



AUSTRALIAN
COPYRIGHT
COUNCIL



***Submission on Copyright Amendment
(Technological Protection Measures) Bill
2006 (Exposure Draft)***

September 2006

Australian Copyright Council

1. The Australian Copyright Council is a non profit company. It receives substantial funding from the Australia Council, the Federal Government's arts funding and advisory body. The Copyright Council provides information about copyright via its publications, training and website, provides free legal advice about copyright, conducts research, and represents the interests of creators and other copyright owners in relation to policy.
2. Some of the organisations affiliated with the Australian Copyright Council have made separate submissions on the Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006.

Context for the Bill

3. The Bill is intended to implement Australia's obligations under Article 17.4.7 of the Australia–United States Free Trade Agreement (AUSFTA). The Bill would amend, and add to, existing provisions relating to technological protection measures (TPMs) in Part V Division 2A, and s132 of the Copyright Act. The existing provisions are intended to comply with the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT).
4. WCT Article 11 provides:

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.
5. WPPT Article 18 is in similar terms.¹
6. These treaties set out minimum standards for contracting parties. Neither treaty prevents a contracting party from introducing protection which is more extensive than the required minimum.

¹ Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Scope of protection

AUSFTA provisions

7. AUSFTA Article 17.4.7 sets out the parties' obligations regarding technological protection measures.
8. The first part of AUSFTA Article 17.4.7(a) sets out the purpose of the remedies and penalties required by the second part of 17.4.7(a):

in order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers and producers of phonograms use in connection with the exercise of their rights
9. The second part of 17.4.7(a) requires the AUSFTA parties to provide remedies and penalties in relation to:
 - circumventing an effective technological measure that controls access to a work, and
 - trafficking in certain devices and services connected to circumvention.
10. Article 17.4.7(b) provides that "effective technological measure" means:

any technology, device or component that, in the normal course of its operation:

 - controls access to a protected work, performance or phonogram, **or**
 - protects any copyright.

"Access control technological protection measure"

11. The proposed definition of "access control technological protection measure" would only apply to something which is designed

to prevent or inhibit the doing of an act:

 - (i) *that is comprised in the copyright, and*
 - (ii) *that would infringe copyright.*
12. The condition in (i) would exclude from the definition a measure intended to control access to material whose consumption or use, after access has been achieved, would not result in an act comprised in the copyright.
13. It would also exclude a measure intended to prevent or inhibit secondary infringement – such as importation for commercial purposes (ss37 and 102), distribution of infringing articles (ss38 and 103) and authorisation of infringement.
14. The condition in (i) is not required by the AUSFTA or by the WIPO treaties. On the contrary, its inclusion renders the proposed new definition too narrow for compliance with either.
15. The government's *Summary of exposure draft provisions on technological protection measures* says:

*Technological protection measures are technical locks copyright owners use to stop their copyright material from being copied **or** accessed (eg passwords, encryption software and access codes). [emphasis added]*

16. This statement is not, however, reflected in the drafting.
17. The government appears to have taken the view that the meaning of “effective technological measure” in the AUSFTA may be limited by reference to the expression of purpose in the first part of Article 17.4.7(a). We think this interpretation of the AUSFTA is incorrect.
18. In any event, in our view, a measure used by a copyright owner to prevent or inhibit unauthorised viewing or listening or use of copyright material is a measure used “in connection with the exercise of [the owner’s] rights” that “restrict[s] unauthorised acts in respect of” the owner’s copyright material. We do think that “unauthorised acts” is not confined to acts comprised in the copyright.
19. For example, an access control TPM on an audiovisual file may, when unlocked, allow a person to view the contents of the file on a screen. The technical process that enables the person to view the contents of the file may not involve an act comprised in the copyright. An alternative technological solution for achieving the same end result – that is, a person becomes entitled to view the contents of a file after being authorised to unlock the access control TPM – may result in an act comprised in the copyright. The government’s approach would arbitrarily protect the second technological solution, but not the first.
20. The government’s approach may thus force copyright owners to adopt technological solutions which produce incidental reproductions – not necessary for the delivery of the content – in order to get the protection of the TPM provisions. Even this may not be commercially feasible for organisations which have already made significant investments developing business models, and accompanying technology, relating to payment for authorised access.
21. We also take the view that a TPM designed to prevent or inhibit secondary infringement is a measure used “in connection with the exercise of [the owner’s] rights” that “restrict[s] unauthorised acts in respect of” the owner’s copyright material.

“Technological protection measure”

22. Our concerns about the limitation of “access control technological protection measure” to measures designed to prevent or inhibit the doing of an act comprised in the copyright also apply to the definition of “technological protection measure”.

Reference to “and includes an access control technological measure” in TPM definition

23. The proposed definition of “technological protection measure” includes the phrase “and includes an access control technological measure”. The inclusion of this phrase is ambiguous: it is not clear whether the effect of including the phrase is that a TPM **must** include an access control technological protection measure, or that an access control technological protection measure is **also** a technological protection measure.
24. We assume, from the AUSFTA, that the latter is intended. If that is the case, it would be clearer to omit the reference to “access control technological protection measure” from the definition of “technological protection measure”, and define “access control technological measure” by reference to the definition of “technological protection

measure” – that is: a technological protection measure that is designed to prevent those who do not have the permission of the copyright owner or exclusive licensee from getting access to copyright material.

Aims of the bill

25. The approach in the bill is at odds with the aims of the bill, which the government stated in its media release of 4 September include

to increase the availability of music, film and games in digital form

and in its *Summary of exposure draft provisions on technological protection measures* as

create a more secure environment for copyright owners to release their copyright materials

with the result that

more material will be made available digitally and through online distribution channels.

“Inappropriate” reliance on the TPM provisions

26. The government’s *Summary of exposure draft provisions on technological protection measures* says:

The scheme will not cover TPMs which are not designed to prevent or inhibit people from infringing copyright. The scheme will not apply to TPMs solely designed for other purposes, such as market segmentation (eg region coding) or the protection against competition in aftermarket goods (eg spare parts) where the TPM does not have a connection with copyright.

27. The statement apparently refers to US cases involving TPMs such as *Lexmark v Static Components*, *Chamberlain v Skylink*, and *Storage Technology Corp v Custom Hardware Engineering Consulting Inc*. These cases all concerned access controls on computer programs, which were circumvented by competitors in order to develop a competing product or service. Access to the computer program in each case was not an end in itself; it was a means to an end of producing a competing product or service (recycled toner cartridges, universal garage door openers, data maintenance services).
28. Unfortunately, the government’s approach goes much further than addressing the concerns in the above statement. The lack of focus has resulted in limitations on the scope of protection which are inconsistent with the government’s objectives for the provisions, and inconsistent with Australia’s treaty obligations.
29. In our view, concerns about inappropriate reliance on the TPM provisions should be addressed in defences to liability, not by limiting the scope of protection.
30. There are defences in the Bill specifically relating to computer programs. Where the limitations described in the government’s summary are not met by the exceptions allowed by subparagraphs (i) to (vii) of AUSFTA Article 17.4.7(e), a person may apply for an exemption under the process set out in Article 17.4.7(e)(viii). A person with a region-coded DVD which will not play on his or her DVD player, for example, could apply for an exemption allowing circumvention. Such an exception could be granted if the criteria in Article 17.4.7(e)(viii) are met.

“Circumvention device”

31. Clause 2 of the bill would introduce a new definition of “circumvention device”, replacing the existing definition in s10(1).
32. Art 17.4.7(a)(ii)(A) of the AUSFTA requires sanctions against a person who traffics in devices, products or services that are promoted, advertised or marketed for the purpose of circumvention. A person may be liable for trafficking in a device or service that has been promoted by another person.
33. The government appears to have taken the view that the sanctions required by Art 17.4.7(a)(ii)(A) only apply to trafficking of a device or service which is promoted for circumvention if the promotion is done by the trafficker. The AUSFTA, however, requires sanctions against a person who traffics in a device or service promoted for circumvention, whether or not the promotion is done by the trafficker.
34. In any event, it would be clearer to confine the definition of circumvention device to the characteristics of the device, and to deal elsewhere with the activities proscribed in relation to such a device.

“Circumvention service”

35. We have similar concerns about the definition of “circumvention device” as we do for the definition of “circumvention service”.

Exceptions

Clause 8: proposed new s116AK(7): exception for law enforcement and national security

36. AUSFTA Art 17.4.7(e)(vi) allows an exemption for:

*Lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security or **similar** government purposes. [emphasis added]*

37. Proposed new s116AK(7) is apparently intended to give effect to Article 17.4.7(e)(vi). The proposed exception, however, would cover “performing of a statutory function, power or duty”. There is no requirement that such function, power or duty be in the nature of law enforcement, intelligence or essential security, as required by the AUSFTA. The exception is thus broader than the exception allowed by the AUSFTA. Similar concerns apply to other references to “statutory function, power or duty” in the Exposure Draft.
38. In addition, the bill applies the exemption not only to something done by or on behalf of the Commonwealth, State or Territory, but also to anything done by or on behalf of an authority of one of those bodies. In our view, the application of the exception to “authorities” is not compliant with the AUSFTA.

Exception for libraries and educational institutions: s116AK(8)

39. Proposed new s116AK(8) appears to be intended to implement AUSFTA 7(e)(vii), which allows an exemption for:

access by a non-profit library, archive or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions.

40. Proposed new s116AK(8)(b) refers to a “library” as a “person” (that is, an entity). There is no definition of “library” in the Copyright Act. Other references to “library” in the Copyright Act suggest that a library is a collection that is owned by a person (the library itself is not a person). Section 18, for example, provides that library is not taken to be established or conducted for profit by reason only that it is owned by a person carrying on a business for profit.
41. The “person” in relation to archives, on the other hand, is a body referred to in the definition of “archives” in s10(1) (such as the Australian Archives), or a body referred to in s10(4).
42. Similar concerns apply to other references to “library” in the Exposure Draft.
43. The reference to “educational institution” suggests that the definition in s10(1) would apply. That definition, however, applies to non-profit and profit-making entities, whereas the AUSFTA requires the exemption to apply only to non-profit entities. Similar concerns apply to other references to “educational institution” in the Exposure Draft.

Prescribed acts: S116AK(9) to (12)

44. AUSFTA Article 17.4(7)(e)(viii) allows exemptions to circumvention liability, other than those listed in paragraphs (i) to (vii), which meet all of the following criteria:
- the circumvention is of an access control technological measure;
 - the use of the work is non-infringing;
 - there is an actual or likely adverse impact on that non-infringing use; and
 - that impact is credibly demonstrated.
45. In addition, any exemption must apply:
- to a class of works, performances or phonograms, and
 - only to the extent that it does not impair
 - the adequacy of legal protection, or
 - the effectiveness of legal remedies
- against the circumvention of effective technological protection measures.²

² Articles 17.4.7.4(7)(e)(viii) and 17.4(7)(f).

Class of works

46. Proposed s116AK(10) provides that the regulations *may* prescribe a particular class of acts and a particular class of persons. The AUSFTA requires that any exemption *must* apply to a class of works.

Opportunity to respond to proposed exceptions

47. We understand that the intention of s116AK(12) is to cover submissions made before the commencement of the amending act, as well as submissions made after that. We understand that submissions to which the government has had regard so far are submissions made to the LACA Committee, submissions made to the Attorney-General's Department and submissions made to the Attorney-General. We understand that submissions made after the commencement of the TPM amendments will be made to the Attorney-General. We think that paragraph (12) should specify to whom the submission must have been made.
48. We submit that the AUSFTA requirement that an adverse impact has been "credibly demonstrated" requires the government to notify, and allow a response to, any proposed exemption. We think this is also required as part of the "legislative or administrative review or proceeding" referred to in Article 17.4.7(e)(viii) of the AUSFTA. Such an obligation should be required by the Act.

No procedure for review of exceptions

49. In our view, the AUSFTA requires review of existing as well as proposed exemptions at least every four years. The proposed amendments do not provide any mechanism for review of an exemption that has been granted.
50. Similar concerns apply to proposed new s132APA(8).

Who can make a submission seeking a new exemption?

51. Criteria to be addressed for reviews of additional exceptions, in ADG e-News Issue 40 (September 2006), paragraph (C) provides:

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 e.*
- 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.*

52. The note to s116AK(12), however, says:

For the purposes of paragraph (a), it is not necessary for the person who made the submission to be the person in relation to whom the act is prescribed.

53. There is an inconsistency between the procedure in the bill and the criteria for new exceptions published by the Attorney-General's Department.

Limitation on remedies: s116AP

54. The proposed limitation on remedies for libraries, educational institutions and public broadcasters does not appear consistent with the AUSFTA. AUSFTA Article 17.4.7(a) allows these bodies to be exempt from criminal penalties, but not from civil remedies.

Defences to circumvention offences: s132APA(2)–(13)

55. AUSFTA Art 17.4.7(a) provides

Each party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

56. The AUSFTA allows, but does not require, each party to exclude the listed types of bodies from criminal penalties. The criminal penalties only apply, however, to a person who circumvents "with the intention of obtaining a commercial advantage or profit". The defences thus appear to relate to an activity undertaken by a non-profit body for commercial advantage or profit. We seek information from the government about the types of activities it thinks would be covered by these defences.
57. It is not clear why all the exceptions to civil liability are repeated as defences to criminal liability. Different public policy considerations apply where the circumvention is done for commercial advantage or profit.
58. As noted above, it appears that the term "educational institution" in the bill includes an educational institution conducted for profit, but that the exceptions allowed by AUSFTA apply only to non-profit educational institutions.
59. The Exposure Draft allows the Minister to recommend additional defences to criminal offences, as well as exception to civil actions. If this is to remain, the notification process referred to above in relation to civil actions would need to clearly identify whether a submission had sought an exception from civil action, or a defence or a criminal action, or both. The consequences of each are obviously different.

Exemptions to circumvention liability in draft Regulations

Relationship between criteria for exemptions and exemptions granted by draft regulations

60. AGD e-News on Copyright Issue 40 (4 September 2006) sets out criteria to be addressed for reviews of additional exceptions.
61. We assume these criteria were applied to the exceptions which would be granted by the draft Regulations.
62. We do not know how the government has applied these criteria to the exceptions in the draft regulations, and thus have had no opportunity to respond. The government appears to have applied the criteria to particular situations described in submissions to the LACA Committee, the Attorney-General's Department or to the Attorney-General. We do not know which submissions contained evidence of activities that the government regards as having met the AUSFTA criteria.

None of these exceptions should apply if the material is available from another source

63. It is unlikely that there is adverse impact if a non-infringing use can be made from another source. All these proposed exceptions should therefore be subject to the material not being available from another source.
64. Under the current provisions, a person may not supply a circumvention device or service to a person, unless that person has provided a signed declaration stating (amongst other things), that:

a work or other subject in relation to which the person proposes to use the device or service is not readily available to the person in a form that is not protected by a technological protection measure.

Exceptions too broadly framed

65. We have sought, and we seek again, information from the government about the evidence upon which it has relied in determining, in relation to each of these proposed exceptions, that:
 - there is an actual or likely adverse impact on the non-infringing use; and
 - that impact has been credibly demonstrated.
66. We note that the report on *Technological Protection Measures* by the House of Representatives Legal and Constitutional Affairs (LACA) Committee makes no reference to circumvention which is currently occurring, and would have to cease as a result of the AUSFTA amendments.
67. We understand the Attorney-General's Department takes the view that there is evidence of such current circumvention in submissions to the LACA Committee, but to date it has declined to provide details.

68. If, in fact, there are non-infringing activities which will be adversely affected by the forthcoming amendments, the exceptions must be directed towards those activities. It appears that the government takes the view that some activities done by educational institutions for educational purposes have been credibly demonstrated to be likely to be adversely affected by the forthcoming amendments. The exception, however, applies to *all* activities for educational purposes.

No classes of works identified

69. As noted above, the AUSFTA requires any exception to apply to a class of works. No class of works is identified for most of the exceptions.

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