

Thampapillai, Dilan (2007) The Emergence of an Access Right in Australian Copyright Law.

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The Emergence of an Access Right in Australian Copyright Law

Dilan Thampapillai¹

The concept of an access right is an inherently controversial concept within copyright because it departs from the traditional assumptions of copyright law. When Australia first responded to the challenges of the digital era there was widespread resistance to the concept of an access right. The Australian Government took great care to avoid statutory language that would too closely mirror the terms of the United States' Digital Millennium Copyright Act. The terms of the DMCA appeared on their face to create a broad access right for copyright owners. However, recent decisions of US courts have actively read down the provisions of the DMCA to require a direct link to copyright infringement. But in the aftermath of the Australia-United States Free Trade Agreement the legal position within Australia has irrevocably changed. The terms of the AUSFTA have required a two-fold change in the law that has given rise to the emergence of an access right in Australian copyright law. Firstly, the Australia-United States Free Trade Agreement Implementation Act (Cth) changed the material form requirement. Secondly, the implementation of article 17.4.7 of the AUSFTA separated the concept of access from copyright infringement. This development reverses the standard set by the High Court in the case of Steven v Sony and raises the question of where the law, consumers and copyright owners are headed.

I. Introduction

Since the signing of the Australia-United States Free Trade Agreement (AUSFTA) Australia has embarked upon a remarkable and controversial period in its copyright laws. The changes brought about by the AUSFTA both extend and add to the reforms that the Australian Government had been required to pursue in order to bring Australian copyright law into the digital era. This has led to a great concern that the rights of copyright owners have been extended to the detriment of copyright users. This initial concern caused the Australian Government to commence the Fair Use Inquiry at the same time as the first round of amendments to the *Copyright Act 1968* (Cth) were being passed in order to implement the AUSFTA.² Regardless of whether the outcomes of the Fair Use Inquiry can actually be said to counter-balance the extensions of copyright owner's rights there remain a deep suspicion from some stakeholders that the further changes to the law have given copyright owners greater powers and indeed rights that go beyond the traditional boundaries of copyright.

¹ BA, LLB (ANU), M.Com (University of Sydney), LLM (Cornell University). Solicitor of the Australian Capital Territory. Associate Lecturer, Faculty of Law, Queensland University of Technology.

² The Fair Use Inquiry was formally launched in May 2005. The discussion paper for the Fair Use Inquiry is available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Copyright-ReviewofFairUseExemption-May2005

Last checked 28 August 2007.

The formal response to the submissions to the Fair Use Inquiry was released via press release. See further Hon Philip Ruddock MP, Attorney-General, "Major Copyright Reforms Strike Balance," Press Release, 14 May 2006.

Nowhere is this concern more evident than in the debates that surround the access right within the context of technology protection measures. The reforms of the *Digital Millennium Copyright Act* (DMCA) that introduced anti-circumvention laws were criticized at the time as creating “para-copyright” in the copyright laws of the United States.³ It would seem apparent that the same concern lurks behind the recent debates that have attended the draft legislation that is designed to implement Australia’s outstanding obligations in relation to anti-circumvention laws under the AUSFTA.⁴ In this regard, the Senate Legal and Constitutional Affairs Committee in its consideration of the *Copyright Amendment Bill 2006* heard representations by stakeholders concerned with the potential reach of the new anti-circumvention laws.⁵ Those same stakeholders called upon the Australian Government to preserve within Australian law the logic of the High Court in relation to Australia’s initial anti-circumvention laws in the *Stevens v Sony*⁶ decision.

The context within which this controversy has come to pass commenced with the digital era. The rapid advancement of technology and the onset of the internet in the early nineties signalled a period of rapid change within international copyright law. It is self-evident that no body of law can remain static in a rapidly changing world. Moreover, a body of law whose development and relevance is closely linked to technology cannot be expected to remain unaffected by changes in the real world environment in which it operates. It followed that with the commencement of the digital revolution and the internet, copyright law has faced a series of challenges in which policy-makers and courts have sought to re-shape the law so as to keep pace with changes in the copyright landscape. At an international level the negotiation and resolution of two treaties at the World Intellectual Property Organization; the WIPO Copyright Treaty and the WIPO Performers and Phonograms Treaty, have signalled an emergence of a broad international consensus on intellectual property rights.⁷ In relation to anti-circumvention this consensus was a loose and flexible standard that allowed the Australian Government to pass laws that were ultimately held in *Stevens v Sony* to directly link the concept of access to protection against copyright infringement.⁸

³ See further Daniel Higgs, “*Lexmark International, Inc v Static Control Components, Inc.* and *Chamberlain Group, Inc. v Skylink Technologies, Inc.*: The DMCA and Durable Goods Aftermarkets,” 18 *Berkeley Technology Law Journal* 59 (2004). See also P.Samuels, “Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised,” 14 *Berkeley Technology Law Journal* 519 (1999); J. Cohen, “WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive,” *European Intellectual Property Reporter* 236 (1999); R. Denicola, “Freedom to Copy,” 108 *Yale Law Journal* 1661 (1999), R. Denicola, “Mostly Dead? Copyright Law in the New Millennium,” 47 *Journal Copyright Society USA* 193 (2000).

⁴ See for example Brian Fitzgerald, “Copyright Visions: Copyright Jails,” On Line Opinion, Thursday 26 October 2006. Available at: <http://www.onlineopinion.com.au/view.asp?article=5068>
Last checked 28 August 2007.

⁵ See further the submissions to the Senate Legal and Constitutional Affairs Committee, Inquiry into the Copyright Amendment Bill 2006 available at:
http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sublist.htm
Last checked 28 August 2007.

⁶ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193.

⁷ For a discussion of the WIPO Internet Treaties see further Mihaly Ficsor, *The Law of Copyright and the Internet, The 1996 WIPO Treaties, their Interpretation and Implementation*, Oxford University Press 2002.

⁸ See further David Brennan, “What can it mean to ‘prevent or inhibit the infringement of copyright?’ A Critique on *Stevens v Sony*,” 17 *Australian Intellectual Property Law Journal* 81 (2006). See also

In contrast the provisions of the AUSFTA are more detailed and less flexible than the WIPO Copyright Treaty. For its part the United States had been frustrated by the slow development of multilateral agreements on trade, including intellectual property, and has now successfully negotiated a series of bilateral free trade agreements with various nations, including Australia. These agreements go beyond the flexible consensus achieved at the WIPO. In particular, in the field of anti-circumvention laws the requirements of article 17.4.7 of the AUSFTA impose requirements that go beyond the broad consensus of article 11 of the WIPO Copyright Treaty.

This article will analyse the access right that appears to emerge from the requirements of article 17.4.7. The article will first explore the concept and potential of an access right. The article will then critique the legal debates that surround the implementation of article 17.4.7 of the AUSFTA and the emergence of an access right in Australian copyright law.

II. The Concept of an Access Right

Orthodox notions of copyright invariably restrain the notion of copying to a direct replication of the physical article. This orthodoxy fitted quite well with the realities of the analogue era in which the law of copyright first developed. In order to copy a work the would-be plagiarist would first require that he physically possessed the protected work and then he would need access to a means of copying.⁹ His purpose in the act of copying would be no doubt to permanently retain for himself a copy of the protected work. The reproduction right that emerged and the jurisprudence that developed was predicated on this basic scenario. The purpose of copyright law in this context was to protect the value that was embodied in the physical work itself.

But the digital era has brought with it an environment that does not fit with the traditional assumptions of the analogue environment. Furthermore, the advent of digital technology has given rise four basic realities. The first is that the means by which copyright protection can be achieved has increased. The second is that the multitude of different marketing offerings that copyright owners can now provide has also increased immensely. To this end it is now possible for copyright owners to provide ‘celestial jukebox’ type marketing offerings where a consumer can pay for differing levels of access to the movie, music or book. If anything copyright, in this context at least, has transposed itself into a perception right, rather than a property right centred around permanent possession of an article. Permanent appropriation is at best a secondary concern in this area.

The third reality is that where there are no protections, or inferior protections, it is possible for an infringer to make perfect digital copies. The fourth reality, which emerges from the third, is that copyright owners must now contend with the dichotomy of the purchasing consumer and the pirating consumer. In this regard, the *Napster*¹⁰ and *Grokster*¹¹ cases have aptly demonstrated that in the absence of effective restraints consumers have little inhibition in copying content for free.¹²

Kimberlee Weatherall, “On Technology Locks and the Proper Scope of Digital Copyright – Sony in the High Court,” 26 *Sydney Law Review* 613 (2004).

⁹ See for example *University of New South Wales v Moorhouse* (1975) 133 CLR 1.

¹⁰ *A&M Records Inc v Napster*, 284 F.3d 1091 (9th Cir. 2002).

There clearly remains a need to protect the value created by the copyrighted work. In real terms, the value of a copyright protected work is the ability to perceive it. In this context it is the ability to see the movie, hear the song or to read the text that is essential.¹³ The only means by which the “perception right” can be physically protected is to employ access and copy controls. This involves the use of technology protection measures to restrict access to the protected work and to prevent unauthorised copying.

Recognising that in the digital era the act of perception now has primacy over the state of possession necessarily entails de-linking the concept of access from that of copying. Whereas in the traditional world of copyright, access and copying were so inextricably intertwined as to deny the former any real significant role at law, that state of affairs does not hold true in the digital era. In the digital era both access and copying are separate from each other, but are still concerned with protecting the value for which copyright law was traditionally employed.

The access right has its greatest utility in the context of a celestial jukebox-type marketing offering where content is streamed or downloaded over the internet. In this situation the access control serves as a necessary gate-keeper to prevent free-riders. Indeed, in this area the access right is concerned with giving effect to the level of authorisation that is agreed between the copyright owner and the consumer. As such, the access right is a neighbouring right to copyright, in that the right itself is not directly concerned with copyright, but depends for its existence on there being copyright in the protected work.

Where the physical article itself is purchased, such as the hard copy sale of a DVD or a CD, the access right still exists, but has less utility as a legal concept. In this regard, every DVD or CD purchased has some type of access control which is employed to inhibit the infringement of copyright. But where copyright law now recognises temporary copies as being copies for the purpose of infringement,¹⁴ the access right will likely be violated only incidentally in the act of copyright infringement.

In the United States copyright owners and legislators were quick to realise that the copyright environment had changed. The DMCA provided statutory support to the physical protection of access. The rationale that lay behind the DMCA was that for every digital lock that could be invented there would be another innovator clever enough to pick the lock.¹⁵

¹¹ *Metro-Goldwyn Mayer Inc., et al v Grokster Ltd., et al.*, 545 U.S. (2005)

¹² Dilan Thampapillai, “Balancing new technologies and copyright interests: the Grokster cases from the Ninth Circuit to the Supreme Court,” *Copyright Reporter* Vol 23 No 4 (December 2005).

¹³ The writings of Jane Ginsburg and Paul Goldstein consider the potential of an access right and the ‘celestial jukebox’ respectively. See further Jane Ginsburg, “From Having Copies to Experiencing Works: the Development of an Access Right in US Copyright Law,” in *US Intellectual Property: Law and Policy*, Hugh Hansen, editor, Sweet & Maxwell, 2000. See further P. Goldstein, *Copyright’s Highway*, Stanford Law and Politics, Stanford, revised edition 2003.

¹⁴ For example, the definition of ‘material form’ in section 10 of the *Copyright Act 1968* (Cth) was amended by the *United States Free Trade Implementation Act 2004* (Cth) sch 9, part 10, item 186.

¹⁵ See generally David Nimmer, “Appreciating Legislative History the Sweet and Sour Spots of the DMCA’s Commentary,” 23 *Cardozo Law Review* 909 (2002). *Universal City Studios v. Corley*, 273 F.3d 429, 435 (2d Cir. 2001). See also David Nimmer, *Copyright: Sacred Text, Technology, and the*

The difficulty posed by the legal protection of the access right was that by protecting access copyright law could now be invoked to protect a variety of uses that had little to do with copyright itself. For this dilemma two broad perspectives emerged both of which have thus far remained unreconciled. The first perspective, adopted by the information libertarians, was that the protection of access endangered competition, fair use and access to information.¹⁶ The second perspective, reflecting the commercial interests of copyright owners, was that the increased legal protections were necessary to protect the owner's investment in information products. Another view, that remains somewhat embryonic, is that protecting the access right provides necessary security for copyright owners to provide a number of new market offerings that leverage off copyright works as the base products.

III. The Digital Millennium Copyright Act

In considering the controversies that may surround the emergence of an access right in Australian copyright law it is useful to examine the US Digital Millennium Copyright Act of 1998 (DMCA).¹⁷ The laws of the United States were substantially in compliance with the WCT before the DMCA was introduced.¹⁸ The DMCA implemented the United States' obligations under the WCT and then went further than those obligations under Article 11 to a position that mirrored that of the original US proposal at the WIPO.¹⁹ The DMCA prohibits circumvention of technological measures designed to control access to a copyrighted works.²⁰ The DMCA also prohibits circumvention of technological measures designed to protect a copyrighted work.²¹ The DMCA further prohibits the manufacture and distribution of circumvention devices.²² The DMCA provides some minor exceptions for such uses

DMCA, Kluwer Law International (2004) at pp385-443; Diane M. Barker, Note, "Defining the Contours of the Digital Millennium Copyright Act: The Growing Body of Case Law Surrounding the DMCA," 20 Berkeley Technology Law Journal 47, (2005).

¹⁶ The term "copy-left" is invariably used by copyright owner groups as a term of derision. Accordingly, the term "information libertarian" is to be preferred in reference to those groups and commentators who argue for reforms to copyright laws that are more favourable to copyright users. See further Professor Brian Fitzgerald and Nicolas Suzor "Getting the Balance Right" - A Submission to House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into technological protection measures (TPM) exceptions (2005). Available at: http://www.law.qut.edu.au/files/QUT_GettingTheBalanceRight.pdf

Last checked 28 August 2007.

¹⁷For a discussion of these controversies see further Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in A Connected World*, Random House, New York, (2001); Siva Vaidyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, NYU Press, New York, (2001); Jessica Litman, *Digital Copyright*, Prometheus Books, New York, (2001); J. Cohen, "WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive," *European Intellectual Property Reporter* 236 (1999); R. Denicola, "Freedom to Copy," 108 *Yale Law Journal* 1661 (1999), R. Denicola, "Mostly Dead? Copyright Law in the New Millennium," 47 *Journal Copyright Society USA* 193 (2000). Adrian Thierer & Clyde Crews Jr (eds), *Copy Fights: The Future of Intellectual Property in the Information Age*, Cato Institute, Washington, 2002.

¹⁸ Dan Burk, "Anti-Circumvention Misuse," 50 *University California Los Angeles Law Review* 1095 (2003). See also Terri Cohen, "Anti-Circumvention: Has Technology's Child Turned Against its Mother?" *Vanderbilt Journal of Transnational Law*, May 2003.

¹⁹ See further P. Goldstein, *Copyright's Highway*, Stanford Law and Politics, Stanford, revised edition 2003 at pp170-176.

²⁰ 17 U.S.C. §1201(a)(2).

²¹ §1201(b)(1).

²² §1201(a)(2)(A)-(C); (b)(1)(A)-(C).

as encryption research,²³ computer security,²⁴ interoperability of computer products²⁵ and personal privacy.²⁶ Civil and criminal penalties apply for violations of the provisions of the DMCA.

Criticisms of the DMCA

A number of academic commentators have made criticisms of the shortcomings of the DMCA.²⁷ Under the DMCA a user cannot use a device to gain access or to circumvent a control in order to make fair use of materials that would otherwise be inaccessible.²⁸ In this sense whilst the DMCA stated that it was not intended to impede existing user rights it provided no clear mechanism for the realization of those rights.²⁹ The exceptions to the anti-circumvention provisions did not cover the breadth of permitted exceptions under the fair use doctrine.³⁰ Furthermore, the anti-circumvention provisions of the DMCA appeared to effectively extend copyright protections to materials that were previously outside the scope of copyright.³¹ For example, facts and useful ideas may be interspersed with copyright material, but as they cannot be accessed or copied under the DMCA, they are effectively granted de facto copyright protection.

It was feared that the DMCA also had the potential to make even very trivial uses of technology into criminal acts. As one commentator noted a violation of the anti-circumvention provisions of the DMCA could be effected simply by applying a felt tip marker to a copy-protected CD in order to play the CD on a computer.³² It was felt that a law that could be so easily be violated, and which enforced draconian penalties could not really be good for society.

The concerns that underpinned this view were illustrated in the cases of Professor Felten and the Secure Digital Music Initiative (SDMI)³³ and Dimitri Sklyarov. SDMI developed encryption technology to limit the use of certain files with a digital watermark. SDMI announced publicly a challenge for anyone who could remove the digital watermark, offering a \$10,000 reward. Professor Felten of Princeton and his team successfully circumvented most of the encryption technologies and prepared a paper on their work. As Professor Felten and his colleagues were preparing to present the paper at a conference he received a letter from the Recording Industry Association of America (RIAA) warning that public disclosure of the paper might subject him to

²³ §1201(g).

²⁴ §1201(j).

²⁵ §1201(f)

²⁶ §1201(i).

²⁷ Ibid note 13.

²⁸ Ibid note 14.

²⁹ Ibid. See also David Nimmer, "A Riff on Fair Use in the Digital Millennium Copyright Act," 148 *University of Philadelphia Law Review* 673 (2000). However, in *Chamberlain Group, Inc. v Skylink Techs Inc.*, 381 F.3d 1178 (Fed. Cir. 2004) the Second Circuit seized upon this wording in the DMCA to insist that no new property rights had been created.

³⁰ Ibid note 14.

³¹ Ibid. See also Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised," 14 *Berkeley Technology Law Journal* 519 (1999).

³² Terri Cohen, "Anti-Circumvention: Has Technology's Child Turned Against its Mother?" *Vanderbilt Journal of Transnational Law*, 961 May 2003.

³³ See Paul Goldstein, *Copyright's Highway*, Stanford Law and Politics, Stanford, revised edition 2003 at pp175-181.

action under the DMCA. Fearing that the release of the paper would undermine all their investment in the encryption technologies SDMI had sought to prevent Professor Felten's research from becoming public. In the ensuing public furore SDMI and the RIAA backtracked and guaranteed Professor Felten and his colleagues that they would not sue.

In the case of Russian software programmer, Dimitri Sklyarov, he was jailed under the provisions of the DMCA.³⁴ Sklyarov had prepared a copyright circumventing program in Russia for his employer, ElcomSoft. At the time that Sklyarov wrote the program it was perfectly legal in Russia. He was arrested in the United States whilst in Las Vegas to speak at a conference on digital security mechanisms. His arrest sparked more adverse publicity for the DMCA. Ultimately he was released from prison in exchange for testifying against his employer.

Both the cases of Professor Felten and Dimitri Sklyarov indicated the potential for the DMCA to be used to serve commercial interests and to frustrate the research and the pursuit of knowledge. These are the draconian aspects of the DMCA that have raised the ire of academic commentators and internet lobbyists. The potential for the DMCA to be used to serve existing commercial interests and to stifle knowledge is a significant public policy issue.³⁵

Three cases, each of which clearly raised issues of competition law, emerged within the United States to again cast doubt on the soundness of the DMCA. Each of these cases concerned the application of the DMCA with respect to aftermarket industries. In the case of the plaintiff Chamberlain Group attempted to assert *Chamberlain Group, Inc. v Skylink Technologies Inc.*, rights under the DMCA to prevent the defendant from supplying their product for use in conjunction with the plaintiff's garage door opener system.³⁶ The Second Circuit held that the DMCA did not create any new property rights. This decision represented a significant reading down of the DMCA and was followed in subsequent cases.³⁷

Similarly, in *Lexmark International, Inc., v Static Control Components, Inc.*,³⁸ the Sixth Circuit vacated an injunction in favour of Lexmark, remanding the case to the District Court. Lexmark, a manufacturer of printers and toner cartridges, had sought to rely on the DMCA in order to prevent non-Lexmark ink cartridges from operating on Lexmark printers. The Sixth Circuit found that the Toner Loading Program, in which Lexmark sought to assert copyright, was not capable of attracting copyright protection.³⁹ The Sixth Circuit then rejected outright Lexmark's claims under the

³⁴ Ibid note 66 at p991. See also Lawrence Lessig, Jail Time in the Digital Age, New York Times, July 30, 2001. L. Trager, "U.S. Prosecutors Claim DMCA Applies Around the Globe," Washington *Internet Daily*, Feb. 12, 2002, available at LEXIS, News Library, Warren Publications File.

³⁵ See further Pamela Samuelson, "Intellectual Property and the Digital Economy: Why the Anti-Circumvention Regulations Need to Be Revised," 14 *Berkeley Technology Law Journal* 519 (1999).

³⁶ *Chamberlain Group, Inc. v Skylink Techs Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

³⁷ See further Zohar Efroni, "A Momentary Lapse of Reason: Digital Copyright, the DMCA and a Dose of Common Sense," 28 *Columbia Journal of Law and Arts* 249 (2005). See also Daniel Higgs, "Lexmark International, Inc v Static Control Components, Inc. and Chamberlain Group, Inc. v Skylink Technologies, Inc.: The DMCA and Durable Goods Aftermarkets," 18 *Berkeley Technology Law Journal* 59 (2004).

³⁸ 387 F.3d 522 (6th Cir. 2004).

³⁹ Ibid at 537-539.

DMCA primarily on the grounds that the absence of copyright in the underlying work precluded the operation of the DMCA.⁴⁰

In the case of *Storage Technology Corporation v Custom Hardware Engineering*⁴¹ the Federal Circuit Court of Appeals held that s117 of the US Copyright Act allowed a third party to repair or maintain another company's software. The Court further held that the DMCA could not be utilised where the third party did not violate any copyrights.⁴²

The controversies that attended the DMCA created fears in the minds of Australian stakeholders after the AUSFTA had been signed. On the one hand it was quite clear that the United States was actively exporting DMCA norms under the guise of its various free trade agreements.⁴³ On the other hand it was apparent that even within the borders of the United States the rules of the DMCA had not been well received. That said, it is the view of the author that the controversies that have arisen over almost a decade of the DMCA, whilst alarming in some instances, are not substantial enough to suggest that the law itself is actually wrong or counter-productive. Furthermore, whilst there may well be some doubt as to whether the courts in Chamberlain was correct to read down the provisions of the DMCA, the courts simply did what the legislature would inevitably have had to do – they subordinated the access right to the basic principles of competition law.

IV. Australian Anti-Circumvention Law

Copyright law in Australia is covered by the *Copyright Act 1968 (Cth)*. The *Copyright Act* covers two basic types of material. The first are artistic, literary, musical and dramatics work.⁴⁴ As in the United States computer programs are regarded as literary works.⁴⁵ The second type of subject matter concerns broadcasts (sound and television, films), sound recordings, cinematograph films and published editions of works.⁴⁶ The Copyright Act is intended to cover the field of copyright law in Australia. After the AUSFTA copyright in works exists for the life of the author plus 70 years.⁴⁷ In order to qualify for copyright protection a work must be original, in material form and have some connection to Australia.⁴⁸

As a statutory regime the Copyright Act applies to an extremely diverse range of subject matter. The range of works now protected by the Copyright Act has increased due to technological advances. In Australia the main Government body involved in policy review and research on copyright law was the Copyright Law Review

⁴⁰ Ibid at 551.

⁴¹ 421 F.3d 1307 (Fed Cir. 2005).

⁴² Ibid at pp19-20.

⁴³ Mia Garlick, "Locking Up the Bridge on the Digital Divide – A Consideration of the Global Impact of the US Anti-Circumvention Measures For the Participation of Developing Countries in the Digital Economy," 20 *Santa Clara Computer and High Technology Law Journal* 941 (2004).

⁴⁴ Part III.

⁴⁵ Section 10.

⁴⁶ Part IV.

⁴⁷ Section 33.

⁴⁸ Section 10.

Committee.⁴⁹ The Copyright Law Review Committee fell in part under the aegis of the Commonwealth Attorney-General and the Attorney-General's Department.⁵⁰

Prior to the AUSFTA a number of policy reviews had taken place and amending Acts to the Copyright Act had been passed. The *Copyright (Computer Programs) Amendment Act 1999 (Cth)*, the *Copyright Amendment (Digital Agenda) Act 2000 (Cth)* and the *Copyright Amendment (Moral Rights) Act 2000 (Cth)* have all modified the *Copyright Act*. Chief amongst those has been the *Copyright Amendment (Digital Agenda) Act 2000* otherwise known as the Digital Agenda Reform Act. The significance of the Digital Agenda Reform Act was that it was the main response of the Commonwealth Government to the challenges facing Australian copyright law in the digital era.⁵¹

Whilst at the time of the Digital Agenda Act, Australia had yet to accede to the WIPO Copyright Treaty it was recognized that there was a need to bring Australia into general compliance with emerging international standards. The Digital Agenda Act was intended by Australia to implement its these standards. As such the Digital Agenda Act reflected the need to protect owners of copyright from unfair and arbitrary interferences with their legal rights. Section 3 of the Digital Agenda Act stated that the objective were to:

- ensure the efficient operation of relevant industries in the online environment by promoting the creation of copyright material and the exploitation of new online technologies by allowing financial reward for creators and investors; and
- promote certainty for industries that are investing in and providing online access to copyright material.

The Digital Agenda Act made five key changes to the *Copyright Act*. Firstly the Act provided for a technologically neutral right of communication to the public.⁵² In essence this right was included to ensure that there was a broad right to make material available to the public online. However, as it was feared that if the right were expressed in particular technological terms, that the right might quickly become outdated it was decided to use a technology-neutral term.⁵³ Secondly the Act extended exceptions to the exclusive rights of copyright owners to the digital environment.⁵⁴

Thirdly anti-circumvention provisions were introduced.⁵⁵ However the then Australian anti-circumvention provisions applied civil and criminal penalties only for making or commercially dealing in devices that are for the circumvention of technology protection measures.⁵⁶ There were no provisions for the use of anti-

⁴⁹ In 2005 the Attorney-General, Mr Philip Ruddock decided that as a number of reviews by the Copyright Law Review Committee (CLRC) had yet to receive a response it was best to place the Committee in abeyance.

⁵⁰ In part the Copyright law Branch of the Attorney-General's Department is now the only part of the Australian bureaucracy with functions that are comparable to those of the US Copyright Office. See further, Kimberlee Weatherall, "What Can We Learn From The Recent History of Australia's Recent Copyright Reforms?," *Melbourne University Law Review* (Forthcoming).

⁵¹ Phillips Fox (Law Firm), "Digital Agenda Review: Technology and Rights Issues Paper," July 2003.

⁵² Section 31(1).

⁵³ Leif Gamertsfelder, "Digitising Copyright Law – An Australian Perspective," 6 *Media & Arts Law Review* 13 (2001).

⁵⁴ Sections 103A-103C.

⁵⁵ Section 116A.

⁵⁶ *Ibid.*

circumvention devices. Fourthly the Act introduced statutory licenses for the transmission of free to air broadcasts.⁵⁷ Finally the Act limited and clarified the liability of carriers and carriage service providers for third party copyright infringements.⁵⁸

Section 116A of the Copyright Act prohibited certain dealings in circumvention devices. It was almost the rough equivalent of section 1201 of the DMCA except that it did not explicitly proscribe the use of a circumvention device.⁵⁹ The then section 116A set a three part test for liability. Firstly a work or subject matter must be protected by a technological protection device.⁶⁰ Secondly, that a person makes available a circumvention device for use by others.⁶¹ With respect to this second requirement, section 116A(1) listed six different ways in which a person may make an circumvention device available, such as by sale, exhibition, distribution, import, promotion or by making it available online.⁶² Thirdly a person must know, or ought reasonably to know, that the device would be used to circumvent, or facilitate the circumvention of a technological protection measure.⁶³ With regard to the final element, the Copyright Act placed the onus of proof upon the defendant to show that he or she did not have the requisite knowledge.

The rights created by the Digital Agenda Act could be utilized if a person applies a technological protection measure to that person's work or subject matter. A 'technological protection measure' was defined in s10 of the Copyright Act as:

A device or product, or a component incorporated into a process, that is designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject matter by either or both of the following means:

- (a) by ensuring that access to the work or other subject matter is available solely by use of an access code or process (including decryption, unscrambling or other transformation of the work or other subject matter) with the authority of the owner or licensee of the copyright;
- (b) through a copy control mechanism.⁶⁴

Under this definition a section 10(1) technological protection measure was one whereby the user could not access the content unless they used a code or a key supplied by the owner. Notably, this definition created a direct link between the employment of the technology protection measure and the protection of copyright. Under this definition the concept of access was limited solely to operation in direct conjunction with copyright protection. Uncontroversially, a copy control measure was any device employed by the owner that would prevent a person copying a digital product.⁶⁵

A 'circumvention device' was defined in section 10(1) as:

⁵⁷ Section 135AL

⁵⁸ Section 22(6).

⁵⁹ Ibid note 19. See also Scott McConnel, "The Napster case: which way would the balance of interests fall in Australia," 6 *Media & Arts Law Review* 13 (2001).

⁶⁰ Section 116A(1)(c).

⁶¹ Section 116A(1)(b).

⁶² Ibid.

⁶³ Ibid note 49.

⁶⁴ Section 10(1)

⁶⁵ Ibid.

a device (including a computer program) having only a limited commercially significant purpose or use, other than the circumvention, or facilitating the circumvention, of an effective technological protection measure.

The question of what constitutes a circumvention device is not definitively answered by section 10(1). Clearly a computer program devised to hack into a work qualifies as a circumvention device.⁶⁶ The broad scope of what constitutes a circumvention device is likely to be an attempt by Australian drafters to avoid choosing a technology-specific or narrow definition that would be likely to be outmoded by technological change. This approach to the statute is evident in the technology neutral right of broadcast to the public.

Stevens v Sony

The anti-circumvention provisions of the Digital Agenda Act were tested in *Kabushiki Kaisha Sony Computer Entertainment v Stevens*.⁶⁷ In *Sony* The defendant, Mr Stevens sold mod chips to consumers in order to allow them to play infringing copies of Sony games and authorised copies that were bought in regions other than that covered by the Australian regional coding. The TPM in question was the Boot Rom of the Sony game console which did not prevent the copying of Sony games but rather prevented non-region or infringing games from being played on the Play Station.

At first instance, Sackville J in the Australian Federal Court found in favour of Stevens ruling that the Boot Rom in the Sony console was not a TPM.⁶⁸ Accordingly, if the Boot Rom were not a TPM it followed that the mod-chips used by Stevens could not be considered circumvention devices. The decision was promptly appealed and the Full Federal Court ruled that the “mod-chipping” of Play Station consoles infringed section 116A.⁶⁹ Significantly, the Full Federal Court found that the term ‘inhibit’ in the s10 definition of TPM could encompass controls that made the playing of infringing games on the Sony console difficult. That is, in the view of the Full federal Court the Sony Boot Rom was a TPM for the purposes of s116A even where the actual copyright infringement had already occurred.

On 6 August 2004 the High Court granted Mr Stevens special leave to appeal from the decision of the Full Court of the Federal Court in. In *Stevens v Sony*⁷⁰ The High Court ruled unanimously in favour of Stevens and found that the Boot Rom did not constitute a TPM for the purposes of section 116A of the Copyright Act because it did not prevent access until after an infringement had already occurred.⁷¹ The High Court also accepted the proposition put forward by Sackville J and the Full Federal Court that temporary reproduction in the RAM was not copying.⁷²

⁶⁶ L. Gamertsfelder, “Digitising Copyright Law – An Australian Perspective,” 6 *Media & Arts Law Review* 2001.

⁶⁷ [2003]FCAFC 157. Criminal prosecution under the Digital Agenda Act has also occurred. See also *CDPP v Ng, Tran and Lee*.

⁶⁸ *Kabushiki Kaisha Sony Computer Entertainment v Stevens* [2002] FCA 906.

⁶⁹ *Ibid*.

⁷⁰ *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, (2005) 224 CLR 193. This decision is available electronically at: <http://www.austlii.edu.au/au/case/cth/HCA/2005/58.html>.

⁷¹ *Ibid* at 213.

⁷² *Ibid* at 211.

The High Court rejected the Full Court of the Federal Court's broad interpretation of the term 'inhibit'. Chief Justice Gleeson, Gummow, Hayne and Heydon JJ stated:

... in construing a definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it. A defect in the construction rejected by Sackville J is that its effect is to extend the copyright monopoly by including within the definition not only technological protection measures which stop the infringement of copyright, but also devices which prevent the carrying out of conduct which does not infringe copyright and is not otherwise unlawful. One example of that conduct is playing in Australia a program lawfully acquired in the United States. It was common ground in the courts below and in argument in this Court that this act would not of itself have been an infringement.⁷³

Kirby J stated:

Had it been the purpose of the Parliament, by the enactment of the Digital Agenda Act, to create a right to control access generally, it had the opportunity to say so. It even had overseas precedents upon which it could draw. The Australian Government was pressed to provide protection for all devices that "control access". This is evident in the definition of TPM suggested to the Australian Parliamentary Committee by the International Intellectual Property Alliance. Such a definition would effectively have mirrored the provision adopted by the Congress of the United States in the *Digital Millennium Copyright Act of 1998*. By the time the Australian definition of TPM was enacted, the United States Act had been in force for two years. Nevertheless, the propounded definition of wider ambit was not accepted. Instead, in Australia, the Parliament chose to focus its definition upon protection from infringement of copyright as such.

....

Avoiding over-wide operation: There is an additional reason for preferring the more confined interpretation of the definition of TPM in the Copyright Act. This is because the wider view urged by Sony would have the result of affording Sony, and other rights holders in its position, a de facto control over access to copyrighted works or materials that would permit the achievement of economic ends additional to, but different from, those ordinarily protected by copyright law. If the present case is taken as an illustration, Sony's interpretation would permit the effective enforcement, through a technological measure, of the division of global markets designated by Sony. It would have the effect of imposing, at least potentially, differential price structures in those separate markets. In short, it would give Sony broader powers over pricing of its products in its self-designated markets than the Copyright Act in Australia would ordinarily allow.⁷⁴

Justice Kirby noted also that there may be constitutional problems if the Australian legislature would be to stray too far from the ambit of the copyright power in the Australian Constitution in enacting anti-circumvention laws. Justice Kirby stated:

The provisions of the Australian Constitution affording the power to make laws with respect to copyright operate in a constitutional and legal setting that normally upholds the rights of the individual to deal with his or her property as that individual thinks fit. In that setting, absent the provision of just terms, the individual is specifically entitled not to have such rights infringed by federal legislation in a way that amounts to an impermissible inhibition upon those rights constituting an acquisition. This is not the case in which to explore the limits that exist in the powers of the Australian Parliament, by legislation purporting to deal with the subject matter of copyright, to encumber the enjoyment of lawfully acquired chattel property in the supposed furtherance of the rights of copyright owners. However, limits there are.⁷⁵

Whilst the tone of Kirby J's comments on the constitutionalism of anti-circumvention laws is ominous it is highly likely that the Australian Parliament can rely on the

⁷³ Ibid at 211

⁷⁴ Ibid at 254

⁷⁵ Ibid at 256.

external affairs power in enacting article 17.4.7 if its measures prove to be outside the ambit of the copyright power.

However, Kirby J, and the other judges of the High Court, clearly recognised the limitations imposed on consumer rights by regional coding.⁷⁶ If *Stevens v Sony* were to remain good law the decision would likely to have an effect on DVD technology. With regards to lawfully purchased game CDs and DVDs, the use of regional coding represents a curtailment of property rights in that it result in a situation where Australian consumers would have to pay twice to access content that they had already legally purchased or risk being excluded from content. Intuitively this is an unfair result for consumers and displays little evident incentives for creativity other than rent-seeking behaviour with regards to distribution. To this extent the Australian Competition and Consumer Commission (ACCC) expressed their disapproval of the Full Court of the Federal Court's decision, stating that, "consumers will suffer a loss of choice and pay more for their games."⁷⁷

Some caution should be expressed in relation to the prospect of the decision in *Stevens* remaining good law after the implementation of Australia's obligations under article 17.4.7 of the AUSFTA. In this regard, the *Australia-United States Free Trade Agreement Implementation Act 2004 (Cth)* (hereinafter the AUSFTAI Act) amended the definition of material form to effectively provide that temporary reproduction of a work, from an infringing copy, can violate copyright. Accordingly, temporary copying in the RAM of an infringing game CD would likely give rise to liability under s43B of the Copyright Act. Furthermore, article 17.4.7 implementation would necessitate a shift away from the direct link between TPM protection and copyright protection as envisaged by the High Court.

V. The Australia-United States Free Trade Agreement

The story of the AUSFTA is simple. The United States, frustrated by the slow development of international trade law rules at a multilateral level has sought to further its international trade agenda by engaging in a number of bilateral preferential trade agreements (somewhat misleadingly referred to as free trade agreements).⁷⁸ The United States had successfully prosecuted such agreements with Chile, Singapore before turning its attention to Australia. In each of the agreements negotiated by the US intellectual property had been a significant component of the bilateral free trade agreement.

⁷⁶ Indeed it is an open question if fundamental property rights are embedded in the Australian Constitution as to whether the external affairs power can be utilized to limit or curtail those rights. Similarly, if the copyright power imposes express restrictions it is also unclear as to whether those restrictions can be avoided by reliance on another head of power. To this end, whilst anti-circumvention laws might not fall entirely within the scope of copyright it is unclear as to whether the two are fundamentally inconsistent.

⁷⁷ "Consumers Lose in Playstation Decision," Media release of the ACCC 31 July 2003. <http://www.accc.gov.au/media/mediar.htm>

⁷⁸ See further Peter Drahos, "Securing the Future of Intellectual property: Intellectual Property Owners and their Nodally Coordinated Enforcement Pyramid," 36 *Case Western Journal of International Law* 53 (2004).

With regard to the AUSFTA, the political will for the free trade agreement overcame sectional interests within Australia during the negotiations.⁷⁹ Indeed, chapter 17 was pitched to the Australian community as a loss on intellectual property, whereby Australia signed up to a more restrictive regime, in exchange for trade concessions.⁸⁰

In the aftermath of the AUSFTA in May 2004 three things occurred. Firstly, in response to concerns raised by the public and Parliament in both the Joint Standing Committee on Treaties and the Senate Select Committee, the Howard Government decided to hold an inquiry into fair use. Secondly, the Parliament passed the AUSFTAI Act, the first round of legislation implementing the Chapter 17 obligations.⁸¹ Amongst other things this legislation increased the term of copyright protection from life plus 50 years to life plus seventy years and changed the definition of material form. Thirdly, the Government has begun to prepare to pass the second round of legislation implementing Chapter 17. This round would include the obligations set out in article 17.4.7, the outcome, if any, of the fair use inquiry and a number of minor amendments pursuant to AUSFTA implementation.

In relation to the implementation of article 17.4.7(e) the Parliament convened a House of Representative Legal and Constitutional Affairs Committee (LACA) to look at any exceptions that could be made under the TPMs scheme in article 17.4.7.⁸² The LACA Committee comprised several high profile Australian politicians, held three main hearings and attracted numerous submissions from stakeholders. The Committee published the findings of its review at the end of February 2006.⁸³

Interestingly, a Government Legal Advisor was seconded to the LACA to assist the Committee members with their inquiries. It is quite notable that the Committee recommended that there be a direct link between the use of an access control and copyright protection.⁸⁴ This view undoubtedly reflected the sentiments expressed by the High Court in *Stevens v Sony*.⁸⁵ The findings of the LACA Committee in early 2006 mirrored the finding of the Senate Committee on Legal and Constitutional Affairs later that year in regard to the implementation of article 17.4.7.

VI. Article 17.4.7

Under the AUSFTA Australia was required to implement article 17.4.7 by 1 January 2007. Article 17.4.7 provides:

⁷⁹ Matthew Rimmer, "Robbery Under Arms: Copyright Law and the Australia-United States Free Trade Agreement," *First Monday*, March 2006 Vol 11(3). Available at:

http://www.firstmonday.org/issues/issue11_3/rimmer/index.html

Last checked 28 August 2007.

⁸⁰ Fergus Shiel, "Libraries Caught In Copyright Changes," *The Age*, 11 February 2004, at

<http://www.theage.com.au/articles/2004/02/10/1076388365432.html>

Last checked 28 August 2007.

⁸¹ *Australia-United States Free Trade Agreement Implementation Act 2004* (Cth).

⁸² See further House of Representatives Standing Committee on Legal and Constitutional Affairs, Inquiry into Technological Protection Measures (TPMs) Exceptions Report available at:

<http://www.aph.gov.au/house/committee/laca/protection/report.htm>

Last checked 28 August 2007.

⁸³ *Ibid.*

⁸⁴ *Ibid.* at 2.61. It could be speculated that the initial government view was that the AUSFTA could allow a direct link between access controls and copyright infringement.

⁸⁵ In fact the Committee commented on the *Stevens v Sony* decision in Chapter 2 of its Report.

7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

(i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, or phonogram, or other subject matter; or

(ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public, or provides services that:

(A) are promoted, advertised, or marketed for the purpose of circumvention of any effective technological measure;

(B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or

(C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

shall be liable and subject to the remedies specified in Article 17.11.13. Each Party shall provide for criminal procedures and penalties to be applied where any person is found to have engaged wilfully and for the purposes of commercial advantage or financial gain in any of the above activities. Each Party may provide that such criminal procedures and penalties do not apply to a non-profit library, archive, educational institution, or public non-commercial broadcasting entity.

(b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.

(c) In implementing sub-paragraph (a), neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing sub-paragraph (a).

(d) Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.

(e) Each Party shall confine exceptions to any measures implementing sub-paragraph (a) to the following activities, which shall be applied to relevant measures in accordance with sub-paragraph (f):

(i) non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;

(ii) non-infringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorisation for such activities, to the extent necessary for the sole purpose of identifying and analysing flaws and vulnerabilities of technologies for scrambling and descrambling of information;

(iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a technology, product, service, or device that itself is not prohibited under the measures implementing sub-paragraph (a)(ii);

(iv) non-infringing good faith activities that are authorised by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;

(v) non-infringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;

(vi) lawfully authorised activities carried out by government employees, agents, or contractors for law enforcement, intelligence, essential security, or similar governmental purposes;

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

(viii) non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.

(f) The exceptions to any measures implementing sub-paragraph (a) for the activities set forth in sub-paragraph (e) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:

(i) any measures implementing sub-paragraph (a)(i) may be subject to exceptions with respect to each activity set forth in sub-paragraph (e);

(ii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions with respect to activities set forth in sub-paragraph (e)(i), (ii), (iii), (iv), and (vi); and

(iii) any measures implementing sub-paragraph (a)(ii), as they apply to effective technological measures that protect any copyright, may be subject to exceptions with respect to the activities set forth in sub-paragraph (e)(i) and (vi).

Put simply the AUSFTA requires that Australia imposes civil and criminal liability in relation to (i) acts of circumvention of TPMs which prevent access to copyright protected material, (ii) dealings with devices and services that may be used to circumvent TPMs by restricting access to copyright protected material and (iii) dealings with devices and services that circumvent TPMs which protect copyright by means other than by restricting access to the copyright protected material (eg copy controls). This represented a departure from Australia's then TPMs scheme. Firstly, prior to the *Copyright Amendment Act 2006* (Cth) Australia did not prohibit the act of circumvention. Secondly, the definition of technological protection measure in the Copyright Act confined the operation of TPMs under the section 116A scheme to the direct protection of copyright. Article 17.4.7(e) provides a number of specific exceptions and article 17.4.7(e)(viii) allows both nations to create specific exception after a legislative or administrative hearing. The LACA Committee in its Report

formed the view that it did not constitute such a hearing, as such hearings could only be held after the commencement of the article 17.4.7 scheme.⁸⁶

VII. The Exposure Draft Legislation

The decision in *Steven v Sony* and the unrest of stakeholders most likely unnerved the Australian Government. The exposure draft legislation released in September 2006 appeared at first glance to be an attempt to appease those stakeholders that would be displeased by the lukewarm results of the Fair Use Inquiry. It is likely also that the statements of Kirby J in *Stevens* would have given the legislators cause to think of the possible unconstitutionality of Australia's implementation of article 17.4.7 of the AUSFTA.

The concerns placed the Government in an unenviable position. On the one hand the fundamental norms of public international law required that Australia had to make a good faith attempt to comply with its treaty obligations.⁸⁷ On the other hand constitutional and stakeholder difficulties loomed large upon the horizon. Caught in this predicament it would appear that the Australian Government attempted to achieve an implementation that did not go beyond that which was strictly necessary. The views expressed by Mr Mark Jennings, Senior Counsel, Office of International Law of the Attorney-General's Department in his testimony to the House of Representatives Legal and Constitutional Affairs Committee in 2005⁸⁸ would tend to support this analysis.

In testimony before the LACA Committee, Mr Jennings stated:

There are two elements in this text from the chapeau which are joined by the conjunctive 'and'. The first is that an ETM is to be used in connection with the exercise of a copyright holder's rights. The second is that an ETM is to restrict unauthorised acts in respect of the copyright holder's works, performances or phonograms. ... The broader context of the chapeau may support a reading that restricts rights to those comprising copyright. Article 17.4 deals only with rights comprising copyright, as I have mentioned. In addition, the definition of an ETM refers to technology that protects any copyright, not that protects any right.

In relation to the second element ... unauthorised acts may be taken to mean acts in relation to copyright which are not authorised by the copyright holder or by law.⁸⁹

The view of Mr Jennings was important in that it influenced the LACA Committee to recommend that the definition of technology protection measures (TPMs) should require a direct link between access controls and copyright protection.⁹⁰ It would appear that this view (the narrow view) also influenced the drafting of the exposure draft legislation. In his testimony Mr Jennings argued that the broader context of article 17.4 supported a reading that would restrict the rights discussed in the chapeau

⁸⁶ Legal and Constitutional Affairs Committee Review of Technological Protection Measures Exceptions Report at paragraph

⁸⁷ The obligation of *pacta sunt servanda* – that treaty obligations are to be performed – is a norm of customary international law.

⁸⁸ Mr Mark Jennings, *Transcript of Evidence*, 5 December 2005, pp25-26 House of Representatives Legal and Constitutional Affairs Committee Review of Technological Protection Measures Exceptions.

⁸⁹ *Ibid.*

⁹⁰ Legal and Constitutional Affairs Committee Review of Technological Protection Measures Exceptions Report at paragraph 2.55.

only to copyright rights. In support of this proposition it was suggested that article 17.4 refers only to copyright.⁹¹ It was also suggested that the definition of an effective technological measure (ETM) refers to technology that protects any copyright, as opposed to any right.⁹²

The Exposure Draft and Non-Compliance with the AUSFTA

It is worth considering the reasons whether the exposure draft legislation could comply with the terms of the AUSFTA as it is the preferred legislation of the information libertarians amongst Australia's copyright stakeholders. An analysis of the text of article 17.4.7 suggests that the narrow view was unlikely to succeed. The text of the chapeau of article 17.4.7 provides:

7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use *in connection* with the exercise of their rights *and* that restrict unauthorised acts in respect of their works, performances, and phonograms, each Party shall provide that any person who

The conjunctive “and” joins together two concepts. The first is the exercise of intellectual property rights and the second is an authorisation right. It would appear to be the view of the Attorney-General's Department that the authorisation right was to be limited only to authorising acts that relate to copyright. That is, if the act does not involve something that includes a right comprised within the copyright, then it does not fall within the parameters of the authorisation right contained within article 17.4.7.

However, whilst the conjunctive joins together the two concepts discussed above it does not equate them with each other. The authorisation right is not necessarily limited in its scope by being joined together with the term “rights”. As will be discussed below, “authorisation” is an essential component of the operation of access controls. The chapeau should also be read together with the definition of effective technological protection measure in article 17.4.7(b).

Effective Technological Protection Measures

The definition of effective technological protection measure in the AUSFTA is:

(b) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright.

The AUSFTA uses the term ETM instead of TPM to mirror the language in the WIPO Copyright Treaty (WCT). There are four elements to the AUSFTA definition in that an ETM is (i) a technology, device or component that (ii) in the normal course of its operation, (iii) controls access to a protected work, performance, phonogram or other protected subject matter, (iv) or protects any copyright. The fact that the fourth element “protects any copyright” is prefaced by the disjunctive “or” indicates a clear

⁹¹ Ibid note 84.

⁹² Ibid.

delineation between the access right referred to in the third element and the copyright protection referred to in the fourth element. The interpretation by Senior Counsel Mark Jennings ignored this delineation between the two elements.

The first element of the definition of an ETM also raises the possibility that if an ETM in the normal course of its operation controls access or protects any copyright, it might still be an ETM even if it does something else outside of the normal course of its operation.

Access Controls and the Exposure Draft Legislation

The definition of an access control technological protection measure (ACTPM) in the draft legislation was:

access control technological protection measure means a device, product or component (including a computer program) that:

- (a) is used by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter; and
- (b) is designed, in the normal course of its operation, to prevent or inhibit the doing of an act:
 - (i) that is comprised in the copyright; and
 - (ii) that would infringe the copyright;

by preventing those who do not have the permission of the owner or exclusive licensee from gaining access to the work or other subject-matter.

Note: To avoid doubt, a device, product or component (including a computer program) that is solely designed to control market segmentation is not an access control technological protection measure.

It is notable from this definition that there was a direct link between the access control and copyright protection. Given the discussion above, it is clear that the AUSFTA required that the TPM control access to a copyrighted work in the normal course of its operation. In contrast the exposure draft legislation required that the access control protect copyright in the normal course of its operation by preventing access. This was a narrow construction of the article 17.4.7 obligation and, as will be discussed below, it would appear to deny the copyright owner the full scope of the access right contemplated by the AUSFTA. The degree of inconsistency between the ACTPM and the AUSFTA ETM will likely be highlighted if and when the new provisions are brought before a court. This was a particularly crucial issue because if a court further reads down the ACTPM once it had been brought into the Copyright Act, particularly given the constitutional issues raised by Kirby J in *Stevens v Sony*,⁹³ then the issue of AUSFTA compliance may have been further enlivened.

AUSFTA Compliance

As discussed above, Mr Jennings argued that the broader context of article 17.4 supported a reading that would restrict the rights discussed in the chapeau only to copyright rights. In support of this proposition he suggested that article 17.4 refers

⁹³ *Stevens v Kabushiki Kaisha Sony Computer Entertainment*, [2005] HCA 58, 6 October 2005. This decision is available electronically at: < <http://www.austlii.edu.au/au/case/cth/HCA/2005/58.html>>.

only to copyright and that the definition of an ETM refers to technology that protects any copyright, as opposed to any right.

As a necessary first step we should consider what may be gained by demonstrating that article 17.4 refers to rights other than copyright. The answer to this question can be determined in the negative. If article 17.4 is concerned only with copyright then the authorisation right can be confined to operation only in relation to copyright. However, if article 17.4 does refer to rights other than copyright it opens up the possibility that the authorisation right contemplated in relation to access in the chapeau is broader in its scope than just ordinary copyright rights. It would then be pertinent to consider what this discovery would prove. It would prove that there is scope for constructing the authorisation right as applying to acts other than those involving only rights comprised in copyright. However, it would also undermine the basis for the narrow construction of the authorisation right thereby questioning whether the draft legislation is fully AUSFTA compliant. If there is no sound basis at law for the narrow view, then regardless of any compelling policy arguments in its favour, the broader construction, for which there are also some very compelling policy arguments, should be preferred.

In determining the issue of compliance there are two steps that must be undertaken: the first is to analyse the definition of effective technological measure and the second is to either find reference in article 17.4 to rights other than those normally considered copyright rights or find textual evidence that 17.4 is to be considered as separate from copyright.

As discussed above, there is a clear delineation in the definition of ETM between a device that controls access to a protected work or subject matter and a device that protects any copyright. This would appear to set a very simple test for determining whether a TPM can be regarded as an ETM for the purposes of the AUSFTA. That is, to be an ETM under the AUSFTA the device or technology need only control access to the work or subject matter. There is no further requirement that the device or technology protect copyright by preventing access. The significance of this further requirement, which is imposed by the draft legislation, is that it narrows the range of devices or technologies that might be regarded as an ACTPM under the Copyright Act.

Indeed, the ACTPM in the exposure draft legislation is narrower in its scope than the ETM in the AUSFTA. On a prima facie level this is non-compliance with the terms of article 17.4.7 of the AUSFTA. It follows that if the definition of an ACTPM is unduly narrow then the authorisation right itself, which corresponds to the breadth of devices that may be regarded as an ACTPM, is also narrower than required by the AUSFTA. Whether this is permissible depends upon the legal foundation of the narrow view which has informed the draft legislation.

The foregoing analysis of the AUSFTA definition of an ETM does not appear to support the basis for the narrow view. From my analysis of the definition of an ETM it is clear that there is a separation between the access right and copyright protection. Accordingly, it is difficult to see how Mr Jennings' contention that the definition of an ETM refers to technology that protects any copyright, as opposed to any right can be supported.

This still leaves for consideration the contention that article 17.4 refers only to copyright. There is textual evidence that the provisions of article 17.4 are to be considered as separate from copyright. Indeed, even if 17.4 were to be read in isolation, article 17.4.7(d) clearly separates civil and criminal liability under article 17.4.7 from liability for infringement under each Party's copyright law. That is, liability under 17.4.7 is a separate issue from liability under copyright law. This is a very clear indication that liability under article 17.4.7 need not be directly related to copyright infringement but can attach to a violation of the access right.

It is possible that there is an argument that article 17.4.7(d) should be construed quite strictly so as to mean only that liability under 17.4.7 does not depend upon actual copyright infringement. But at its strongest point this argument does not defeat my overall view of 17.4.7 nor does it advance the narrow view. If anything, it weakens one of the fundamental assumptions of the narrow view – that there be a direct connection between copyright protection and the employment of the access control. For, it does beg the question of how a legal measure can be directly connected to copyright protection if liability for its violation does not depend upon copyright infringement. The connection between the legal measure (the access control right) can only be indirectly connected to copyright protection. Ultimately, the strict view of article 17.4.7(d) does not weaken the neighbouring rights argument and there is nothing to compel the strict view when the terms of 17.4.7(d) are quite plain. That is, a violation of a measure implementing 17.4.7 is a separate civil and criminal offence and independent of any infringement that might occur under the treaty party's copyright law.

There is also some evidence, though admittedly less compelling, that article 17.4 refers to rights other than copyright. In this context, article 17.4.10 refers articles 17.4, 17.5 and 17.6, of which 17.6 is concerned with performer's rights. This is significant because performer's rights are not copyright, they are a neighbouring and related right. Similarly, if 17.4.7 is read within the context of Chapter 17 then this would necessitate consideration of the Berne Convention and the WIPO Performances and Phonograms Treaty (WPPT).

The Berne Convention includes article 6bis which is concerned with moral rights. Like performer's rights, moral rights are not copyright, but rather they are a related and neighbouring right to copyright. This would give impetus to the suggestion that the access right in article 17.4.7 is not one which stems directly from copyright but is rather a neighbouring and related right. That is, as with moral rights, and to an extent performer's rights, there is a pre-condition that before the right can exist there must be copyright in some material, but the exercise of the right is not directly tied to copyright infringement.

On the basis of the reasoning above I am of the view that the narrow view, which presumably has informed the draft legislation, is flawed. It is clear that the ACTPM in the exposure draft legislation was narrower than the ETM in the AUSFTA. It follows then that if the ACTPM in the former is narrower than contemplated by the AUSFTA that the authorisation right in the latter is also not given its proper effect. In the view of the author the proper construction of article 17.4.7 is that the access right operates as a neighbouring and related right to copyright. That is, the proper

implementation of 17.4.7 would involve giving effect to an access right that depends upon there being copyright in the underlying material but whose operation is almost independent and different in its nature to copyright. Put simply, an access right would be a right to prevent access to copyright protected material, but would not depend upon the user infringing copyright nor upon the access control itself being designed to prevent or inhibit copyright infringement in the normal course of its operation.

VIII. The Copyright Amendment Act 2006

The reaction to the exposure draft legislation by information libertarians and other user-oriented stakeholders was overwhelmingly positive. However, their joy was short-lived as the compliance difficulties in the exposure draft legislation were commented upon by a number of stakeholders. Finally, the Australian Government modified its position and released the then Copyright Amendment Bill 2006. The Bill was referred to a Senate Committee for review in late October 2006 before being passed mostly unamended by the Parliament. That the Bill was passed without significant amendment is reflective more of the Howard Government's control of both houses of Parliament than of any widespread satisfaction with the new laws.

The Copyright Amendment Act 2006 made changes to key parts of Australia's anti-circumvention laws. The most pivotal change was the new definition of access technology protection measure. Section 10 of the Copyright Act now defines access technology protection measure as follows:

"access control technological protection measure" means a [device](#), product, technology or component (including a [computer program](#)) that:

- (a) is used in [Australia](#) or a [qualifying country](#):
 - (i) by, with the permission of, or on behalf of, the owner or the exclusive licensee of the [copyright](#) in a [work](#) or other subject-matter;
 - (ii) in connection with the exercise of the [copyright](#); and

- (b) in the normal course of its operation, [controls access](#) to the [work](#) or other subject-matter;

but does not include such a [device](#), product, technology or component to the extent that it:

- (c) if the [work](#) or other subject-matter is a [cinematograph film](#) or [computer program](#) (including a computer game)--controls geographic market segmentation by preventing the playback in [Australia](#) of a non-infringing [copy](#) of the [work](#) or other subject-matter acquired outside [Australia](#); or
- (d) if the [work](#) is a [computer program](#) that is embodied in a machine or [device](#)--restricts the use of goods (other than the [work](#)) or services in relation to the machine or [device](#).

For the purposes of this definition, [computer program](#) has the same meaning as in section 47AB.

A simple reading of the terms of the new legislation would indicate that a digital lock can be construed as being an ACTPM if it is used together with a work in which copyright subsists and if it controls access to that work. This would give rise to the potential for the Copyright Act to support new and innovative market offerings on the part of copyright owners. Indeed, as the Attorney-General, Philip Ruddock MP stated in the first reading speech of the Copyright Amendment Bill 2006:

The bill provides for more effective TPM protection to encourage distribution of copyright material online and increase the availability of music, film and games in digital form.

This, in turn, will foster the development of new business models and provide enhanced choice for consumers.⁹⁴

However, there is room for some confusion with regards to the interpretation of the new access right in the Copyright Act. This owes itself to the equivocal statements of the Government in the Explanatory Memorandum to the Copyright Amendment Act 2006. At paragraph 12.1 the Government stated:

Where access to a work or other subject-matter is controlled in more than one way, each form of access control would be a separate access control TPM, provided that each type of control could be circumvented independently. Where an access control has different functions but each function cannot be circumvented independently, that access control would be considered to be only one access control TPM.

This statement within the EM would indicate a broad reading of the term access technological protection measure. However, at paragraphs 12.6 and 12.7 the Government retreated from this position in regards to the crucial phrase “in connection with the exercise of copyright.”

At paragraphs 12.6 and 12.7 of the Explanatory Memorandum the Government stated:

12.6 Sub-paragraph (a)(ii) of the definition requires a measure to have been applied in circumstances where the copyright owner or exclusive licensee is exercising an exclusive rights. The term ‘connection’ is used to reflect the need for this link. Eg the link would be established when a measure is applied to a work by a copyright owner where they are communicating the work to the public or where a copyright owner is making copies of other subject-matter.

12.7 The fact that a measure is applied to a work or other subject-matter in which copyright subsists would not be sufficient, in and of itself, to establish the link. The use of the measure must be connected to the exercise of an exclusive right by the owner of the copyright in that work or other subject-matter.

It is the last sentence of paragraph 12.7 that is liable to cause the most confusion to those who are called upon to interpret the definition of an access control. In this regard the phrase “in connection with the exercise of copyright” is vital because it determine what controls fall within the definition, and, when they can fall within the definition. If paragraph 12.7 were to be read too literally it might give rise to the notion that the exercise of the copyright must be simultaneous with the use of the copyright. The difficulty with this approach is that it may prove too burdensome for copyright owners. The owner may only be regarded as exercising their copyright rights when reproducing their own works. Temporally, an access right would have no utility in this situation. However, if the exercise of rights were any act of copying, by any person, then in conjunction with the amendments to the term material form, the access right would have a greater application.

The equivocality in the language of the Explanatory Memorandum suggests that the Australian Government was caught between the demands of vociferous stakeholders⁹⁵

⁹⁴The Hon Philip Ruddock MP, Copyright Amendment Bill 2006 First Reading Speech, 19 October 2006. Available at: www.aph.gov.au
Last checked 28 August 2007.

and the requirements of treaty compliance. As such the language of the Explanatory Memorandum evinces a counter-productive conservatism that is not at all useful to the goals of statutory interpretation. On the one hand the Australian Government seems to embrace the potential of the access right but on the other hand they also shy away from recognising the access right as a neighbouring right to copyright.

How the definition of access technological protection measures is interpreted will now depend greatly upon the courts. In this regard, Australia is now back in the same position that it was in prior to the *Stevens v Sony* litigation. The added burden that Australia must now bear is that if an Australian court takes an unduly narrow view of the construction of the term access technological protection measure this will lead to a state of non-compliance with the treaty obligations of the AUSFTA.

The Impact of the Amendments

It is too early to assess the practical impact of the new laws with respect to Australia's copyright industries and consumers. However, both the hearings and the report of the Senate Standing Committee Upon Legal and Constitutional affairs provided a useful barometer of stakeholder discontent with the provisions of the Copyright Amendment Bill 2006.⁹⁶ The Bill itself covered a number of areas of copyright law, more than just technology protection measures, and there was widespread dissatisfaction with a number of the proposed amendments.⁹⁷ Schedule 12 of the Bill dealt with anti-circumvention and was considered in detail by the Senate Standing Committee and a number of stakeholders.

Stakeholders Professor Brian Fitzgerald and Mr Dale Clapperton expressed the concern that the new laws could, "arguably be interpreted to allow almost any restriction imposed by the copyright owner to be protected by anti-circumvention law."⁹⁸ Other stakeholders also expressed profound dissatisfaction with the terms of the Bill.⁹⁹ It was further contended that exposure draft legislation was the correct interpretation of article 17.4.7 of the AUSFTA.

Whilst there is certainly some merit to the view that the new laws do potentially provide unchecked powers to copyright owners it should be noted that none of the stakeholders critical of the then Copyright Amendment Bill 2006 were able to

⁹⁵ See further Official Committee Hansard, Senate Legal and Constitutional Affairs Committee, Inquiry into the Copyright Amendment Bill 2006, Tuesday 7 November 2006, Canberra. Available at: <http://www.aph.gov.au/hansard/senate/commtee/S9857.pdf>

Last checked 28 August 2007.

⁹⁶ Ibid note 65. The Report of the Senate Legal and Constitutional Affairs Committee, Inquiry into the Copyright Amendment Bill 2006 was released on 13 November 2006. The full text of the Report is available at: http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/report/index.htm Last checked 28 August 2007.

⁹⁷ However, for our purposes we are concerned only with Schedule 12 of the Copyright Amendment Bill 2006 as it relates to anti-circumvention.

⁹⁸ Ibid note 91.

⁹⁹ See for example the following submissions to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Copyright Amendment Bill 2006, Open Source Industry Australia, *Submission 21*, Professor Graham Greenleaf et al, *Submission 37* and Apple Computers, *Submission 63*. Available at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/copyright06/submissions/sublist.htm Last checked 28 August 2007.

advance convincing reasons at law as to why the exposure draft legislation was a correct implementation of article 17.4.7.¹⁰⁰ The interpretation of the exposure draft legislation advanced by commentators such as Professor Fitzgerald and Mr Dale Clapperton required that there be a link between copyright infringement and the circumvention of the access control.¹⁰¹ However, the view expressed by the Attorney-General's Department, with which the author concurs, is that, "those interpretations would have resulted in Australia not complying with the free trade agreement."¹⁰²

In its report the Senate Standing Committee did recommend that "the definition of 'technological protection measure' be harmonized with the language used in the definition of 'access control technological measure.' This would have involved effectively requiring a direct link between copyright infringement and the use of the access technology protection measure. In light of both the analysis in section VII of this article, and the view expressed to the Senate Standing Committee by Ms Haipola of the Attorney-General's Department during the Committee Hearings on 7 November 2006, it would appear that the recommendation of the Committee would not comply with the AUSFTA."¹⁰³

The failure to engage with the implementation debate, and the marked preference for the policy debate, reduced the effectiveness of many of the pro-user commentators which in turn disadvantaged the Senate Standing Committee on Legal and Constitutional Affairs. In this regard, it is clear that once the terms of the AUSFTA were settled a substantial part of the real policy debate on copyright law had been concluded, albeit, behind closed doors. The key debate relevant to both the exposure draft legislation and the then Copyright Amendment Bill 2006 was that of implementation. This debate required a consideration of international law and treaty interpretation and could not be resolved simply by recourse to issues of domestic policy.

At this stage it is difficult to conceive a scenario in which the terms of the AUSFTA would come to be re-negotiated. As such, if Schedule 12 of the Copyright Amendment Act 2006 does indeed represent the proper implementation of article 17.4.7 then there is no room at law for the relevant provisions of the Copyright Act to be amended. The only possible option is that the Australian Government could rely on the exceptions contained in article 17.4.7 itself to impose some constraints on the operation of Australia's new anti-circumvention laws. Whilst this is a possibility it would appear that the Government is reluctant to explore this option.

IX. Forward with the Access Right

¹⁰⁰ Ibid. This was a difficulty that attached to many of the submissions to both the House of Representatives Standing Committee on Legal and Constitutional Affairs and the Senate Committee on Legal and Constitutional Affairs. It can only be speculated that as neither committee comprised an actual expert in copyright law that this neglect on the part of the stakeholders hindered the work of the committees.

¹⁰¹ See further the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Copyright Amendment Bill 2006, Professor Brian Fitzgerald and Mr. Dale Clapperton *Submission 21*.

¹⁰² Committee Hansard, 7 November 2006, p47.

¹⁰³ See Recommendation 12 of further the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Copyright Amendment Bill 2006 Report at paragraphs 3.140 and 3.155. It would appear also that in paragraph 3.140 of its Report the Senate Standing Committee did not fully acknowledge the difference between an access control and a copy control.

It cannot be denied that the pro-user commentators and stakeholders have identified significant difficulties that will likely be associated with the existence of an untrammelled access right. Reductions in consumer liberty, potentially anti-competitive practices and the decreased utility of copyright exceptions are not minor concerns. It follows that as a matter of sound public policy there is a need for a thorough and public analysis of potential limitations and exceptions to the anti-circumvention laws. However, the caveat must be added that for such a review to have any value both the issues of implementation of article 17.4.7 and policy in relation to anti-circumvention must be treated as separate matters. It is regrettable that much of the debate after the AUSFTA was signed has blurred and confused the two issues.

That said, an access right, subject to proper limitations, has much to offer copyright in the digital era. In the view of the author the proper role of the access right under the AUSFTA, and arguably under the DMCA, is to operate as a neighbouring and related right to copyright. That is, it would exist within copyright law in the same way that performer's rights and moral rights currently exist.¹⁰⁴ To this end, the existence of an access right would be dependant upon copyright subsisting in the work or other subject matter for which protection is sought but the operation of the access right would be almost independent of copyright.¹⁰⁵

That there may have been no coherent view as to how the access right should function as a neighbouring right to copyright in the digital era is not helpful to this analysis but neither is it fatal. The history of copyright has demonstrated that the emergence of neighbouring rights is invariably incremental. Indeed, there may come a time where the encroachment of the neighbouring right upon the traditional territory of copyright law is so complete as to the two types of rights ceasing to be meaningfully distinct from one and another. For example, there are aspects of performer's rights which are almost indistinct from copyright rights such as the right against unauthorised broadcasting.

Having given consideration to how an access right would exist within the realm of copyright law it is pertinent to give consideration as to how it might function as a general legal concept. In this regard, the concepts of access and authorisation are fundamentally linked to each other. It is this link that the draft legislation both obscures and reads down. An access control is fundamentally concerned with giving technical effect to the desired level of authorised use that a copyright owner wishes a user to have with respect of his product. That access may be withheld in order to prevent illegitimate copying is a central aspect to the authorisation right but it does not constitute the entire breadth of the right. Copying remains of fundamental importance in the digital era but the ability to perceive content in the digital environment is where the fundamental market value of "copyright" exists. Without this market value, copyright law would be uncontroversial.

¹⁰⁴ See further S Ricketson and M Richardson *Intellectual Property, Cases Materials and Commentary*, 3rd ed, LexisNexis Butterworths, 2005. R Reynolds and N Stoianoff, *Intellectual Property Text and Essential Cases*, 2nd ed, Federation Press, 2005. A Fitzgerald and B Fitzgerald *Intellectual property: In principle* Sydney: Thomson Lawbook Co, 2004. McKeough, Bowrey and Griffith, *Intellectual Property, Commentary and Materials*, 4th ed, Thomson LawBook Co 2007.

¹⁰⁵ Ibid.

The viewing or listening right is the ability to control whether or how a user perceives a particular work or subject matter. This is the substance of what the access right in its broader reach could legitimately capture. It follows that when we speak of an access right, what we are really concerned with is an authorization right at law which is given practical effect by access controls.

X. Conclusion

The emergence of an access right in Australian copyright law will likely remain a source of controversy for some time. It remains to be seen as to how industry attempts to use the access right within Australia. No doubt the utilisation of the access right will be accompanied by disputes relating to competition law, consumer freedom and constitutionality. Nevertheless if used sensibly the access right can be beneficial to the overall goals of copyright law as it provides a platform from which owners can provide new and innovative market offerings.

In regards to the existing debates within copyright law, that the access right emerged at all represents a profound defeat for the copy-left movement.¹⁰⁶ The manner in which the right came to be enshrined in the AUSFTA also raises very real concerns about the extent of democratic participation in the making of Australian copyright law. This is a separate issue to the utility of the access right itself, and it is one that deserves further debate and analysis.

¹⁰⁶ It could be remarked that given the entirety of the AUSFTA implementations and related amendments to the Copyright Act that the copy-left and information libertarians have very decisively lost the copyright wars of the digital era. In this context the struggle would now appear to concern the nature of the copyright culture.