent users from continuing to access works which they have legitimately acquired. Failure to gain access to material in the way described in the submissions would be a detrimental or injurious impact on access.

28 (ii) Where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product

Response

The Government accepts this recommendation. The proposal for an exception to liability for the circumvention of a TPM that interferes with or causes damage to, or a malfunction of, a product, or where circumvention is necessary to repair a product examined by the Committee satisfies the criteria for determining additional exceptions under Article 17.4.7(e)(viii) outlined in recommendations 8 – 9.

The submissions provided evidence of TPMs, which interfere with or cause damage to or a malfunction of a product, or where circumvention is necessary to repair a product, prevent users from accessing the work on the product which 'reads' the work, because the TPM has affected the proper functioning of that product.

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.

Response

The Government notes this recommendation. Making back up copies of material other than computer programs is an infringing act. This was not changed by the fair use review. If it is changed in the future the Government will consider the Committee's recommendation.

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.

Response

The Government notes this recommendation. The Government has reviewed this issue as part of the 'fair use and other exceptions' review and does not accept there should be broad exception for format shifting. The Government will amend the Copyright Act to allow format shifting of some copyright material (for example, copying sound recordings from one format to another). Following the commencement of these amendments, if there is an adverse impact on the new non-infringing uses, relevant users may seek an exception in a future ad hoc or periodic review. Those seeking an exception should ensure they address the criteria discussed at recommendations 8-9. However, the Government notes that a wide exception for format shifting could have the potential to impair the adequacy of legal protection or the effectiveness of legal remedies. In a future review, people seeking an exception should take this into account in framing their submission.

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.

Response

The Government notes this recommendation. The issue of orphaned works may be reviewed by the Government. Should this become a non-infringing act, a person may seek an exception in a future ad hoc or periodic review. People seeking exceptions should ensure they address the criteria discussed at recommendations 8-9.

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.

Response

The Government does not accept this recommendation, as it considers the requirements of Article 17.4.7(e)(viii) have not been met. When enacted the TPM scheme will provide a mechanism for the introduction of additional exceptions to liability. Proponents of this exception may seek it in future ad hoc or periodic reviews. Submissions to such reviews should have regard to the criteria set out in response to recommendations 8-9.

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.

Response

The Government accepts this recommendation in principle. The Committee's discussion of this issue will also be of assistance when the Government responds to the Copyright Law Review Committee's report on Copyright and Contract.

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.

Response

The Government accepts this recommendation. In order for requests for exceptions to be made, the AUSFTA imposes an obligation on Australia to:

hold either a legislative or administrative review or proceeding; and

conduct such a review at least once every four years from the date of the previous review.

An administrative review on the TPM exceptions conducted by the Attorney-General's Department would comply with the obligation.

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.

Response

The Government accepts this recommendation. A statutorily defined process for the review of existing and proposed exceptions would comply with the obligation the AUSFTA. The obligation does not prevent subsequent reviews or proceedings being conducted at any time to consider other possible additional exceptions.

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.

Response

The Government accepts this recommendation and notes that there may be earlier ad hoc reviews.

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.

Response

The Government accepts this recommendation. The process for implementing and amending exceptions must be flexible and responsive. Amending subordinate legislation takes less time than legislative changes, it is still subject to parliamentary scrutiny, and is accessible to public through the Federal Register of Legislative Instruments.