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A V S D A

Australian Visual Software Distributors Association Ltd

**AVSDA SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

14 October, 2005

The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
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Review of technological protection measures exceptions.

Background:

The Australian Visual Software Distributors Association (AVSDA) takes this opportunity to provide this submission in response to the House of Representatives Standing Committee on Legal and Constitutional Affairs review of technological protection measures (TPM) exceptions (the **TPM Review**).

AVSDA represents the interests of owners of copyright in, and distributors of, DVDs and videos in Australia. AVSDA's members range from all the major international film distribution companies through to wholly owned Australian companies. AVSDA members include: Buena Vista Home Entertainment, Imagine Entertainment, Magna Pacific, Paramount Home Entertainment, Rainbow Video, Rajon Vision, Roadshow Entertainment, Shock DVD, Sony Pictures Home Entertainment, Time-Life Australia, Twentieth Century Fox Home Entertainment, Universal Pictures Video, Warner Home Video and Warner Vision.

The Australian DVD and video market represents a significant part of the Australian economy, in terms of revenues, employment and culture. In 2004/2005 the wholesale sales of DVDs and VHSs in Australia amounted to \$1,095,441,607. The industry has rapidly reached maturity but is expected to grow in solid single digit growth in coming years.

Introduction:

AVSDA members depend for their existence on their capacity to protect the value of their investments through their intellectual property. A strong and effective copyright regime is essential for their continued success and survival in the market and Australia's copyright laws are regarded as world class. They have a highly developed program of enforcement of their rights in Australia.

The industry relies on TPM's to protect its legitimate copyright interests. AVSDA members are very concerned about the prospect of additional TPM exceptions to those foreshadowed under the Australia US Free Trade Agreement (AUSFTA).

The additional exceptions proposed by the terms of reference for this Committee are in AVSDA's view too broad and too premature given the recent nature of the AUSFTA implementation. All but the exception listed under (c) in the Committee's terms of reference (the use of databases by researches) refers broadly to "the activities of..." which AVSDA believes is too unspecific to respond to adequately.

AVSDA would be better able to respond to specific use examples and demonstrated need of exceptions rather than broad exceptions and would welcome an opportunity to do so should any come forward.

AVSDA also notes that the terms of reference given to the Committee includes that of considering region coding exceptions. AVSDA strongly opposes any exception for region coding. This submission looks in detail at the benefits of the region coding system for the industry, noting it has negligible impact on the consumer, while being a valuable tool in fighting piracy.

In any case, since the announcement of the TPM Review by the Attorney General, the High Court of Australia delivered judgment in the case of *Stevens v Kabushiki Kaisha Sony Computer Entertainment*¹ (**Sony v Stevens**). The decision has had the effect of narrowing the scope of the current law in respect to the TPM provisions under the Copyright Act in such a way that the provisions are, in AVSDA's view, inconsistent with Australia's obligations under the AUSFTA. Accordingly, AVSDA has also taken the opportunity to comment upon the implications of that decision in this submission.

TPM's and the Industry:

The industry relies on TPM's to protect its legitimate copyright interests. The Australian Government through the *Copyright Amendment (Digital Agenda) Act 2000* and the AUSFTA enshrine the rights of owners and producers of copyright to receive legitimate income and protect its works through the use of TPMs. In addition, TPM's are seen as legitimate mechanism by other international bodies and governments such as WIPO and the European Union for protecting copyrighted works against illegal replication in the digital environment. The film industry has been working hard to develop TPM's to assist in protecting its works against piracy in order to remain a viable industry into the future. The recent announcement from Motion Picture Laboratories Inc., a Motion Picture Association supported company, demonstrates the industry's determination and commitment to use TPM's as a way of protecting its interests:

¹ [2005] HCA 58 (6 October 2005).

Motion Picture Laboratories, Inc.

FOR IMMEDIATE RELEASE:

Monday, September 19, 2005

**STUDIOS FOUND MOVIELABS TO HELP PROTECT
AGAINST MOTION PICTURE THEFT & MISUSE**

New Entity Will Provide R & D For Content Protection Methods

Los Angeles - - Six major motion picture studios announced today that they have agreed to found a new non-profit research and development company called Motion Picture Laboratories, Inc. (Movielabs). The new entity will create new technologies to protect the distribution of films and other works as well as to protect against electronic theft, particularly on the Internet. The founding owners of Movielabs, Inc. are Walt Disney Pictures and Television, Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLLP and Warner Bros. Entertainment Inc.

"Movielabs is a smart investment that will help the entertainment industry adopt new means of fighting piracy and protecting copyrights," said MPAA President and CEO Dan Glickman. The association was instrumental in assisting these studios in facilitating the development of the new company and will act as an outside management and technology consultant to the new venture.

"There are thousands of new concepts floating around the high tech community about how to develop tools to fight piracy. Researching and developing these technologies now will help save the major studios and other motion pictures producers and distributors money in the future," he added.

Movielabs will explore and develop new technologies to fight motion picture theft that otherwise might remain dormant. The pooled investment provides a greater opportunity for quality products that will help the film industry as a whole.

Projects envisioned by Movielabs include developing new technology to detect camcorders; evaluating and exploring network management technologies for traffic shaping, port access controls, client software detection, data management and other related tools. These new technologies will also be recommended to universities, corporations, Internet service providers and other network services operators to reduce piracy.

"These new technological developments that emerge should also prove invaluable in conducting research on peer to peer technologies in pursuit of protecting motion pictures and other audiovisual works from unauthorized access or misuse," Glickman said.

Movielabs will locate offices and staff in Los Angeles and operate as an independent non-profit corporation.

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The Australian Film Industry - Parallel Importation and Region Coding:

A key support in fighting piracy and providing protection for the Australian film and DVD industry is the Commonwealth Parliament's decision to not allow the parallel importation of films. This decision ensured that:

- Australia's censorship and classification laws would not be undermined by the entry into Australia of copies of films produced without regard for these laws;
- The theatrical release of films in Australia, and especially in country and regional areas would not be undermined by the entry into Australia of copies of films for commercial release prior to the date such films can be made available for cinema release; and
- Region coding would continue to be a simple, effective device for Police and Customs officials to identify and seize infringing copies of films entering Australia and/or distributed for sale in Australia.

A view supported by both sides of politics as was evidenced during the debates and passage in 2003 of the *Copyright Amendment (Parallel Importation) Bill 2002*. Region coding (Australia is region 4) is crucial in supporting the Parliament's intent. Region coding also is a key weapon in fighting piracy through the easy identification of pirated product as well as non-classified films.

The cost of producing, broadcasting and exploiting a film or video game is substantial. By its very nature, film production has a high risk/high return profile, and can result in significant cash flow volatility.² Investment in Australian feature films from the domestic film and television industry and private investment has fallen for the past three years, from \$45.5 million in 2001/2002 to just \$17.2 million in 2003/2004.³ This is a reflection of the assessment of risks and returns in an increasingly uncertain environment of piracy and internet file sharing.

The film and video market operates on an economic model that maximises the returns to the producers of films in order to offset their enormous investment through a number of distinct but related channels. These include theatrical release, Pay TV, video rental release, retail video release, and free-to-air television broadcast. Each of these represents a commercial opportunity to derive income critical to keeping the industry going. The home entertainment sector of the film business is now more profitable than that of theatrical sales. This is important to consider in the context of creating further exceptions other than those specified by the AUSFTA and the importance of region coding as a valuable weapon in the fight against piracy.

Region coding also allows the operation of what are called 'windows' in the industry. That is, as outlined above, a movie is first released theatrically in cinemas, then to DVD, pay TV free to air and increasingly over the internet thereby giving consumers choice regarding the timing, method and price point at which to view the movie. These windows are also crucial to the business and success of the industry. Removal of region coding and parallel importation restrictions would result in product, both 'legal' and illegal copies of films, entering Australia at the detriment of Australia's cinema industry. A film released overseas is often held for local release to coincide, for example, with school holidays. A children's movie, local Australian film or Hollywood blockbuster relies on release windows and school holidays to ensure profitability. Cinemas, in particular regional and rural cinemas, are struggling with box office revenues which are down in 2005 over previous years. Cinemas in small towns and regional centres across Australia are often the social focal point of the region and their long-term viability will likely be impacted upon by the removal of region coding and any removal of the parallel importation protections restrictions.

There is a strong and increasing commercial tie-in between films and TV programs. Whereas once they may have been regarded as quite different and parallel commercial channels, around 30% of DVDs that are sold in Australia are copies of serialised TV programs that have already been broadcast in Australia (invariably on free-to-air television). Therefore there is increasingly a secondary market for the commercial supply of programs that have been broadcast freely. This means that the industry is vitally interested in the protection of copyright in films even where they have been licensed for free-to-air broadcast. Loss of control over content during this phase has

² Village Roadshow Limited Annual Report 2002;

³ National Survey of Feature Film and TV Drama Production 2003/2004, Australian Film Commission.

the potential to greatly damage secondary markets for the same programs, through retail sales. Again, region coding is an important tool in making sure that: a) pirated and illegal discs are not being sold in Australia prior to, or after, Australian free-to-air broadcast, and b) the ability of the owners of the content to market the product after the various channels have been exploited is not eroded by premature and illegal release of the TV series in Australia.

In the past, some people have argued that region coding unfairly restricts the rights of consumers to play a legitimate overseas purchased DVD when back in Australia on their DVD player. This debate is historically anachronistic and dangerous in the current context of digital piracy. The current ready availability of multi-region DVD players in Australia gives the Australian consumer the ability to play region coded DVD's other than region 4. The consequences on consumers are very small in this context. The issue of region coding, therefore, is not about consumer choice for playing foreign purchased DVDs at home in Australia, but rather it being a vital tool to combat piracy as well as maintaining a 'window's' based business model.

Film Piracy:

At the same time, the film industry is at a crossroads in terms of the threat of piracy. Although it has historically not suffered to the same degree as the music industry, the uptake and ready availability of digital duplication technology and the prevalence of internet file sharing have begun to have a substantial effect on the whole film and video game industry. AVSDA estimates that film piracy cost the Australian industry over \$400 million in 2004. These issues make the industry acutely sensitive to any suggestion of reviewing the region coding of home entertainment film products.

Pirate discs seized by Australian Police, Customs and Industry:⁴

2003	61,550
2004	148,937
2005 first 3 months	77,644

Due to the profit margins associated with DVD film piracy, organised crime has become involved with transnational links. In overseas markets, film piracy has been linked to the funding of terrorist groups. Detective Superintendent Richard Grant, Victorian Police Organised Crime Investigation Division, made this point at the 'Organised Crime Strategy Workshop', in Melbourne on August 24th -25th 2004:

"Buying pirate DVD's undermines legitimate business and provides funds to organized criminal networks to engage in other criminal activity. Ultimately it's our business community and our communities in general that suffers."

Mr. Graham Ashton, Australian Federal Police General Manager (Southern Region), made a similar observation in 2002:

"We have found the level of sophistication is such where they operate almost in a franchise structure... Operators in this country are given fairly strong written instructions on how to conduct their business in Australia.... They are required to keep very detailed records to report back to their syndicate bosses overseas as to how they are traveling financially in terms of sales and marketing".

⁴ Source: Australian Federation Against Copyright Theft

No other copyright industries are as affected by piracy as the entertainment industries that supply products using optical discs⁵. The film industry is one where the magnitude of the threat is such that any weakening of the enforcement, TPM and copyright environment should be strongly resisted. If anything it is an industry that deserves additional protections in the face of the disproportionate threat to them to enable them to protect its products⁶ against theft.

Piracy is not the result of a failure by copyright owners to produce the products that consumers want⁷. It is the result of the introduction of technologies that have a single real focus – to permit consumers to copy and distribute content that they do not own. Most consumers know that this is as wrong as stealing a DVD from a shop or a neighbour's newspaper. TPM's play a crucial role in stemming the piracy tide.

Censorship and Classification:

In terms of public policy and legislation, participants of the film industry have the additional requirement of having to comply with the national classification scheme. AVSDA strongly supports the classification scheme and works cooperatively with the Office and Film and Literature Classification (OFLC) in ensuring compliance and working towards improvements in the scheme.

It is AVSDA's experience as evidenced through enforcement activities, that pirated films being imported or manufactured in Australia are mostly uncensored. Additionally, when cases of parallel imported films are detected being sold through such places as Ebay, Australian censorship markings have been found to be non-existent. Any consideration of changing region coding and parallel importation policy must assess the impact it will have on the national classification scheme and compliance. AVSDA is working hard with Commonwealth and State and Territory Government's to ensure greater compliance and enforcement of and prosecution of non-classified film traders and importers. AVSDA is aware of a raid the Australian Federation Against Copyright Theft (AFACT) conducted at a market which resulted in the seizure of the jewel case for a well known children's film, but which contained a disc containing x-rated pornography inside.

Sony v Stevens and the implications for this Committee's Review:

On Thursday 6 October 2005, the High Court delivered its decision in *Sony v Stevens*. Since the decision was handed down, AVSDA has had a chance to conduct a preliminary review of the decision and consider its impact.

The decision of the High Court in *Sony v Stevens* turns on whether or not the device is a Sony PlayStation (comprised of access coding system) was, in that instance, a TPM for the purpose of s116(a) of the Act. If it was, then the device would be afforded the protection of the remainder of s116 which allows a copyright owner or exclusive licensee to bring an action against any person who makes or deals in a 'circumvention device capable of circumventing, or facilitating the circumvention', of a TPM.

⁵ There is no comparison, for example, between the threat from school children exchanging burnt CDs or DVDs at school and the remote possibility of exchanging photocopies of books.

⁶ AVSDA is aware of submissions that have been made to the government by the Film Coalition, AFACT and by Village Roadshow that outline a number of additional measures that would be appropriate to assist participants in the film industry protect their copyright.

⁷ If this were the case, then one would expect consumers to turn away from the products not to pirate them in increasing numbers.

A technological protection measure is defined in s 10 as:

“technological protection measure” means 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 authority of the owner or exclusive licensee of the copyright;
- (b) through a copy control mechanism.”

The High Court considered whether the PlayStation device was a device designed to ‘prevent or inhibit the infringement of copyright in a work or other subject matter’. Amongst other things the High Court took a narrow view of the words ‘prevent or inhibit’ in the definition, concluding, in a general sense, that the definition of a TPM was not concerned with devices that merely have a ‘general deterrent effect’ or ‘discouraging effect’ on those who might be contemplating infringing copyright in a class or work for example by making unlawful copies of a CD-ROM. Rather, the device must physically prevent an act of infringement, say, the unlawful copying of a CD-ROM.

The decision in *Sony v Stevens* makes it clear that, under the current Copyright Act, a device that prevents a primary infringement occurring (such as the unlawful copying of a CD-ROM) will be afforded the protection of the TPM provisions. However, a device that prevents the use of unlawful items (such as CD-ROMS that have been unlawfully copied), will not be regarded as a TPM and will not be afforded the protection of s116 of the Act.

TPMs are of particular significance for the protection of copyright works by AVSDA members because they are an effective means of minimising copyright infringement in a digital environment. It is of great concern that this decision winds back the potential scope of protection that otherwise is available to AVSDA members in countries such as the USA and the UK.

AVSDA submits that in light of the interpretation given to the definition of a TPM by the High Court in *Sony v Stevens* the current definition requires amendment so as extend the definition to include devices which control access to copyright protected work (whether it directly or indirectly prevents or inhibits copyright infringement).

AUSFTA:

Given the decision in *Sony v Stevens*, AVSDA notes that the definition of a TPM, which is referred to as an 'effective technological measure' in Article 17.4(b) of the AUSFTA (which came into effect on 1 January) is broader than the definition of 'technological protection measure' in the Copyright Act because it is not limited to devices that "prevent or inhibit infringement" but, rather devices that "control access to protected works".⁸ This broader definition would, in AVSDA's view, include an access code device such as that considered in *Sony v Stevens*.

Further, Article 17.4(a) of the AUSFTA broadly requires the Australian Government to provide effective legal remedies against the circumvention of 'effective technological measures' or TPMs in circumstances not only where the TPMs operate to prevent primary infringements (such as the unlawful copying of a CD-ROM), but also where they operate to 'restrict unauthorised acts'. Unlike the interpretation given to the definition of a TPM by the High Court, an unauthorised act would include playing a infringing copy of an article (eg unlawfully copied CD-ROMs) by users.

Accordingly, AVSDA submits that the decision in *Sony v Stevens* means that the definition of a TPM in the Copyright Act requires amendment if Australia is to comply with its obligation under Article 17.4 of the AUSFTA.

Conclusion:

Through this TPM Review process, AVSDA looks forward to seeing what specific additional TPM exceptions will be sought through submissions and the justifications for such exceptions. As AVSDA has not seen a demand or argument for broad additional exceptions as outlined in the Review's terms of reference, it cannot provide a specific response to the exceptions proposed. As such, AVSDA will need an opportunity to respond to any exemptions sought and the justifications for them through this Review or some other process.

However, the fact that this Review and Committee is considering region coding exemptions for digital technologies is of tremendous concern. In Australia, the film industry is fortunate to have laws against parallel importation. Region coding provides a valuable and necessary tool in distinguishing between an illegally imported and or pirated product and an authorised copy of the film. Through the omission of a region code, or the incorrect region code for Australia being placed on the DVD, law enforcement officers and industry can easily determine not only pirated films, but also unclassified content. Government and industry are working hard together to find solutions to fight piracy and maintain a viable local film industry, introducing region coding exceptions, even in a limited way, is a retrograde step and one which sends the wrong message to consumers.

In addition, in light of the High Court's *Sony V Steven's* decision, AVSDA would strongly support a Government decision to amend the definition of a TPM under the Copyright Act to comply with Article 17.4 of the AUSFTA.

⁸ This view is also shared by the International Intellectual Property Alliance, who's view is that TPMs should be defined to extend to all access control technologies and not just those that prevent primary infringements.

AVSDA looks forward to answering any questions the Committee may have and responding to any specific exceptions sought.

Kind Regards

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