

## Exceptions proposed to the Committee

- 4.1 This Chapter considers exceptions to the liability scheme proposed to the Committee during the course of its inquiry. Proposed exceptions are assessed against the criteria set out in Article 17.4.7(e)(viii) and 17.4.7(f) (the Committee's approach to these criteria is discussed in Chapter 3). The Committee notes that, while it can make an assessment of exceptions at this stage, it will be the responsibility of the Government to assess comprehensively proposed exceptions for inclusion under the legislation implementing Article 17.4.7.
- 4.2 Due to the fact that a large number of exceptions were proposed to the Committee, for simplicity and clarity exceptions are grouped according to sectors and are conflated where possible. A number of proposed exceptions which appear to be covered by the specified exceptions in Article 17.4.7(e)(i) – (vii) are considered in Chapter 3, and the issue of region coding is considered separately in Chapter 2.
- 4.3 It was proposed in a number of submissions that the current permitted purposes/exceptions under the *Copyright Act* 1968 should be put into exceptions under Article 17.4.7(e)(viii) as a matter of course.<sup>1</sup> The Government has indicated its support for maintaining the existing permitted purposes under the Act in the new liability

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<sup>1</sup> See for example, NSW Attorney-General's Department, *Submission No. 35*, p. 5; Electronic Frontiers Australia (EFA), *Submission No. 36*, p. 6; Department of Education, Science and Training (DEST), *Submission No. 48*, p. 25; Australian Digital Alliance/Australian Libraries' Copyright Committee (ADA/ALCC), *Submission No. 49*, pp. 22, 25. The permitted purposes are set out in Chapter 2 above.

scheme,<sup>2</sup> and the Committee endorses the Government's position in this regard.

### **Recommendation 13**

- 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*.**
- 4.5 A number of the proposed exceptions considered in this Chapter relate closely to the current permitted purposes.
- 4.6 The issue of the exclusion or limitation of permitted exceptions by agreement is also considered at the end of the Chapter.

## **Information technology**

### **Circumvention for the investigation of copyright infringement**

- 4.7 An exception was proposed for technological protection measure (TPM) circumvention for the purpose of investigating copyright infringement of licensed computer programs.<sup>3</sup> It was submitted to the Committee that, where an infringing reproduction or adaptation of a computer program has been created and then protected with a TPM, that TPM can prevent the original copyright owner from investigating the infringement.<sup>4</sup>

### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.8 *Non-infringing use* – the use of copyright material by a copyright owner in this context will not be infringing if done for the purposes of s.43 of the *Copyright Act 1968*.
- 4.9 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.10 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

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2 Mr Peter Treyde, *Transcript of Evidence*, 5 December 2005, p. 33.

3 Cybersource Pty Ltd, *Submission No. 13*, p. 2; Ms Janet Hawtin, *Submission No. 6*, p. 2.

4 Cybersource Pty Ltd, *Submission No. 13*, pp. 1-2.

- Inability of software developers to access critical TPM-protected copyright material in order to investigate possible copyright infringement; and
  - Financial impost incurred by a copyright owner paying subscription fees to access TPM-protected data which infringes their own copyright.<sup>5</sup>
- 4.11 *Non-impairment of legal protection or remedies* – currently under s.43 of the *Copyright Act 1968* anything done for the purposes of a judicial proceeding or a report of a judicial proceeding is lawful; also a fair dealing with a literary, dramatic, musical or artistic work is lawful if it is done for the purpose of the giving of professional advice by legal practitioners, patent attorneys, or trade marks attorneys.

### The Committee's assessment

- 4.12 The Committee is concerned that an unrestricted exception to circumvent TPMs on software for the purpose of investigating copyright infringement could lead to abuse. A general ability to circumvent could encourage fishing expeditions, particularly where there was no reasonable belief of an infringement. In addition, an unrestricted exception to circumvent of this nature could conceivably lead to situations of intellectual property theft under the guise of infringement investigation.
- 4.13 It was suggested to the Committee that this issue could be resolved by focusing on the results of the circumvention – that the propriety of the circumvention, in other words, would be confirmed if it was found that copyright had indeed been infringed.<sup>6</sup> This however still does not address the central question of the legitimacy of the initial act of circumvention itself, and would raise a problematic situation for the circumventing party if no infringement was found.
- 4.14 The Committee is of the view therefore that an unrestricted exception to circumvent TPMs on software for the purpose of investigating copyright infringement would not be desirable from a public policy perspective. The Committee does believe however that the concerns of the proponents of this exception are valid, and it appears that the criteria are satisfied for an exception for TPM circumvention on computer programs for the investigation of copyright infringement. In order to strike a proper balance, it would seem to the Committee

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5 Cybersource Pty Ltd, *Submission No. 13*, pp. 2-3.

6 Mr Steven D'Aprano, *Transcript of Evidence*, 15 November 2005, p. 20.

that such an exception should only be granted upon the order of a court where the court is satisfied that there are reasonable grounds for the investigation.

#### **Recommendation 14**

**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.**

### **Circumvention for making back-up copies of computer programs**

4.16 An exception was proposed for TPM circumvention for the purpose of making back-up copies of computer programs on media such as CD-ROMs, floppy discs, DVD-ROMs and data tapes.<sup>7</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

4.17 *Non-infringing use* – lawful use of copyright material under s.47C of the *Copyright Act 1968*.

4.18 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.

4.19 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Financial impost as a result of needing to replace purchased copies of computer programs that are fragile or stored on fragile media.<sup>8</sup>

4.20 *Non-impairment of legal protection or remedies* – currently under s.47C of the *Copyright Act 1968* the making of back-up copies of computer programs is lawful under certain circumstances.

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7 Mr Alex Andrews, *Submission No. 23*, p. 3; see also Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section C. An exception was also proposed for TPM circumvention for making back-up copies of copyright material other than computer programs; this is considered at paragraphs 4.191 – 4.198 below.

8 Mr Alex Andrews, *Submission No. 23*, p. 3.

## The Committee's assessment

- 4.21 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the purpose of making back-up copies of computer programs, to the extent currently delineated in s.47C of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

## Circumvention for the reproduction or adaptation of computer programs for interoperability

- 4.22 An exception was proposed for TPM circumvention for the reproduction or adaptation of computer programs for achieving interoperability between computer programs.<sup>9</sup>

## The criteria under Article 17.4.7(e)(viii) and (f)

- 4.23 *Non-infringing use* – lawful use of copyright material under s.47D of the *Copyright Act 1968*.
- 4.24 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.25 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the inquiry:
- Inability to implement an important organisation-wide digital asset storage strategy due to a lack of software interoperability and inability to access particular computer programs.<sup>10</sup>
- 4.26 *Non-impairment of legal protection or remedies* – currently under s.47D of the *Copyright Act 1968* the reproduction or adaptation of a computer program for creating interoperable products for program interoperability is lawful.

## The Committee's assessment

- 4.27 It may be that TPM circumvention for the reproduction or adaptation of computer programs for software interoperability purposes will be covered by the exception specified in Article 17.4.7(e)(i). However, to the extent that this is not the case, it appears to the Committee that the criteria are satisfied and that an exception of this nature, to the extent

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9 See for example National Gallery of Australia (NGA), *Submission No. 18*, p. 2; ADA/ALCC, *Submission No. 49*, pp. 22, 25.

10 NGA, *Submission No. 18*, p. 2.

currently delineated in s.47D of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

- 4.28 Exceptions were also proposed for TPM circumvention for the purposes of achieving interoperability between software and computer systems or hardware.<sup>11</sup> The Committee considers that such interoperability needs will be covered either by the exception discussed above or by the exception specified in Article 17.4.7(e)(i).

### Circumvention for the reproduction or adaptation of computer programs for error correction

- 4.29 An exception was proposed for TPM circumvention for the reproduction or adaptation of computer programs for correcting errors in computer programs.<sup>12</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.30 *Non-infringing use* – lawful use of copyright material under s.47E of the *Copyright Act 1968*.
- 4.31 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.32 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the inquiry:
- Financial loss due to the purchase of computer programs with errors where the program vendor was unable/refused to correct the problem.<sup>13</sup>
- 4.33 *Non-impairment of legal protection or remedies* – currently under s.47E of the *Copyright Act 1968* the reproduction or adaptation of a computer program for error correction is lawful.

#### The Committee's assessment

- 4.34 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction or adaptation

11 See for example Ms Janet Hawtin, *Submission No. 6*, p. 2; NGA, *Submission No. 18*, p. 2; Mr Alex Andrews, *Submission No. 23*, p. 2. Ms Kimberlee Weatherall submitted that circumvention should be permitted for 'all activities required to ensure interoperability': *Submission No. 38*, p. 35.

12 Supporters of Interoperable Systems in Australia (SISA), *Submission No. 47*, p. 3; ADA/ALCC, *Submission No. 48*, pp. 22, 25.

13 SISA, *Submission No. 47*, p. 3.

of computer programs for correcting errors in computer programs, to the extent currently delineated in s.47E of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

- 4.35 The Committee notes the recent difficulties experienced in the United States when a 'patch' released by Sony to correct problems initially created by a Sony TPM (or 'rootkit') on selected music CDs failed to adequately correct these problems.<sup>14</sup> The Committee was relieved to receive advice from the Attorney-General's Department (AGD) that, to its knowledge, these issues have not yet manifested in Australia.<sup>15</sup>

### Circumvention for interoperability between computer programs and data

- 4.36 An exception was proposed for TPM circumvention for achieving interoperability between computer programs and data.<sup>16</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.37 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.38 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.39 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the inquiry:
- Inability to access data due to the presence of a TPM on the proprietary application program within which the data is stored;<sup>17</sup> and
  - Inability of owners of data to migrate data from a proprietary format protected by TPMs to another format.<sup>18</sup>
- 4.40 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

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14 See <http://www.eff.org/deeplinks/archives/004117.php> (accessed 25/01/2006).

15 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 27.

16 Open Source Software Industry Australia Ltd, *Submission No. 17*, section 4. See also National Library of Australia (NLA), *Submission No. 28*, p. 7.

17 Mr Brendan Scott, *Transcript of Evidence*, 14 November 2005, p. 52. See also NLA, *Submission No. 28*, p. 7.

18 NLA, *Submission No. 28*, p. 7.

## The Committee's assessment

- 4.41 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for interoperability between computer programs and data should be permitted under Article 17.4.7(e)(viii).
- 4.42 The Committee was informed by the AGD that the specified exception in Article 17.4.7(e)(i) would not provide for computer program-data interoperability unless the program was decompiled and a separate computer program created.<sup>19</sup>

### Recommendation 15

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

- Making back-up copies of computer programs;
- The reproduction or adaptation of computer programs for interoperability between computer programs;
- The reproduction or adaptation of computer programs for correcting errors in computer programs; and
- 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.

## Circumvention for legitimate research into encryption, technical access, copy control measures, and other issues relating to computer security

- 4.44 An exception was proposed for TPM circumvention for the purpose of legitimate research into encryption, technical access and/or copy control measures and any other issues relating to computer security.<sup>20</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.45 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*; see also ss.47B and 47F of the Act.

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<sup>19</sup> AGD, *Submission No. 52.1*, p. 7.

<sup>20</sup> Ms Kimberlee Weatherall, *Submission No. 38*, p. 31.



- 4.46 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.47 *Credibly demonstrated likely adverse impact* – the following adverse impact was identified in evidence to the Committee:
- Well-documented cases of threats of legal action against legitimate researchers in the United States conducting security research.<sup>21</sup>
- 4.48 *Non-impairment of legal protection or remedies* – currently under ss.47B and 47F of the *Copyright Act 1968* the making copies of computer programs for study and security investigation purposes is lawful under certain circumstances.

### The Committee's assessment

- 4.49 As far as the Committee is aware, the circumstances outlined in the evidence of the overseas adverse impacts have no equivalent in Australia. No likely adverse impact within Australia was credibly demonstrated. Accordingly, the Committee is unable to recommend an exception for TPM circumvention for legitimate research into encryption, technical access and/or copy control measures and any other issues relating to computer security.
- 4.50 This being said, the Committee does not discount the possibility that such adverse impacts may become relevant to Australia in the future and that a corresponding exception may well be needed in due course. The Committee is of the view therefore that the issue should be monitored by the Government.

### Recommendation 16

- 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.**
- 4.52 The Committee also notes that TPM circumvention for legitimate research into encryption, access, copy controls and other issues relating to computer security may well be covered in any event by the exception specified in Article 17.4.7(e)(ii). The Committee notes further that ss.47B and 47F of the *Copyright Act 1968* currently permit acts in relation to computer programs for certain study and security

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21 Ms Kimberlee Weatherall, *Submission No. 38*, pp. 33-35.

flaw/vulnerability investigation and correction purposes. As noted at paragraph 4.3 above, the Government has indicated its support for maintaining the existing permitted purposes under the Act in the new liability scheme, and the Committee endorses this position.

## Circumvention for the temporary copying of computer programs

4.53 An exception was proposed for TPM circumvention for temporary copying of licensed computer programs.<sup>22</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

4.54 *Non-infringing use* – lawful use of lawfully obtained copyright material in accordance with license conditions and ‘special grants’.<sup>23</sup>

4.55 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.

4.56 *Credibly demonstrated likely adverse impact* – the following adverse impact was identified in evidence to the Committee:

- Likely inability or material impediment to the use of computer programs in the course of volunteer work.<sup>24</sup>

4.57 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee’s assessment

4.58 No likely adverse impact was credibly demonstrated, given that license conditions and ‘special grants’ currently operate to authorise the temporary copying and no indication was given that these licences and grants would not continue to operate under the liability scheme. Accordingly the Committee is unable to recommend an exception for TPM circumvention for temporary copying of computer programs at this time.

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22 Mr James Cameron, *Submission No. 2*, para. 2.2. An exception catering for ‘ignorance of downloads’ was also proposed in this submission but was not sufficiently detailed for full consideration.

23 Mr James Cameron, *Submission No. 2*, para. 2.2.

24 Mr James Cameron, *Submission No. 2*, para. 2.2.

## Circumvention for compilations of lists of websites blocked by commercial filtering software

- 4.59 An exception was proposed for TPM circumvention for compilations of lists of websites blocked by commercial filtering software.<sup>25</sup> It was noted in the submission that an equivalent exception has been granted in the United States by the United States Copyright Office (USCO).

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.60 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.61 *Particular class of works, performances, or phonograms* – literary works as categorised under the *Copyright Act 1968*; computer programs; other factors may also be relevant.
- 4.62 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee.
- 4.63 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee's assessment

- 4.64 The Committee is unable to recommend an exception for TPM circumvention for compilations of lists of websites blocked by commercial filtering software as no likely adverse impact was demonstrated in the evidence.
- 4.65 However, given that an equivalent exception was permitted by the USCO and that adverse impacts must therefore have been identified in the American context, the Committee does not discount the possibility that equivalent adverse impacts may become more relevant to Australia in the future and that a corresponding exception may well be needed in due course. The Committee is of the view that the issue should be monitored by the Government.

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25 Mr Danny Yee, *Submission No. 11*, p. 1.

## Recommendation 17

- 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.**

### Circumvention for tinkering, decompilation and exploitation of 'abandonware'

- 4.67 An exception was proposed for TPM circumvention for tinkering, decompilation and exploitation of 'abandonware'.<sup>26</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.68 *Non-infringing use* – currently there is no exception under the *Copyright Act 1968* to authorise the reproduction etc. of copyright material purely because the copyright owner is not asserting or enforcing their copyright.
- 4.69 *Particular class of works, performances, or phonograms* – computer programs; other factors may also be relevant.
- 4.70 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee:
- 4.71 *Non-impairment of legal protection or remedies* – no exception currently exists in the *Copyright Act 1968*.

#### The Committee's assessment

- 4.72 The Committee is unable to recommend an exception for TPM circumvention for tinkering, decompilation and exploitation of 'abandonware' as it was not shown that this is a non-infringing use, and no likely adverse impact was credibly demonstrated. The desirability of supporting innovation in the information technology sector was emphasised in the submission. While the Committee agrees wholeheartedly with the principle of supporting innovation in this sector, the fact that there is no exception in the *Copyright Act 1968* and the lack of a credibly demonstrated likely adverse impact precludes the Committee from recommending an exception.

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26 Department of Communications, Information Technology and the Arts (DCITA), *Submission No. 56*, p. 3.

4.73 The Committee notes that the issue of seemingly abandoned or ‘orphaned’ works is being considered by the Government as part of its review of the fair dealing provisions in the *Copyright Act 1968*.<sup>27</sup> The Committee believes that the use of ‘orphaned’ works such as ‘abandonware’ should not be an infringing use under the Act in the future. Should the tinkering, decompilation and exploitation of ‘abandonware’ become a non-infringing act, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

### Recommendation 18

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*.

## Parliament and government

### Circumvention for the provision of copyright material to members of Parliament

4.75 An exception was proposed for TPM circumvention for the provision of copyright material to members of Parliament.<sup>28</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

4.76 *Non-infringing use* – lawful use of copyright material under ss.48A, 104A and 50 of the *Copyright Act 1968*.

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27 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 29. Accessible online at: [http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

28 Department of Parliamentary Services, Parliament of Australia (DPS), *Submission No. 24*, p. 2; Queensland Parliamentary Library (QPL), *Submission No. 22*, section 5; Ms Hilary Penfold QC, *Transcript of Evidence*, 28 November 2005, pp. 1-2.

- 4.77 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.78 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Compromised ability to provide copyright material in support of members of Parliament;<sup>29</sup> and
  - Hindrance of parliamentarians’ free access to published information (with an associated risk of compromised democratic processes).<sup>30</sup>
- 4.79 *Non-impairment of legal protection or remedies* – currently under ss.48A and 104A of the *Copyright Act 1968* copyright is not infringed by acts done by parliamentary libraries for members of Parliament. Also, under s.50 of the Act other libraries and archives are authorised to provide parliamentary libraries with copies of certain copyright materials under certain circumstances in order to assist members of Parliament.

### The Committee’s assessment

- 4.80 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the provision of the identified classes of works, performances, or phonograms to members of Parliament, to the extent currently delineated in ss.48A, 50 and 104A of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii). Both the Department of Parliamentary Services of the Parliament of Australia and the Queensland Parliamentary Library indicated that they do not currently perform TPM circumvention, but anticipate that this is likely to be necessary in the future.<sup>31</sup>

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29 DPS, *Submission No. 24*, pp. 2-3; QPL, *Submission No. 22*, section 5.

30 QPL, *Submission No. 22*, sections 4-5.

31 DPS, *Submission No. 24*, pp. 3-4; QPL, *Submission No. 22*, sections 3, 5.

## Circumvention for the use of copyright material for the services of the Crown

4.81 An exception was proposed for TPM circumvention for the use of copyright material for the services of the Crown.<sup>32</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

4.82 *Non-infringing use* – lawful use of copyright material under s.183 of the *Copyright Act 1968*.

4.83 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.

4.84 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

- Hindrance of the performance of significant government functions due to inability to use copyright material;<sup>33</sup>
- Hampering of government's ability to engage in non-infringing use of copyright material;<sup>34</sup>
- Delay or prevention of government service delivery and increase in delivery costs;<sup>35</sup> and
- Decrease in availability of potential resources to government.<sup>36</sup>

4.85 *Non-impairment of legal protection or remedies* – currently under s.183 of the *Copyright Act 1968* copyright is not infringed by any use of copyright material for the services of the Commonwealth or a State.

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32 See for example DEST, *Submission No. 48*, p. 35; ACT Government, *Submission No. 50*, p. 2; Queensland Government, *Submission No. 51*, pp. 2-3; NSW Attorney-General's Department, *Submission No. 35*, p. 4; Australian Government Libraries Information Network (AGLIN), *Submission No. 20*, p. 1; States and Territories Copyright Group (STCG), *Submission No. 63*, p. 2; Australian Tax Office (ATO), *Submission No. 9*, paras 5-8. See also WA Department of the Premier and Cabinet and Department of Justice, *Submission No. 58*, pp. 8-10.

33 Dr Anne Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 74.

34 ACT Government, *Submission No. 50*, p. 2.

35 Queensland Government, *Submission No. 51*, p. 2; see also STCG, *Submission No. 63*, p. 2.

36 Queensland Government, *Submission No. 51*, p. 2.

## The Committee's assessment

- 4.86 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the identified classes of works, performances, or phonograms for the services of the Crown, to the extent currently delineated in s.183 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).
- 4.87 As discussed in Chapter 3, the Australian Tax Office (ATO) raised concerns regarding the scope of the specified exception in Article 17.4.7(e)(vi), and the Office of Film and Literature Classification (OFLC) also raised concerns about the discharge of its statutory functions without an appropriate exception (both the ATO and the OFLC indicated that they currently utilise s.183 of the Act<sup>37</sup>). The Committee reiterates its view, stated in Chapter 3, that the issue of the precise scope of the exception in Article 17.4.7(e)(vi) will need to be carefully considered and resolved by the Government. As recommended by the Committee in that Chapter, Article 17.4.7(e)(vi) should also be interpreted in the implementing legislation so as to permit exceptions to liability for TPM circumvention for the government activities identified by the ATO and the OFLC.
- 4.88 The Committee is also of the view that the Government will need to ensure that the exception permitted for the use of copyright material for the services of the Crown in line with s.183 integrates smoothly with the eventual scope of the exception in Article 17.4.7(e)(vi), and that the coverage provided by both exceptions will need to be sufficient for the full range of government activity.

### Recommendation 19

- 4.89 **The Committee recommends that the proposed exceptions to liability for TPM circumvention for:**
- **The provision of copyright material to members of Parliament; and**
  - **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.**

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37 ATO, *Submission No. 9*, para. 7; OFLC, *Submission No. 44*, p. 2.



## Recommendation 20

- 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.

## Educational institutions

### Circumvention for the reproduction and communication of copyright material by educational and other institutions

- 4.91 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by educational and other institutions.<sup>38</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.92 *Non-infringing use* – lawful use of copyright material under Part VB of the *Copyright Act 1968*.
- 4.93 *Particular class of works, performances, or phonograms* – literary works, dramatic works, musical works, and artistic works as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.94 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Significantly compromised ability of educational institutions to discharge fundamental teaching and learning roles due to inability to use copyright material;<sup>39</sup>

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38 See for example Copyright Advisory Group of the Ministerial Council on Employment, Education Training and Youth Affairs (CAG), *Submission No. 40*, p. 14; Australian Vice-Chancellors' Committee (AVCC), *Submission No. 53*, pp. 14-15; Flexible Learning Advisory Group (FLAG), *Submission No. 34*, pp. 9-10; ADA/ALCC, *Submission No. 49*, pp. 19-20, 24; University of Southern Queensland, *Submission No. 26*, p. 1.

39 ADA/ALCC, *Submission No. 49*, p. 20.

- Inability of schools and TAFEs to perform their primary role as educational institutions teaching Australian students due to inability to use copyright material;<sup>40</sup>
- Inability to assist students with disabilities in using copyright material;<sup>41</sup>
- Denial of use of copyright material found only on compilation media;<sup>42</sup> and
- Inability of students to create new works on the basis of past copyright material, review copyright material or use copyright material as a learning aid;<sup>43</sup> and
- Inability to use copyright material due to an inability to reformat material for cultural suitability.<sup>44</sup>

4.95 *Non-impairment of legal protection or remedies* – currently under Part VB of the *Copyright Act 1968* the reproduction and communication of copyright material by educational and other institutions is lawful under certain circumstances.

### The Committee's assessment

4.96 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms by educational and other institutions, to the extent currently delineated in Part VB of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

4.97 The Committee notes that the statutory licence contained in Part VB of the Act contains a number of safeguards to prevent abuse of the licence. Copyright owners are generally paid for the use of their copyright material, and there are limits about the types of material and the amount that may be copied. Part VB of the Act also sets out conditions applicable to copying such as commercial availability tests, marking of copies, and requirements for protection of material made available online.

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40 CAG, *Submission No. 40*, p. 5.

41 CAG, *Submission No. 40*, p. 13; AVCC, *Submission No. 53*, p. 18.

42 CAG, *Submission No. 40*, p. 13.

43 CAG, *Submission No. 40*, p. 13.

44 CAG, *Submission No. 40*, p. 13.

- 4.98 The Committee is unaware of the extent (if any) to which Part VB of the Act prevents educational institutions from assisting students with disabilities to gain access to copyright material. The Committee is aware that this issue is currently being considered by the Government as part of the review of the *Copyright Amendment (Digital Agenda) Act 2000*. If any activities for assisting students with disabilities outside of the scope of Part VB subsequently become non-infringing and satisfy the criteria in Article 17.4.7(e)(viii) and (f), the Committee is of the view that the Government should investigate the appropriateness of introducing a corresponding TPM circumvention exception for these activities.

### **Recommendation 21**

- 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.**

### **Circumvention for those with a print disability and for institutions assisting those with a print disability**

- 4.100 An exception was proposed for TPM circumvention for those with a print disability and for the reproduction and communication of copyright material by institutions assisting those with a print disability.<sup>45</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.101 *Non-infringing use* – lawful use of copyright material under s.40 and Part VB of the *Copyright Act 1968*.
- 4.102 *Particular class of works, performances, or phonograms* – literary works as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.103 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

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45 Vision Australia, *Submission No. 19*, p. 3; Mr Tim Evans, *Transcript of Evidence*, 15 November 2005, pp. 53-54.

- Inability of those with a print disability to access copyright material;<sup>46</sup>
  - Reduction of quality of life for those with a print disability due to inability to access copyright material;<sup>47</sup> and
  - Diminished capacity for those with a print disability to participate in the social, cultural and professional life of the Australian community due to inability to access copyright material.<sup>48</sup>
- 4.104 *Non-impairment of legal protection or remedies* – currently under s.40 of the *Copyright Act 1968*, an individual with a print disability can engage in a fair dealing with material for the purposes of research or study. Also, under Part VB of the *Copyright Act 1968* the reproduction and communication of copyright material by institutions assisting persons with a print disability is lawful under certain circumstances.

### The Committee's assessment

- 4.105 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the identified class of works, performances, or phonograms for those with a print disability, and for the reproduction and communication of the identified class of works, performances, or phonograms by institutions assisting those with a print disability, to the extent currently delineated in s.40 and Part VB of the *Copyright Act 1968* respectively, should be permitted under Article 17.4.7(e)(viii).
- 4.106 The Committee is conscious that the exception discussed at paragraph 4.96 above relating to Part VB of the Act may provide sufficient coverage for institutions assisting those with a print disability. However, to avoid doubt, the Committee believes it desirable to recommend an exception for these institutions here also.

### Recommendation 22

- 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**

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46 Vision Australia, *Submission No. 19*, p. 2.

47 Vision Australia, *Submission No. 19*, p. 2.

48 Vision Australia, *Submission No. 19*, p. 2.

- **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.**

- 4.108 In addition, the classification of devices used as accessibility aids by or for those with a print disability as circumvention devices under the TPM liability scheme was raised as a significant concern in the evidence.<sup>49</sup> The Committee believes that the Government should examine this issue with a view to exempting such devices from the liability scheme.

### **Recommendation 23**

- 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.**
- 4.110 The Committee also notes that the operation of the fair dealing exception in s.40 of the *Copyright Act 1968* is currently being considered by the Government as part of its fair dealing review.<sup>50</sup> The Committee is of the view that, pending the outcome of this review, the Government should examine the adequacy of s.40 as a mechanism for those with a print disability and consider implementing a provision which specifically allows for the reproduction and communication of copyright material for private use by those with a print disability.

### **Recommendation 24**

- 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**

49 Vision Australia, *Submission No. 19*, pp. 2-3.

50 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, pp. 11-17, 36.

Accessible online at:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

by those with a print disability.

### Circumvention for access to copyright material pursuant to Parts VA and VB of the *Copyright Act 1968*

- 4.112 An exception was proposed for TPM circumvention for access to copyright material pursuant to Parts VA and VB of the *Copyright Act 1968*.<sup>51</sup>
- 4.113 In relation to Part VA of the Act, in Chapter 3 the Committee noted indications from the Government that broadcasts would not need to be included in the new TPM liability scheme as they do not come within the compass of protected copyright material under Article 17.4.7.<sup>52</sup> The Committee therefore does not make any recommendations in this report concerning broadcasts.<sup>53</sup>
- 4.114 In relation to Part VB of the Act, an exception for TPM circumvention for the reproduction and communication of copyright material by educational and other institutions, to the extent currently delineated in Part VB of the *Copyright Act 1968*, is recommended above.

### Circumvention for reformatting copyright material for cultural suitability

- 4.115 An exception was proposed for TPM circumvention for the purpose of reformatting copyright material for cultural suitability.<sup>54</sup>
- 4.116 An exception for TPM circumvention for the reproduction and communication of copyright material by educational and other institutions, to the extent currently delineated in Part VB of the *Copyright Act 1968*, is recommended above. This exception should provide coverage for circumvention for this use.

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51 See for example CAG, *Submission No. 40*, pp. 14-15; AVCC, *Submission No. 53*, pp. 14-16; FLAG, *Submission No. 34*, pp. 9-12; ADA/ALCC, *Submission No. 49*, pp. 19-21, 24; Ms Robin Wright, *Submission No. 45*, p. 11. See also Australian Broadcasting Corporation (ABC), *Submission No. 14*, p. 13.

52 See AGD, *Submission No. 52.1*, p. 2.

53 Some other proposed exceptions relevant to broadcasters are considered below at paragraphs 4.157 – 4.173.

54 FLAG, *Submission No. 34*, pp. 15-16; AVCC, *Submission No. 53*, p. 20.

## Circumvention for access to data owned by an educational institution but held by an application service provider

- 4.117 An exception was proposed for TPM circumvention for access to data owned by educational institutions but held by application service providers.<sup>55</sup>
- 4.118 An exception for TPM circumvention for interoperability between computer programs and data is recommended above; this exception should provide coverage for circumvention for this use. Beyond this, issues relating to data held in a proprietary format by an application service provider will be contractual in nature and will be more appropriately dealt with under contract law.

## Circumvention for classroom performances of copyright material

- 4.119 An exception was proposed for TPM circumvention for the purpose of classroom performances of copyright material.<sup>56</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.120 *Non-infringing use* – lawful use of copyright material under s.28 of the *Copyright Act 1968*.
- 4.121 *Particular class of works, performances, or phonograms* – literary works, dramatic works, sound recordings, and cinematograph films as categorised in the *Copyright Act 1968*; other factors may also be relevant.
- 4.122 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee.
- 4.123 *Non-impairment of legal protection or remedies* – currently under s.28 of the *Copyright Act 1968* performances of copyright material in class, by a teacher in the course of giving educational instruction, or by a student receiving educational instruction in are deemed not to be performances in public.

### The Committee's assessment

- 4.124 The Committee is unable to recommend an exception for TPM circumvention for the purpose of classroom performances as no likely adverse impact was demonstrated.

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55 FLAG, *Submission No. 34*, p. 15; AVCC, *Submission No. 53*, pp. 19-20.

56 CAG, *Submission No. 40*, p. 15.

- 4.125 In addition, the Committee is somewhat unsure how, in practice, TPMs could prevent the performance of copyright material in a class setting. The Committee notes further that s.28 of the *Copyright Act* 1968 merely deems certain performances of copyright material in certain educational settings not to be performances in public.

## Libraries, archives and cultural institutions

### Circumvention for the reproduction and communication of copyright material for research and study purposes

- 4.126 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for research and study purposes.<sup>57</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.127 *Non-infringing use* – lawful use of copyright material under ss.49 and 110A of the *Copyright Act* 1968.
- 4.128 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works as categorised in the *Copyright Act* 1968; other factors may also be relevant.
- 4.129 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to fulfil or material impediment to fulfilling key or mandated organisational functions due to inability to provide access to copyright material for users;<sup>58</sup>
  - Inability to fulfil major organisational strategic goals due to restrictions on providing access to copyright material;<sup>59</sup> and
  - Increased cost for research and study use of copyright material which has no commercial impact on the markets of copyright owners.<sup>60</sup>

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57 See for example National Library of Australia (NLA), *Submission No. 28*, letter pp. 1-2; DCITA, *Submission No. 56*, pp. 3-4; NGA, *Submission No. 18*, p. 2; ADA/ALCC, *Submission No. 49*, pp. 18-19, 24; TAFE Libraries Australia (TAFE), *Submission No. 21*, p. 2. See also Ms Robin Wright, *Submission No. 45*, p. 11.

58 NLA, *Submission No. 28*, letter pp. 1-2, p. 2; DCITA, *Submission No. 56*, pp. 3-4.

59 NGA, *Submission No. 18*, p. 2.



- 4.130 *Non-impairment of legal protection or remedies* – currently under s.49 of the *Copyright Act 1968* copyright is not infringed by the reproduction and communication of certain copyright materials by libraries and archives for research and study purposes under certain circumstances. Also, under s.110A of the Act copyright is not infringed by the reproduction or communication of unpublished sound recordings and cinematograph films by libraries and archives for research, study or publication purposes under certain circumstances.

### The Committee's assessment

- 4.131 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms for research and study purposes, to the extent currently delineated in ss.49 and 110A of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Circumvention for the reproduction and communication of copyright material for other libraries, archives and cultural institutions

- 4.132 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for other libraries, archives and cultural institutions.<sup>61</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.133 *Non-infringing use* – lawful use of copyright material under s.50 of the *Copyright Act 1968*.
- 4.134 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, sound recordings, cinematograph films as categorised in the *Copyright Act 1968*; computer programs; databases; geospatial works; other factors may also be relevant.

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60 NGA, *Submission No. 18*, p. 2.

61 See for example DCITA, *Submission No. 56*, pp. 3-4; NGA, *Submission No. 18*, pp. 1-3; NLA, *Submission No. 28*, letter pp. 1-2; TAFE, *Submission No. 21*, p. 2; ADA/ALCC, *Submission No. 49*, pp. 18-19, 24. See also Ms Robin Wright, *Submission No. 45*, p. 11.

- 4.135 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to fulfil or material impediment to fulfilling key or mandated organisational functions due to inability to provide access to copyright material for users (via other institutions);<sup>62</sup> and
  - Impediment to key preservation functions due to inability to make communication copies for sending to other institutions.<sup>63</sup>
- 4.136 *Non-impairment of legal protection or remedies* – currently under s.50 of the *Copyright Act 1968* libraries and archives are authorised to provide other libraries and archives with copies of certain copyright material under certain circumstances.

### The Committee's assessment

- 4.137 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms for other libraries, archives and cultural institutions, to the extent currently delineated in s.50 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Circumvention for the reproduction and communication of copyright material for preservation purposes

- 4.138 An exception was proposed for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes.<sup>64</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.139 *Non-infringing use* – lawful use of copyright material under ss.51A and 110B of the *Copyright Act 1968*.
- 4.140 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, sound recordings, cinematograph

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62 NLA, *Submission No. 28*, letter pp. 1-2, pp. 2, 4-7; DCITA, *Submission No. 56*, pp. 3-4.

63 NGA, *Submission No. 18*, p. 1.

64 See for example TAFE, *Submission No. 21*, p. 2; DCITA, *Submission No. 56*, pp. 3-4; NGA, *Submission No. 18*, pp. 1-2; NLA, *Submission No. 28*, letter p. 2; Australian Film Commission (AFC), *Submission No. 55*, section 9 and Appendix B; ADA/ALCC, *Submission No. 49*, pp. 18-19, 24. See also Ms Robin Wright, *Submission No. 45*, p. 11.

films as categorised in the *Copyright Act 1968*; computer programs; databases; geospatial works; other factors may also be relevant.

- 4.141 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to copy copyright materials for preservation purposes, including long-term preservation;<sup>65</sup>
  - Inability to fulfil or material impediment to fulfilling statutory roles and functions due to inability to make preservation copies of copyright material;<sup>66</sup> and
  - Increased financial impost in fulfilling statutory roles and responsibilities due to inability to make preservation copies of preservation material and increased contractual financial impost.<sup>67</sup>
- 4.142 *Non-impairment of legal protection or remedies* – currently under s.51A of the *Copyright Act 1968* copyright is not infringed by the reproduction and communication of copyright material by libraries and archives for preservation and other purposes under certain circumstances. Also, under s.110B of the Act copyright is not infringed by the reproduction or communication of sound recordings and cinematograph films by libraries and archives for preservation and other purposes under certain circumstances.

### The Committee's assessment

- 4.143 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the reproduction and communication of the identified classes of works, performances, or phonograms for preservation and other purposes, to the extent currently delineated in ss.51A and 110B of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Recommendation 25

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

65 See for example DCITA, *Submission No. 56*, pp. 3-4; NLA, *Submission No. 28*, pp. 1-7; Ms Delma Volker, *Transcript of Evidence*, 5 December 2005, p. 4.

66 See for example NLA, *Submission No. 28*, letter p. 2; AFC, *Submission No. 55*, section 9 and Appendix B; ADA/ALCC, *Submission No. 49*, pp. 18-19; DCITA, *Submission No. 56*, pp. 3-4.

67 AFC, *Submission No. 55*, section 9; DCITA, *Submission No. 56*, p. 5.

- **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.

### Circumvention for the temporary reproduction of digital material for exhibition and preservation purposes

4.145 An exception was proposed for TPM circumvention for the temporary reproduction of digital material for exhibition and preservation purposes.<sup>68</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

4.146 *Non-infringing use* – lawful use of copyright material provided under authorisation.

4.147 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.

4.148 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Degradation of the original digital media due to continuous use.<sup>69</sup>

4.149 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

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<sup>68</sup> NGA, *Submission No. 18*, pp. 1, 3.

<sup>69</sup> NGA, *Submission No. 18*, p. 1; Ms Delma Volker, *Transcript of Evidence*, 5 December 2005, p. 3.

## The Committee's assessment

- 4.150 The Committee is unable to recommend an exception for TPM circumvention for the temporary reproduction of digital copyright material for exhibition purposes as no particular class of works, performances, or phonograms was identified.
- 4.151 However, the Committee would support an exception of this type in the future, particularly given the increasing use of digital media by artists. The Committee is of the view therefore that the Government should consult with the NGA (and with any other relevant institutions) to identify an appropriate exception.

### **Recommendation 26**

- 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.**

## Circumvention for fair dealing with copyright material by libraries and archives

- 4.153 An exception was proposed for TPM circumvention for fair dealing with copyright material by libraries and archives.<sup>70</sup>
- 4.154 Exceptions for TPM circumvention for the reproduction and communication of copyright material for research and study purposes and for other institutions, to the extent currently delineated in ss.49, 50 and 110A of the *Copyright Act* 1968, are recommended above.

## Broadcasting

- 4.155 The Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service Corporation (SBS) proposed a number of exceptions for TPM circumvention in relation to broadcasts.<sup>71</sup> As noted in Chapter 3 and at paragraph 4.113 above, Government has

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70 Australian Institute of Aboriginal and Torres Strait Islander Studies, *Submission No. 46*, p. 11.

71 ABC, *Submission No. 14*, p. 21-23; SBS, *Submission No. 37*, sections 3, 5.

indicated to the Committee that broadcasts would not need to be included in the new TPM liability scheme as they do not come within the compass of protected copyright material under Article 17.4.7.<sup>72</sup> The Committee therefore does not make any recommendations in this report concerning broadcasts.

- 4.156 Other exceptions relating to the activities of broadcasters, however, (i.e. not just to broadcasts *per se*) were also proposed in the evidence, and are considered below.

### **Circumvention for fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice**

- 4.157 An exception was proposed for TPM circumvention for fair dealing with copyright material (and other actions) for criticism, review, news reporting, judicial proceedings, and professional advice.<sup>73</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.158 *Non-infringing use* – lawful use of copyright material under ss.41, 42, 43, 103A, 103B and 104 of the *Copyright Act 1968*.
- 4.159 *Particular class of works, performances, or phonograms* – literary works, dramatic works, musical works, artistic works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.
- 4.160 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:
- Inability to fulfil or material impediment to fulfilling statutory obligations due to inability to access copyright material for fair dealing and other purposes;<sup>74</sup>
  - Inability or restricted ability to use copyright material due to an inability to rely on the fair dealing provisions in the *Copyright Act 1968*.<sup>75</sup>

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72 See also AGD, *Submission No. 52.1*, p. 2.

73 ABC, *Submission No. 14*, pp. 19-21; SBS, *Submission No. 37*, sections 3, 5. SBS' fair dealing exception request also related to region coding on DVDs, which is discussed separately in Chapter 2.

74 ABC, *Submission No. 14*, p. 8.

75 ABC, *Submission No. 14*, p. 9.

4.161 *Non-impairment of legal protection or remedies* – currently under ss.41, 42, 103A and 103B of the *Copyright Act 1968* copyright is not infringed by fair dealing with copyright material for the purposes of criticism or review or reporting news under certain circumstances. Also, under ss.43 and 104 of the Act copyright is not infringed by fair dealing and other actions for judicial proceedings or for the giving of professional advice by legal practitioners, patent attorneys, or trade marks attorneys.

### The Committee's assessment

4.162 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the identified classes of works, performances, or phonograms for fair dealing and other actions for criticism, review, news reporting, judicial proceedings, and professional advice, to the extent currently delineated in ss.41, 42, 43, 103A, 103B, and 104 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Circumvention for the inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes

4.163 An exception was proposed for TPM circumvention for the inclusion of copyright material in broadcasts and the reproduction of copyright material for broadcasting purposes.<sup>76</sup>

### The criteria under Article 17.4.7(e)(viii) and (f)

4.164 *Non-infringing use* – lawful use of copyright material under ss.45, 47, 67, 70, 107 and 109 of the *Copyright Act 1968*.

4.165 *Particular class of works, performances, or phonograms* – literary works, dramatic works, musical works, artistic works, sound recordings, and cinematograph films as categorised under the *Copyright Act 1968*; other factors may also be relevant.

4.166 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Loss of value due to unavailability of statutory licenses for use of copyright material currently available to broadcasters.<sup>77</sup>

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<sup>76</sup> ABC, *Submission No. 14*, pp. 19-21; SBS, *Submission No. 37*, section 3.

<sup>77</sup> SBS, *Submission No. 37*, section 3; see also ABC, *Submission No. 14*, p. 10.

4.167 *Non-impairment of legal protection or remedies* – currently under ss.45, 47, 67, 70, 107 and 109 of the Act copyright is not infringed by the inclusion of copyright material in broadcasts or the reproduction of copyright material for broadcasting purposes in certain circumstances.

### The Committee's assessment

4.168 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for the inclusion of the identified classes of works, performances, or phonograms in broadcasts and for the reproduction of the identified classes of works, performances, or phonograms for broadcasting purposes, to the extent currently delineated in ss.45, 47, 67, 70, 107 and 109 of the *Copyright Act 1968*, should be permitted under Article 17.4.7(e)(viii).

### Recommendation 27

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

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

### Circumvention for the purposes of archival retention, maintenance and preservation of cinematograph films and sound recordings

4.170 An exception was proposed for TPM circumvention for the purpose of archival retention, maintenance and preservation of cinematograph films and sound recordings.<sup>78</sup>

4.171 An exception for TPM circumvention for the reproduction and communication of copyright material by libraries, archives and cultural institutions for preservation purposes, to the extent currently delineated in ss.51A and 110B of the *Copyright Act 1968*, is

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78 ABC, *Submission No. 14*, pp. 22-23.



recommended above. This exception should provide coverage for circumvention for this use.

## Circumvention for use of copyright material under blanket licences

- 4.172 An exception was proposed for TPM circumvention for the use of copyright material under blanket licences.<sup>79</sup>
- 4.173 The Committee notes that such blanket licences are contractual arrangements entered into by the users of copyright material with copyright owners or their representatives. The Committee is of the view that issues arising in relation to such licenses are contractual in nature and are more appropriately dealt with under contract law.<sup>80</sup>

## Other exceptions

- 4.174 Along with the exceptions examined above by sector, a number of other exceptions were proposed in relation to a diverse range of issues.

## Circumvention for 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

- 4.175 An exception was proposed for TPM circumvention for 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.<sup>81</sup>

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79 ABC, *Submission No. 14*, p. 10.

80 The ABC also raised the issues of format shifting, TPM interference with equipment, and DVD region coding within its discussion of blanket licenses: these issues are considered separately in this Chapter and in Chapter 2.

81 See for example Ms Kimberlee Weatherall, *Submission No. 38*, pp. 25-26; DEST, *Submission No. 48*, pp. 34-35; AVCC, *Submission No. 53*, pp. 17-18; Dr Anne Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 74; NLA, *Submission No. 28*, pp. 2-3, 5-7; CAG, *Submission No. 40*, pp. 15-16; Ms Delia Browne, *Transcript of Evidence*, 14 November 2005, p. 55; ADA/ALCC, *Submission No. 49*, p. 24.

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.176 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.177 *Particular class of works, performances, or phonograms* – literary works, dramatic works, artistic works, musical works, sound recordings, cinematograph films as categorised in the *Copyright Act 1968*; computer programs; databases; geospatial works; licensed data products; other factors may also be relevant.
- 4.178 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:
- Inability to access and utilise digitally-stored material;<sup>82</sup>
  - Inability to provide and ensure long-term access to digitally-stored copyright material;<sup>83</sup> and
  - Hindrance of the performance of significant government functions due to inability to use copyright material.<sup>84</sup>
- 4.179 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee's assessment

- 4.180 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for access for the identified classes of works, performances, or phonograms where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided, should be permitted under Article 17.4.7(e)(viii).
- 4.181 The exception would only apply where the copyright or TPM owner did not provide effective support to rectify the problem or a replacement TPM.
- 4.182 The Committee notes that a somewhat similar exception was granted in the United States by the USCO in its 2000 rule making process,<sup>85</sup> and that an exception for computer programs protected by obsolete,

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82 Ms Kimberlee Weatherall, *Submission No. 38*, p. 25; AVCC, *Submission No. 53*, p. 17.

83 Ms Kimberlee Weatherall, *Submission No. 38*, p. 25.

84 Dr Anne Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 74.

85 US National Archives and Records Administration, *Federal Register*, Vol. 65 No. 209, p. 64574 (<http://www.copyright.gov/fedreg/2000/65fr64555.pdf>, accessed 06/02/2006).

damaged or malfunctioning dongles was granted by the USCO in the more recent 2003 rule making process.<sup>86</sup>

### **Circumvention for access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product**

4.183 An exception was proposed for TPM circumvention for access where a TPM interferes with or causes damage or a malfunction to a product, or where circumvention is necessary to repair a product.<sup>87</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

4.184 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.

4.185 *Particular class of works, performances, or phonograms* – sound recordings, cinematograph films as categorised in the *Copyright Act 1968*; computer programs; other factors may also be relevant.

4.186 *Credibly demonstrated likely adverse impact* – the following likely adverse impacts were identified in evidence to the Committee:

- Breakdown of systems or products as a result of TPM operation with associated time and resource costs;<sup>88</sup> and
- Loss or damage or risk (e.g. health risk) if repair of a TPM-protected product is not effected.<sup>89</sup>

4.187 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

#### **The Committee's assessment**

4.188 It appears to the Committee that the criteria are satisfied and that an exception for TPM circumvention for access for the identified classes of works, performances, or phonograms where a TPM interferes with or causes damage or a malfunction to a product, or where

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86 US National Archives and Records Administration, *Federal Register* Vol. 68 No. 211, p. 62018 (<http://www.copyright.gov/fedreg/2003/68fr2011.pdf>, accessed 06/02/2006).

87 ABC, *Submission No. 14*, pp. 11, 23; Ms Janet Hawtin, *Submission No. 6*, pp. 2-3. The ABC identified this issue as a blanket licensing issue, but the Committee is of the view that it also has a broader significance.

88 ABC, *Submission No. 14*, p. 11.

89 Ms Janet Hawtin, *Submission No. 6*, pp. 2-3.

circumvention is necessary to repair a product, should be permitted under Article 17.4.7(e)(viii).

- 4.189 The Committee again notes the TPM product interference issue that emerged in the United States regarding a Sony TPM on CDs.<sup>90</sup> The Committee also notes again advice from the AGD that, to its knowledge, this problem has not yet manifested in Australia.<sup>91</sup>

### **Recommendation 28**

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

- **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**
- **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.**

### **Circumvention for making back-up copies of copyright material other than computer programs**

- 4.191 An exception for TPM circumvention was proposed for the purpose of making back-up copies of copyright material other than computer programs such as material on CDs, DVDs and video tapes.<sup>92</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

- 4.192 *Non-infringing use* – currently there is no exception under the *Copyright Act 1968* for the making of back-up copies of copyright material other than computer programs.
- 4.193 *Particular class of works, performances, or phonograms* – sound recordings and cinematograph films as categorised under the *Copyright Act 1968*.

<sup>90</sup> See paragraph 4.35 above.

<sup>91</sup> Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 27.

<sup>92</sup> Mr Alex Andrews, *Submission No. 23*, p. 3; see also Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section C.

- 4.194 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:
- Financial impost as a result of needing to replace purchased copies of copyright material that is fragile or stored on fragile media.<sup>93</sup>
- 4.195 *Non-impairment of legal protection or remedies* – no exception currently exists in the *Copyright Act 1968*.

### The Committee's assessment

- 4.196 The Committee is unable to recommend an exception for TPM circumvention for making back-up copies of copyright material other than computer programs as it was not shown that this is a non-infringing use.
- 4.197 The Committee notes that the Government is currently considering, as part of its fair dealing review, whether the Act should contain an exception for making back-up copies of copyright material other than computer programs.<sup>94</sup> The Committee would support any moves to implement such an exception in the Act. The Committee is of the view that, should making back-up copies of such copyright material become a non-infringing act in future, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

### Recommendation 29

- 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*.**

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93 Mr Alex Andrews, *Submission No. 23*, p. 3.

94 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 29. Accessible online at:  
[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

## Circumvention for access to lawfully acquired or possessed copyright material

- 4.199 A general exception was proposed for TPM circumvention for access to lawfully acquired or possessed copyright material.<sup>95</sup>
- 4.200 The Committee is unable to recommend such an exception. By its very nature, the exception is incapable of complying with the ‘particular class of works, performances, or phonograms’ criterion. The breadth of the exception also militates against its ability to comply with the non-impairment of legal protection or remedies criterion.

## Circumvention for format shifting copyright material

- 4.201 An exception was proposed for TPM circumvention for the purposes of format shifting copyright material.<sup>96</sup>
- 4.202 As noted in Chapter 2, format shifting (along with time shifting) is currently an infringing use of copyright material under the *Copyright Act 1968*. As such, the Committee is unable to recommend an exception for TPM circumvention for format shifting at this time.
- 4.203 The Committee notes that the Government is currently considering, as part of its fair dealing review, whether the Act should contain an exception for format shifting of copyright material.<sup>97</sup> The Committee would support any moves to implement such an exception in the Act. The Committee is of the view that, should format shifting become a non-infringing act in future, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

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95 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section H. See also EFA, *Submission No. 36*, pp. 5-6, and ADA/ALCC, *Submission No. 49.1*, pp. 1-2.

96 See for example Mr Alex Andrews, *Submission No. 23*, p. 2; ABC, *Submission No. 14*, pp. 9, 10, 22; FLAG, *Submission No. 34*, p. 12; AVCC, *Submission No. 53*, pp. 16-17; NGA, *Submission No. 18*, p. 3.

97 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, pp. 27-28.

Accessible online at:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

### Recommendation 30

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*.**

### Circumvention for the reproduction and communication of 'orphaned' works

4.205 An exception was proposed for TPM circumvention for the reproduction and communication of 'orphaned' works.<sup>98</sup>

#### The criteria under Article 17.4.7(e)(viii) and (f)

4.206 *Non-infringing use* – currently there is no exception under the *Copyright Act 1968* to authorise the reproduction etc. of copyright material purely because the copyright owner is not asserting or enforcing their copyright.

4.207 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.

4.208 *Credibly demonstrated likely adverse impact* – the following likely adverse impact was identified in evidence to the Committee:

- Inability to use 'orphaned' copyright material protected by TPMs in the event that an exception for such material is incorporated into the *Copyright Act 1968* but no corresponding TPM circumvention exception is permitted.<sup>99</sup>

4.209 *Non-impairment of legal protection or remedies* – no exception currently exists in the *Copyright Act 1968*.

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98 See for example FLAG, *Submission No. 34*, p. 17; AVCC, *Submission No. 53*, pp. 21-22; ATO, *Submission No. 9*, para. 9.

99 FLAG, *Submission No. 34*, p. 17; AVCC, *Submission No. 53*, p. 22.

## The Committee's assessment

- 4.210 The Committee is unable to recommend an exception for TPM circumvention for the reproduction and communication of 'orphaned' works as it was not shown that this is a non-infringing use, and no particular class of works, performances, or phonograms was identified.
- 4.211 The Committee notes that the issue of seemingly abandoned or 'orphaned' works is being considered by the Government as part of its fair dealing review.<sup>100</sup> The Committee is of the view that, should the reproduction and communication of 'orphaned' copyright material become a non-infringing act in future, the Government should investigate the appropriateness of introducing a corresponding TPM exception.

### Recommendation 31

- 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.**

## Circumvention for access to material not protected by copyright

- 4.213 An exception was proposed for TPM circumvention for access to material not protected by copyright (i.e. public domain material).<sup>101</sup>
- 4.214 The Committee understands that no such exception will be necessary. During the course of the inquiry the Committee put the following question to the AGD:

In the Department's view, will a TPM, in order to come within the scope of the AUSFTA provisions as implemented

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100 AGD, *Fair Use and Other Copyright Exceptions*, Issues Paper, May 2005, p. 29. Accessible online at:

[http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FairUseIssuesPaper050505.pdf/\\$file/FairUseIssuesPaper050505.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FairUseIssuesPaper050505.pdf/$file/FairUseIssuesPaper050505.pdf).

101 See for example FLAG, *Submission No. 34*, pp. 13-14; Ms Robin Wright, *Submission No. 45*, pp. 4-5; AVCC, *Submission No. 53*, p. 18; CAG, *Submission No. 40*, p. 16; ADA/ALCC, *Submission No. 49*, p. 24; ATO, *Submission No. 9*, para. 9; Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section B.



in the new scheme, have to be attached to a work protected by copyright?<sup>102</sup>

4.215 In response, the AGD stated that:

Yes. The use of the word 'protected' in the definition of an ETM means that the work must currently be protected by copyright. Copyright protection for works will generally subsist for the life of the author plus 70 years. After this time period copyright protection ceases and the material passes into the public domain. Once the material passes into the public domain there is no liability against circumvention under Article 17.4.7. ...For an ETM to fall within the scope of the AUSFTA liability provisions it must be attached to a work, performance or phonogram that is protected under Australian copyright law at the time.<sup>103</sup>

4.216 The Committee is conscious however that an issue may arise in relation to 'mixed' works consisting of both copyright material that is in the public domain and material that is protected by copyright. The Committee notes that, under certain circumstances, the *Copyright Act* 1968 extends protection to compilations of copyright material.<sup>104</sup> However, the Committee is of the view that it is also in the public interest that non-copyright material be accessible. While the Committee acknowledges that the potential exists for tension between these two legitimate objectives, copyright owners should not be able to obtain de facto protection for non-copyright material by bundling it with copyright material in mixed works. Accordingly, the Government should develop a TPM circumvention with respect to such works for non-infringing uses where the amount of non-copyright material present is substantial.

### Recommendation 32

**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**

102 See AGD, *Submission No. 52.1*, p. 6.

103 AGD, *Submission No. 52.1*, p. 6.

104 The Committee also notes that s.135ZK of the *Copyright Act* 1968 provides that copyright is not infringed where a literary or dramatic work published in an anthology to a certain extent is reproduced for educational purposes.

**work is substantial.**

### **Circumvention for access to copyright material used under authorisation where TPMs have been installed**

4.218 An exception was proposed for TPM circumvention for access to copyright material used under authorisation where TPMs have been installed.<sup>105</sup>

#### **The criteria under Article 17.4.7(e)(viii) and (f)**

4.219 *Non-infringing use* – lawfully obtained copyright material used with the express authorisation of the copyright owner.

4.220 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.

4.221 *Credibly demonstrated likely adverse impact* – no likely adverse impact was demonstrated in evidence to the Committee:

4.222 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

#### **The Committee's assessment**

4.223 The Committee is unable to recommend an exception for TPM circumvention for access to copyright material used under authorisation where TPMs have been installed as no particular class of works, performances, or phonograms was identified and no likely adverse impact was credibly demonstrated.

4.224 The Committee is also of the view that issues of this type relating to the use of copyright material under express authorisation from copyright owners will be contractual in nature and will be more appropriately dealt with under contract law.

### **Circumvention for access to copyright material which the copyright owner did not intend to be protected by TPMs**

4.225 An exception was proposed for TPM circumvention for access to copyright material which the copyright owner did not intend to be protected by TPMs.<sup>106</sup>

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<sup>105</sup> AGLIN, *Submission No. 20*, p. 2.

### The criteria under Article 17.4.7(e)(viii) and (f)

- 4.226 *Non-infringing use* – no apparent infringing use under the *Copyright Act 1968*.
- 4.227 *Particular class of works, performances, or phonograms* – no particular class of works, performances, or phonograms was identified in evidence to the Committee.
- 4.228 *Credibly demonstrated likely adverse impact* – the following adverse impact was identified in evidence to the Committee:
- Inability to access protected copyright material due to the presence of unintended TPMs.<sup>107</sup>
- 4.229 *Non-impairment of legal protection or remedies* – no impairment apparent at this stage.

### The Committee's assessment

- 4.230 The Committee is unable to recommend an exception for TPM circumvention for access to copyright material which the copyright owner did not intend to be protected by TPMs as no particular class of works, performances, or phonograms was identified.
- 4.231 Further, the Committee notes the following statement from the AGD on this issue:
- There is nothing in the AUSFTA that negates liability for the circumvention of an ETM that is unintentionally applied to copyright material. However, it is difficult to foresee circumstances in which an unintentional application of an ETM could have been placed on the copyright material with the consent of the copyright owner.<sup>108</sup>
- 4.232 The Committee also notes that, in the relevant submission, this issue was discussed in the context of copyright material protected by obsolete TPMs.<sup>109</sup> An exception for TPM circumvention for access to copyright material where a software or hardware TPM is obsolete, lost, damaged, defective, malfunctioning, or unusable, and where support or a replacement TPM is not provided, is recommended above.

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106 ADA/ALCC, *Submission No. 49*, pp. 23-24.

107 ADA/ALCC, *Submission No. 49*, p. 23.

108 AGD, *Submission No. 52.1*, p. 6.

109 ADA/ALCC, *Submission No. 49*, p. 23.

## Circumvention for access where TPMs are not related to copyright but are anti-competitive in nature

- 4.233 An exception was proposed for TPM circumvention for access where TPMs are not related to copyright but are anti-competitive in nature.<sup>110</sup>
- 4.234 The connection between TPMs and copyright protection and the issue of anti-competitiveness are considered in Chapter 2. The Committee recommends in that Chapter that the Government should ensure that TPMs are related to copyright protection rather than to the restriction of competition in markets for non-copyright goods and services.

## Exclusion or limitation of permitted exceptions by agreement

- 4.235 The issue of excluding or limiting permitted exceptions by agreement was raised in evidence to the Committee. One submission contended that:

The first principle that must be recognised is that any rights provided by exceptions to liability for circumvention must be protected from exclusion by agreement. Section 47H provides that an agreement which purports to limit the application of the computer program exceptions has no effect. The exceptions to the anti-circumvention measures in s116A are not similarly protected from exclusion.<sup>111</sup>

- 4.236 It was also submitted that allowing exclusion or limitation by agreement can result in 'significant detriment to innovation',<sup>112</sup> and that:

Restrictions to the limitation of exceptions by agreement should not be limited to the permitted purposes of ss 47D, 47E, 47F, but should extend to all exceptions to circumvention and dealings with circumvention devices and services. There is no reason to allow any exceptions to be contractually

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110 FLAG, *Submission No. 34*, pp.16-17; AVCC, *Submission No. 53*, pp. 20-21; ADA/ALCC, *Submission No. 49*, pp. 10-11, 24; EFA, *Submission No. 36*, p. 6. See also the Intellectual Property Committee of the Law Council of Australia (IPC), *Submission No. 15*, pp. 5-6, and Robin Wright, *Submission No. 45*, pp. 5-6.

111 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section A.

112 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section A.

limited, particularly given the potential negative impacts on consumers and the limited bargaining power in consumer contracts.<sup>113</sup>

- 4.237 The AGD indicated that it will be considering the issue of exclusion or limitation of permitted exceptions by agreement prior to the implementation of Article 17.4.7.<sup>114</sup>
- 4.238 The Committee is of the view that the exclusion or limitation of permitted exceptions by agreement should be prohibited under the liability scheme implementing Article 17.4.7. The widespread use of exclusionary or limiting agreements, particularly when presented to copyright users as virtual *faits accomplis* in the form of end user licence agreements, could easily render the very concept of permitted exceptions meaningless. The approach in s.47H of the *Copyright Act* 1968 should be followed with respect to all exceptions permitted under the liability scheme implementing Article 17.4.7.

### **Recommendation 33**

- 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.**

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113 Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29*, section A. See also Professor Brian Fitzgerald and Mr Nicolas Suzor, *Submission No. 29.2*, p. 3, and Professor Brian Fitzgerald, *Transcript of Evidence*, 14 November 2005, p. 71.

114 Ms Helen Daniels, *Transcript of Evidence*, 5 December 2005, p. 28.