



May 9, 2006

Via Facsimile

The Honorable Philip Ruddock  
Attorney-General  
Central Office  
Robert Garran Offices  
National Circuit  
BARTON ACT 2600  
AUSTRALIA

Dear Mr. Attorney-General:

The International Intellectual Property Alliance (IIPA) is pleased to share these comments on the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs (“Committee”) entitled “Review of technological protection measures exception” (“LACA Report”).

IIPA is a coalition of seven trade associations representing the U.S. copyright-based industries – including the business and entertainment software, audio-visual, sound recording, music publishing and book publishing industries – in bilateral and multilateral efforts to improve international protection of copyright works. Both directly and through our member associations, IIPA has a long history of involvement in the development of copyright law and enforcement policy in Australia. IIPA made a submission to the Committee’s inquiry last October.

We recognize that, by referring this matter to the Committee in the first place, you have sought its information and advice on some important questions regarding Australia’s implementation of the Australia-U.S. Free Trade Agreement (AUSFTA). While to some extent the LACA Report is responsive to your request, it also contains many recommendations that clearly exceed the limited scope of the terms of reference that you gave it. We urge you to view the LACA Report as but one source of information and advice that you will consider in formulating your recommendations to the Cabinet on this important topic.

1. Many Recommendations are Inconsistent with the AUSFTA

While the purpose of your reference to the Committee was for assistance in drafting legislation to implement the AUSFTA, reliance on the LACA Report for this purpose would be largely counter-productive. Were the Committee’s recommendations to be enacted into law in their current form, Australia would fall short of compliance with its obligations under the AUSFTA in significant respects. For this reason, we urge you to reject all the recommendations that suffer from this fundamental flaw.

We list these below. In Attachment A, we spell out in more detail the AUSFTA provision with which each recommendation is inconsistent, and the basis for our conclusion of inconsistency:

- Recommendation 2 (the definition of technological protection measure should “require a direct link between access control and copyright protection”): this Recommendation is inconsistent with the definition of effective technological measure in the AUSFTA.
- Recommendation 4a (excluding “region coding TPMs” from the definition of ‘effective technological measure’)<sup>1</sup>: this Recommendation is also inconsistent with the definition of effective technological measure in the AUSFTA.
- Recommendation 6b (exception for “software installed involuntarily or without acceptance, or where the user has no awareness a TPM [sic] or no reasonable control over the presence of a TPM”): this Recommendation exceeds the bounds of the security testing exception in the AUSFTA, and is unnecessary in light of the fact that the AUSFTA requires liability for circumvention only if done “knowingly, or having reasonable grounds to know”).
- Recommendation 6d (exception for “circumvention for individual privacy online”): this Recommendation exceeds the bounds of the AUSFTA exception for disabling surreptitious collection of personally identifying information).
- Recommendation 9 (any “reasonably foreseeable” adverse impact of TPMs should be treated as “likely;” individual or isolated instance should suffice to justify an exemption; any “likely material impediment to the use of works” should justify an exemption): these aspects of the Recommendation are inconsistent with the AUSFTA limitation that additional exceptions can only be recognized “when an actual or likely adverse impact on ... non-infringing uses is credibly demonstrated.”
- Recommendation 10 (adoption of any specific exceptions permitted in AUSFTA should be presumed not to “impair the adequacy of legal protection of the effectiveness of legal remedies against ETM circumvention”): this Recommendation is inconsistent with the AUSFTA’s use of the adequacy and effectiveness tests as limitations on the ability to recognize exemptions.
- Recommendation 12 (a “statutory licensing system or some other approval regime” should be implemented to allow “manufacturing, trafficking or dealing in circumvention devices or services” for specified exceptions): this Recommendation calls for recognition of trafficking exceptions beyond the exhaustive list of permitted exceptions contained in the AUSFTA.
- Recommendation 13 (“permitted purposes and exceptions” in current law to ban on trafficking in circumvention devices or services should be maintained): this Recommendation calls for recognition of trafficking exceptions beyond the exhaustive list of permitted exceptions contained in the AUSFTA.

As noted in Attachment A, in most of these cases, the LACA Report’s recommendation falls well outside the scope of the terms of reference which you provided to the Committee, which was limited to “whether Australia should include in the liability scheme based on Article 17.4.7.3.viii.” Furthermore, in several instances (also noted in Attachment A), the Committee’s recommendation appears to conflict with your department’s warnings about what Australia must do to comply with AUSFTA – and what it may

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<sup>1</sup> Where individual Recommendations in the LACA Report contain separate proposals on different topics (or alternative recommendations) we adopt for this submission the convention of referring to these separate proposals by lower case letters. Thus, the observation in the text above applies to the proposal contained in the first paragraph of Recommendation 4, which we call Recommendation 4a. The alternative proposal in the second paragraph of Recommendation 4 we refer to as Recommendation 4b.

not do without risking material non-compliance. For example, although your department had clearly stated the position that many aspects of Australia's "permitted purposes" regime for allowing dealing in circumvention devices and services failed to pass muster under the AUSFTA (see Section 4.3 of the Department's Submission 52 to the Committee), the Committee appears to have spurned this advice in adopting Recommendation 13. We urge you to maintain your department's position on this issue – which we believe to be correct – as you review this recommendation of the LACA Report.

In other areas, we must respectfully disagree with some of your department's interpretations of the AUSFTA. For instance, we do not think there is any basis in the agreement for the department's conclusion that "persons or organizations can .... import a circumvention device for non-commercial purposes" in circumstances in which the AUSFTA does not authorize an exemption to the prohibition on trafficking in (including importation of) circumvention devices. Submission 52.2 at 1-2. We note that the Committee apparently disagreed with this interpretation in adopting its Recommendation 12, and we believe it was correct on this point, although the recommendation itself is highly problematic.

We wish to comment on two other categories of recommendations beyond those mentioned above and addressed in Attachment A. These categories concern (1) the procedures and parameters for the "legislative or administrative review or proceeding" which Australia may employ to identify which exemptions it will recognize (pursuant to Art. 17.4.7.e.viii of the AUSFTA) to the prohibition on circumvention of access control measures; and (2) the specific exemptions which should be so recognized.

## 2. Recommendations Concerning the Subparagraph viii Proceeding

Recommendations 8-10 of the LACA Report, and the portions of the Report referenced therein, concern the interpretation of certain key phrases in Article 17.4.7.e.viii of AUSFTA. This provision authorizes Australia to conduct a "legislative or administrative review or proceeding" in which certain further exemptions to the prohibition on circumvention of effective technological measures, beyond those specified in other provisions of AUSFTA, may be recognized. (In this submission, we will sometimes refer to this for convenience as the "subparagraph viii proceeding.") As noted above, the Committee's terms of reference were confined to implementation of this provision of the AUSFTA.

As a review of Attachment A will indicate, to some extent we believe that the recommendations of the LACA Report in this area, particularly that covered by Recommendation 9, are simply inconsistent with the text of the AUSFTA. For example, the AUSFTA allows parties to base exemptions identified in the subparagraph viii proceeding on a "likely adverse impact" on non-infringing uses of works, phonograms or performances falling within a defined "particular class." The LACA Report concludes that "an adverse impact that is reasonably foreseeable should be sufficient to satisfy the [likely adverse impact] criterion." LACA Report, at 3.88.<sup>2</sup> With all due respect, and knowing that in this instance the Committee was following your Department's advice, we strongly disagree. Likelihood and foreseeability are distinctly different concepts. While every likely outcome is foreseeable, many foreseeable outcomes are not likely. Tort law imposes a duty to protect against foreseeable harms, even if those harms are unlikely to occur. But under Article 17.4.7.e.viii of AUSFTA, any exception that is not based on actual adverse impact on non-infringing uses must be based on harms that are likely to occur, and not merely upon scenarios that, while not likely, are foreseeable. We find it very difficult to reconcile your Department's advice (and the Committee's conclusion) on this issue with the plain language of the AUSFTA, and urge that it be reconsidered.

### a. "Particular class of works"

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<sup>2</sup> Unless otherwise indicated, all subsequent citations in this submission are to the LACA Report.

While the Committee concluded that it was not “in a position to formulate a firm definition” of this critical phrase in Article 17.4.7.e.viii, it did set out its “approach to the interpretation of this criterion” and recommended that this “approach” be adopted by the Government. 3.58, 3.66. IIPA questions whether the Committee’s approach will lead to an outcome that is consistent with the limited role contemplated for the subparagraph viii proceeding in the AUSFTA, and thus urges you to proceed with great caution with respect to adopting the Committee’s approach. .

As IIPA noted in its submission to the Committee, the proceeding contemplated under Article 17.4.7.e.viii is directed at almost exactly the same question that the Librarian of Congress, upon the recommendation of the United States Copyright Office (USCO), is directed to answer in the corresponding proceeding under U.S. law. We agree, of course, that “there is no requirement under the AUSFTA for Australia to follow the USCO” (3.59) on the question of the definition of “particular class of works.” But the Committee gave little if any weight to the fact that the Australian proceeding is intended to do almost the same work as the U.S. proceeding. Thus the USCO definition of this critical term in the inquiry, while not entitled to “automatic congruence or weight with the Australian regulatory context” (3.60, emphasis in original) – and IIPA certainly has never argued to the contrary – ought to be accorded more logical weight than the Committee chose to do.

The Committee cited three reasons (in paragraph 3.61) against adopting the USCO interpretation.

- First, it asserted that the definition of “particular class of works” “should be able to draw on a range of pertinent factors so as to accommodate a variety of circumstances and technologies, be in accord with the current approach in the Act, and achieve a level of technological neutrality.” This is a commendable statement of criteria the subparagraph viii proceeding should seek to achieve, but following the USCO definition of “particular class of works” is not inconsistent with any of them. Surely in its detailed recommendations in the two completed rulemaking proceedings under 17 USC § 1201(a)(1), the USCO has “drawn on a range of pertinent factors” and “accommodated a variety of circumstances and technologies” in the “particular classes of works” it has recognized. The only issue of harmonization with the current Act which the LACA Report references in paragraph 3.61 is “the current formulation of the permitted purposes.” As noted above and in Attachment A, this is not a feature of the Act which Australia can preserve unchanged and still achieve compliance with the AUSFTA.
- Second, the LACA Report notes that none of the specific exceptions authorized under the AUSFTA in subparagraphs i through vii of Article 17.4.7.e depend on defining a particular class of works “strictly according to the attributes of the works themselves,” and concludes that “it would be absurd to adopt [the USCO’s] interpretive approach to the ‘particular class of works, performances or phonograms’ criterion [because this] would create inconsistency between” the specific authorized exceptions and those which may be recognized pursuant to Article 17.4.7.e.viii. This entirely misses the point of the provision, which is to enable Australia to recognize additional exceptions in certain circumstances not addressed by any of the specifically authorized exceptions in the preceding subparagraphs. In fact, the specific exceptions, possibly saving number i, do not even identify a “particular class of works;” so the drafters of subparagraph viii clearly intended the “inconsistency” which the Committee found “absurd.” The Committee also overstates the “strictness” with which the USCO allegedly ignores all factors other than “attributes of the works themselves” in determining the boundaries of a “particular class of works.” In several cases, the exceptions recognized by the Librarian of Congress (based on the recommendations of the USCO) are also defined in terms of characteristics of the technological protection measures that may be circumvented. See, e.g., 37 CFR § 201.40(b)(4), in

which the class of works is defined partly in terms of the characteristics of the access control, not just the attributes of the work itself.<sup>3</sup>

- Finally, the Committee overstates the difference between the role of the USCO (and presumably of the Librarian of Congress as the final decisionmaker) under 17 USC § 1201(a)(1), and the role of the decisionmaker in Australia charged with carrying out the proceeding envisioned in Article 17.4.7.e.viii. In both cases, decisionmakers are operating “under constraints” (indeed, very similarly worded constraints) that have already been imposed: in the case of the USCO and the Librarian, by legislation; in the case of the decisionmaker in the Australian proceeding, by the terms of the AUSFTA. Furthermore, the Australian decisionmaker is no more and no less “concerned with policy issues” than the U.S. decisionmaker. Each may address questions of policy, but only to the extent that to do so does not exceed the boundaries of its charter. The analogy drawn by one witness between the Committee (acting in its role as the decisionmaker in the first subparagraph viii proceeding, if that is indeed what it has been asked to do) and the U.S. Congress, cited with approval by the Committee (paragraph 3.61), is unfounded. The U.S. Congress had considerably flexibility in deciding what regime of TPM protection to enact; so did the Australian government, in deciding what it would agree to in the FTA negotiations with the United States, and so did the Australian legislature, in deciding whether to ratify the agreement that was reached. But once those decisions had been taken, the “constraints” became applicable. Certainly it falls well within the prerogatives of the Committee to criticize the terms of the AUSFTA; but to the extent its report constitutes the result of the “legislative or administrative proceeding” contemplated by Article 17.4.7.e.viii, its prerogatives have been constrained, unless or until that provision is modified or made inapplicable to Australia.<sup>4</sup>

b. Credibly demonstrated actual or likely impact on non-infringing uses

Once again, on these aspects of the “legislative or administrative proceeding” contemplated by Article 17.4.7.e.viii, the Committee found itself unable to “formulate a firm definition,” but instead “develop[ed] an approach to the interpretation of the key elements,” which it urges the Government to adopt. LACA Report at 3.83, 3.84, 3.98. Once again, we find the approach flawed and urge the Government to modify it to comply with the AUSFTA.

To the extent that the Committee’s conclusions on these issues rest upon the premises set forth in paragraphs 3.59-3.61 of the Report (see, e.g., the references to those paragraphs at 3.87, 3.88, 3.93), we refer you to the discussion in the section of this submission directly above. In addition, we refer you to our comments above regarding the improper equation of “likely” with “foreseeable” with respect to adverse impact on non-infringing use.

The LACA Report stoutly opposes the concept that an adverse impact must be “substantial” in order to justify an exception, pointing to the absence of that word from the text of Article 17.4.7.e.viii. 3.87. Perhaps this issue is best examined from the opposite point of view: should an actual or likely adverse impact on non-infringing use that is minimal, minor, isolated, or no more than an inconvenience,

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<sup>3</sup> The class of works covers those issued in editions with “access controls that prevent the enabling of the ebook's read-aloud function and that prevent the enabling of screen readers to render the text into a specialized format.”

<sup>4</sup> We confess to some uncertainty about what the LACA Report represents in terms of the “legislative or administrative review or proceeding” contemplated by the AUSFTA. Your department told the Committee, in paragraph 49 of its submission 52, that “the Committee’s current inquiry is the first such ‘review or proceeding’ to be conducted” pursuant to that provision. This is difficult for us to understand and the record suggests that the Committee may not have entirely understood it either. At least it is clear (as discussed in more detail below) that the process the Committee followed does not, in fact, measure up to the procedural standards that the Committee itself recommended ought to apply to such a “review or proceeding.”

warrant setting aside the otherwise applicable prohibition on circumvention of access control measures? IIPA submits that this outcome would run counter to the limited role of the subparagraph viii proceeding, and would be likely to lead to the recognition of exceptions in circumstances in which a minor adverse impact is far outweighed by “use-facilitating” characteristics of particular access controls.

The LACA Report goes on to describe “two types of circumstances” that “strike the Committee as being pertinent for the credible demonstration of an adverse impact.” 3.91. These “circumstances” are virtually unbounded; and IIPA submits that a proper reading of the AUSFTA provision in its context would greatly diminish their pertinence.

The first circumstance in paragraph 3.91 involves “a financial impost relating to the use of works.” In the commercial marketplace for copyright materials, there is almost always, virtually by definition, some “financial impost” that must be satisfied in order to make authorized use of the work. For example, access to a website from which copyright works can be streamed may be conditioned on payment of a subscription fee. An access control such as password protection may be employed to prevent parties who have not paid the fee from obtaining access to the website; however, circumvention of this access control would enable the circumventor to use the copyright materials for free. It could certainly be argued that this amounts to “a financial impost relating to the use of works .... incurred or likely to be incurred directly as a result of an inability to circumvent a TPM and not incurred or likely to be incurred otherwise.” If this is all that is needed to “credibly demonstrate” an “adverse impact,” there will be almost nothing left of the prohibition against circumvention; the exception will have swallowed the whole.

Similarly, in the Committee’s second “pertinent” example, the “credible demonstration of adverse impact” criterion could be met by showing “an actual or likely [presumably meant as “foreseeable”] material impediment to the use of works ... where that use is ... necessary ... in the course of business, occupation, work or the discharge of professional responsibilities, or for the maintenance of a quality of life.” 3.91. This fails to account for the fact that there are robust markets in making copyright material available to particular business sectors, presumably for uses that are “necessary” to those businesses, under specified contractual terms and conditions; and that these business models are increasingly dependent on the use of technological protection measures. Under the Committee’s analysis, circumvention of these measures would *prima facie* be entitled to an exception since the inability to circumvent would cause an “adverse impact” that could be “credibly demonstrated.” The bounds of this example are if anything even less certain to the extent that they embrace the “necessity” of unauthorized access to a work “for the maintenance of a quality of life.”

The Committee also objects to the idea that the occurrence or likelihood of an adverse impact ought to be proven by a preponderance of the evidence in the legislative or administrative proceeding before it can provide the basis for recognition of an exception. The Committee believes that this standard “virtually requires the proponent of an exception to prove the case beyond doubt before the relevant circumstances have arisen;” that it “could favor those with resources or legal representation” and thus exhibits an unacceptable “potential for ... inequity”; and that under it, “aggregate evidence of doubtful probative value [could] outweigh[] evidence with probative value.” LACA Report at 3.88, 3.93. These remarks suggest that the Committee may be interpreting the “preponderance of the evidence” standard rather differently than what the USCO intended by it. To forestall any further misunderstanding, it may be worth explaining what this phrase denotes in U.S. jurisprudence.

Most American lawyers would draw a sharp distinction between meeting a preponderance of the evidence standard and “prov[ing] the case beyond doubt.” The former is the familiar standard for the trier of fact in any civil litigation: is the evidence for one side, considered as a whole, more probative than the

evidence for the other side? The latter is a burden more onerous than what the prosecution undertakes in a criminal case, in which proof beyond a reasonable doubt must be adduced, not “proof beyond doubt” of any kind. Similarly, it is the probative weight of the evidence, not its volume or the number of witnesses or affiants, that tips the balance under a preponderance of the evidence standard in U.S. law. (As to the presence of legal representation, presumably this favors the represented party under any standard, assuming counsel is competent.)

As we read the LACA report, it recommends that, in the proceeding contemplated by Article 17.4.7.e.viii, an exception be granted so long as there is any “reasonable, believable evidence adduced to establish an adverse impact,” even if there is more probative evidence adduced in opposition to that claim. 3.93. We cannot be certain that this is the standard that the Committee itself intended to apply, since the proceeding that it carried out did not include a reply round or any other formal opportunity for parties to adduce evidence or argument in opposition to exemptions proposed by other parties. However, such a conclusion seems consistent with the Committee’s rejection of any consideration, in the subparagraph viii proceeding, of “the balance between copyright owners and users.” 3.96. We take this to be a rejection of the USCO practice (which IIPA and others recommended in the Australian context) of taking into account the use-facilitating characteristics of technological protection measures, and making a net calculation of whether permitting an exception to the prohibition on circumvention would, on balance, enhance or diminish the availability of the particular class of works in question for non-infringing uses. It would be most regrettable if this aspect of the LACA Report were carried forward into legislation, since it would probably mean that exceptions would be recognized in the subparagraph viii proceeding that would have the overall effect of reducing the access of Australian consumers to copyright materials in the digital environment.

c. Adequacy and effectiveness test

The discussion underlying Recommendation 10 of the LACA Report, to the extent that it addresses issues within the Committee’s terms of reference, seems to give short shrift to an important aspect of Article 17.4.7.f of the AUSFTA: the requirement that any exceptions recognized under Australian law be evaluated against the measuring stick of overall adequacy and effectiveness. This principle – especially, and of sole relevance to the task the Committee was asked to undertake, with regard to any exceptions recognized in the proceeding contemplated by Article 17.4.7.e.viii --- defines an outer bound that deserves respect. We agree, of course, that in the last analysis it is the “role and responsibility” of the decisionmaker in the subparagraph viii proceeding to ensure that this outer bound is not exceeded (as the LACA Report notes in paragraph 3.114). However, it should be part of the burden imposed upon proponents of any exception to demonstrate that granting their proposal will not step across this boundary; and it is certainly appropriate for opponents of any exception to present evidence and argument to the contrary. More significantly, the decisionmaker under Art. 17.4.7.e.viii needs to assess the entire range of exceptions granted, in order to evaluate whether, taken as a whole, these exceptions “impair the adequacy of legal protection or the effectiveness of legal measures against circumvention of effective technological measures.” AUSFTA Art. 17.4.7.f.

d. Nature of quadrennial review

In chapter 5 of its report, the Committee addresses a number of other procedural issues. IIPA comments at this time on only two of these.

The Committee recommended that the procedure for the subparagraph viii proceeding ought to include “a period in which comment on other submissions might be made.” 5.40. While literally the procedure followed by the Committee might be said to include such a period, since there was a time lapse

between the receipt of initial submission and the issuance of the LACA Report, in fact there was no point in the process, of which we are aware, at which the Committee identified the proposed exemptions that it was considering, and invited members of the public to comment on them. In view of the Committee's conclusion that "from a natural justice perspective, opportunity for comment on proposed exceptions should be built into the review process," 3.95, we are puzzled as to why the Committee did not follow its own recommendation in the proceeding it carried out. For this reason alone, it would be unwise for the Government to treat the proceedings before the Committee as if they in fact constituted a subparagraph viii proceeding within the meaning of the AUSFTA.

The second issue concerns the nature of the required review, at least once every four years, of any exceptions to the prohibition on circumvention that are recognized in the proceeding contemplated by Article 17.4.7.e.viii. We support the Committee's conclusion (5.10) that "any existing exceptions granted during previous reviews would be subject to reconsideration" in the later quadrennial (or more frequent) reviews. LACA Report, at 5.10. We also believe that it would be appropriate to assign to the proponents of any exception the burden of demonstrating the continued need for it. This would appropriately reflect the fact that these are, indeed, exceptions to an otherwise applicable prohibition, and that they are to be granted only upon a concrete demonstration of the adverse impacts that would be likely to occur if the exception were no longer to be applicable to the particular class of works in question. Certainly proponents of the exception would be in the best position to provide this demonstration to the ultimate decisionmaker. Accordingly, we do not agree with your Department's conclusion that exceptions should be extended in time "by default" if no comments in opposition to their continuation were received, see 5.14, though we recognize that in that situation the practical burden on proponents might be correspondingly limited.

### 3. Recommended exceptions

The preceding section of this submission has canvassed what IIPA views to be pervasive and rather fundamental defects in the approach the LACA Report recommends to the question of exceptions under Article 17.4.7.e.viii. Since to a considerable extent the Committee appears to have followed its own recommendations in the way it considered proposed exceptions, it is hardly surprising that it endorsed a long list of these.

We have already noted in the introductory section of this submission, and explained in Attachment A, our view that to adopt several of the recommendations for exceptions contained in the LACA Report (most falling well outside the boundaries of the contemplated subparagraph viii proceeding) would be inconsistent with Australia's AUSFTA obligations. The remaining recommendations fall generally into two categories.

First, several recommendations either call for the Government to monitor developments in certain areas, or for the Government to consider recognizing an exception allowing circumvention of access controls to carry out activities which may be defined as non-infringing in the future.<sup>5</sup> Because it does not appear that the Committee is recommending any exception be adopted at this time on these topics, IIPA will withhold comment until such time as an exception in any of these areas is under active consideration.

This leaves all or part of nine of the LACA Report's recommendations, which, if enacted, would recognize eighteen exceptions to the prohibition on the act of circumvention.<sup>6</sup> Additionally,

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<sup>5</sup> The following Recommendations in the LACA Report appear to fall into this category: 16, 17, 18, 21, 23, 24, 26, 29, 30, and 31.

<sup>6</sup> This includes Recommendations 4b; 14; 15a through 15d; 19a-b; 22a-b; 25a through 25c; 27a-b; 28a-b; and 32.

Recommendation 33, while not constituting an exception to this prohibition (and thus falling outside the scope of the Committee's terms of reference), would bar copyright owners who use access control measures from entering into contract provisions prohibiting certain acts of circumvention, and plausibly might be considered for inclusion in legislation to implement the AUSFTA.

Taken as a whole, enactment of these 18 exceptions (and the contractual bar contained in Recommendation 33) would, in IIPA's view, virtually eliminate the value of enactment of the prohibition against circumvention of access control measures. Since, essentially, acts of circumvention that are associated with the exercise of virtually any exception to copyright protection now recognized under Australian law would be exempted from liability, such acts could be pursued only in circumstances in which copyright infringement could also be shown to have occurred, and thus would add little or no deterrent value to the current copyright law. In such circumstances, it would be very difficult to argue that the adequacy and effectiveness of this aspect of Australia's anti-circumvention legal regime had not been impaired, and thus that the full suite of exceptions was consistent with Article 17.4.7.f of the AUSFTA.

There is no indication that the Committee made any sort of evaluation of the cumulative impact of the exceptions that it recommended on the adequacy and effectiveness of Australia's anti-circumvention legal regime, as required to be established under the AUSFTA. It is also clear that it did not take into consideration at all the impact of such a wide range of exceptions on the willingness of copyright owners to maintain and expand their digital offerings of works in the Australian market.<sup>7</sup> It seems likely that, without any meaningful legal prohibition on the act of circumventing access controls, and without any ability even to give consumers contractual incentives to refrain from such activities, business models that depend upon access controls would become much less attractive for copyright owners in the Australian market than would otherwise be the case. The net effect on Australian consumers might well be less, not more, availability of copyright works in digital formats and over digital networks.

#### 4. Conclusion

The LACA Report contains a number of recommendations that are outside the scope of the Committee's mandate, many of which are inconsistent with Australia's obligations under the AUSFTA. We urge you to reject these recommendations as you formulate implementing legislation. At the same time, the Committee also left undone much of the task that was assigned to it. It would make sense at this point for the Government to take up the unfinished business it had assigned to the Committee with regard to further exceptions to the prohibition on the act of circumvention of effective technological measures. This could be done either now, or (more appropriately) after legislation has been enacted in which Australia has implemented the other provisions of Article 17.4.7 of AUSFTA, including both the prohibition on circumvention of access controls and the specific exceptions authorized in subparagraphs i through vii of paragraph e, to the extent that Australia chooses to implement these exceptions.<sup>8</sup>

At either juncture, specific proposed exceptions to the prohibition on the act of circumvention (which could include some or all of the 18 recommended by the Committee) should be offered for public

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<sup>7</sup> These omissions may have resulted in part from the Committee's decision not to include a "reply round" phase in which copyright owners would have had an opportunity to demonstrate such impacts.

<sup>8</sup> A threshold question is whether a "review or proceeding" under Article 17.4.7.e.viii can even take place before this provision comes into force for Australia. A related question is whether a proceeding aimed at recognizing exceptions to a prohibition can be carried out before the prohibition itself has been enacted into law. Certainly from a practical standpoint, a meaningful subparagraph viii proceeding could much more readily be undertaken once the extent to which Australia will implement the other allowable exemptions under the AUSFTA has been finalized.

comment, giving a full opportunity for proponents and opponents of these proposals to offer evidence and argument directed toward the critical issue: whether the proponents have credibly demonstrated that, once the prohibition against the act of circumvention of access controls takes effect under Australian law, the prohibition is likely to adversely impact non-infringing uses of a defined particular class of works. The proceeding should be carried out, not under the flawed interpretation of the key elements of this issue spelled out in the LACA Report, but in accordance with a measured interpretation that recognizes the limited role of Article 17.4.7.e.viii as a mechanism for identifying situations in which the comprehensive application of the prohibition on circumvention should be withheld, at least for the time being, because of the likelihood of a net adverse impact on non-infringing uses. Finally, exceptions should be recognized only in those areas in which the burden of credibly demonstrating likely adverse impacts has been fulfilled, and this recognition should be subject to de novo review no more than four years thereafter.

IIPA would certainly encourage its member associations, and their Australia-based affiliates or counterparts, to participate actively in such a proceeding, and would be pleased to offer whatever assistance it can toward the goal of full and timely implementation of the TPM provisions of the AUSFTA. Thank you for considering our views.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Steven J. Metalitz". The signature is fluid and cursive, with a large initial "S" and "M".

Steven J. Metalitz  
Senior Vice President

cc (via email): Helen Daniels, Assistant Secretary, Copyright Law Branch



Attachment A: LACA Report Recommendations That Are Inconsistent with the AUSFTA

(\*\* denotes LACA Report recommendations that appear to fall outside the scope of the Committee’s Terms of Reference)

LACA Recommendation	AUSFTA Provision	AGD Statements	IIPA Comments
<p>**2 (TPM/ETM definition must “require a direct link between access control and copyright protection”)</p>	<p>17.4.7.b (ETM defined as “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”); 17.4.7.a.i (requiring liability for circumventing “any ETM that controls access to a protected work, performance or phonogram”)</p>	<p>AGD Submission 52, at 7 (“The AUSFTA requires Australia to introduce liability for the act of circumventing an ETM that controls access to copyright material”: no reference to “direct link” concept); but see Jennings testimony, 5 Dec 2005 at 25-26) (chapeau language to Art. 17.4.7.a “suggests that there is to be a relationship between the use of a TPM and the exercise of rights by a copyright holder”).</p>	<p>Per se coverage of access controls is clearly mandated by AUSFTA. The contrary argument based on the reference in the “chapeau” to 17.4.7.a to protection of ETMs that authors, producers and performers “use in connection with the exercise of their rights” does not change this conclusion, both because the text of 17.4.7.a itself covers all access controls, and because the identical language in WCT and WPPT is authoritatively interpreted to cover all access controls (see WIPO Guide, para. CT- 11.8: “There are two basic forms of restricting (making conditional) acts: first, restricting access to works, and second, restricting the carrying out of certain acts in respect of works. The obligations under Article 11 cover both of these basic forms.”).</p>

<b>LACA Recommendation</b>	<b>AUSFTA Provision</b>	<b>AGD Statements</b>	<b>IIPA Comments</b>
**4a (“region coding TPMs be specifically excluded from the definition of ‘effective technological measure’”)	Same	“Region coding controls access to copyright material...However, the definition of an ETM must be read together with the chapeau to Art. 17.4.7(a) which establishes the limits of the proposed liability scheme.” AGD Submission 52.1 at 5.	Nothing in the AUSFTA allows a party to exclude a particular kind of access control from the definition of ETM. See above regarding the “chapeau” argument.
**6b (17.4.7.e.iv “should be interpreted ... so as to permit exceptions to liability for ... circumvention for software installed involuntarily or without acceptance, or where the user has no awareness a TPM or no reasonable control over the presence of a TPM”)	Art. 17.4.7.e.iv (security testing exception); Art. 17.4.7.a.i (liability for circumvention only if done “knowingly, or having reasonable grounds to know”)	None?	There is no basis in the AUSFTA for categorical exclusion of a TPM from protection based on the circumstances of its installation or the level of the user’s awareness about it (though any liability for circumventing it would depend on the circumventer’s actual or constructive knowledge). Of course, other laws may govern the legality of such installation. The security testing exception would apply to circumvention of such TPMs (and any others) so long as the requisites of that exception are met.
**6d (17.4.7.e.v “should be interpreted ... so as to permit exceptions to liability for ... circumvention for individual privacy online” )	Art. 17.4.7.e.v (disabling surreptitious collection of personally identifying information)	None?	LACA responded favorably (with a reference to this provision) to a submission that asserted “a product which collects personal information of the user should not be protected by a TPM.” Paras. 3.29, 3.30. However, such a broad exception would far exceed the FTA

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			provision, which applies only to PII collection or dissemination activities that are “undisclosed.”
9 (in the administrative or legislative proceedings to evaluate proposed exemptions to the prohibition on circumvention of access controls, any “reasonably foreseeable” impact should be treated as “likely” (para. 3.88); individual or isolated instances are sufficient to justify an exemption (para. 3.89); any “likely material impediment to the use of works ... directly as a result of an inability to circumvent a TPM” could justify an exemption (para. 3.91)).	Art. 17.4.7.e.viii (“when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated....”)	Section 3.5.2 of Submission 52 (equating “likely” to “reasonably foreseeable”; proponent of exception must “show that the use of the copyright material for which they are seeking an exception to circumvent the ETM will not infringe copyright”)	The fact that it is “foreseeable” that an event will occur does not make it “likely” to occur. A “credible demonstration” requires more than speculation about “foreseeable” possibilities. All TPMs impede some uses; the focus must be on “adverse impact .... on non-infringing uses” only, including the availability of such uses under license or by other legal means, even if a “financial impost” is required.
**10 (para. 3.112: “The Committee can only assume ... that any exceptions permitted under Art. 17.4.7(e)(i)-(vii) will not impair the adequacy or legal protection or the effectiveness of legal remedies against ETM circumvention”)?	Art. 17.4.7.f (exceptions allowed under 17.4.7.e may be recognized “only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of ETMs”).	None?	The AUSFTA text makes clear that the adequacy and effectiveness tests are limitations on the ability to recognize exemptions, not the other way round.
**12 (some mechanism – such as “a statutory licensing system or some other approval regime” -- should be implemented to allow “manufacturing, trafficking or dealing in circumvention devices	Art. 17.4.7.f.ii (exceptions to the prohibition on trafficking in circumvention devices and services with regard to access controls is permitted only “with respect to activities set forth in	Submission 52.2 at 1-2 (where act of circumvention is exempted but trafficking in devices is not, “persons or organizations can create their own circumvention devices or import a	This provision is not “a lamentable and inexcusable flaw in the text ... that verges on absurdity,” as LACA asserts in para. 3.118. Rather, it is a feature of a system intended to

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or services ... for ... the exceptions permitted under Article 17.4.7.(e)(v), (vii) and (viii)”(para. 3.117).	sub-paragraph (e)(i), (ii), (iii), (iv), and (vi)”.)	circumvention device for non-commercial purposes” without running afoul of AUSFTA obligations).	prevent the development of an open market in circumvention devices and services that would undermine the adequacy and effectiveness of the entire TPMs regime. We agree with LACA that AGD’s “non-commercial importation” exception has no basis in the AUSFTA text (para. 3.126).
**13 (existing permitted purposes and exceptions” in the Copyright Act should be maintained)	Art. 17.4.7.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):”)	Section 4.3 of Submission 52 (“Some of the permitted purposes exceptions ... are not consistent with the requirements “ of AUSFTA (giving specific examples in paras. 43 and 44)	The AUSFTA provisions are an exhaustive list of all allowable exceptions. To the extent that the existing “permitted purposes” provisions allow trafficking in circumvention devices and services to an extent greater than permitted under Art. 17.4.7.e, they must be amended. Indeed, as we understand it, the recognition that these provisions were inconsistent with the AUSFTA was one of the main motivating factors for Australia’s insistence that it be accorded an additional two years to implement Art. 17.4.7.