

*AUSTRALIAN
FEDERATION
AGAINST
COPYRIGHT
THEFT*

RECEIVED
21 OCT 2005
BY: LAA

Submission No. 39
Date Received

AFACT

in association with



Ph: 02-9997 8011
Fax: 02-9999 2466
Free Call: 1800 251 996
Email: info@afact.com.au
www.moviepiracy.org.au
P.O. Box 515, Mona Vale 1660

OCTOBER 21, 2005

AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT SUBMISSION TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS INQUIRY INTO TECHNICAL PROTECTION MEASURES (TPM) EXCEPTIONS

1. INTRODUCTION

- 1.1 The Australian Federation Against Copyright Theft Limited (**AFACT**) was established in 2004 by the Motion Picture Association (**MPA**), to protect the film industry in Australia from the adverse effects of copyright theft in all forms.
- 1.2 AFACT's principal objective is to work closely with industry, Government, police, customs authorities, educational institutions and the public in Australia to address copyright theft, and protect the interests of the film and television industry and Australian movie fans.
- 1.3 AFACT members include: Village Roadshow Limited; Buena Vista International Inc; Metro-Goldwyn-Mayer Studios Inc; Paramount Pictures Corporation; Sony Pictures Releasing International Corporation; Twentieth Century Fox International Corporation; Universal International Films Inc; Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.
- 1.4 Information about AFACT, the film industry in Australia, the problems of movie piracy and copyright theft is provided for the Committee's information in Annexure A to this submission.
- 1.5 AFACT appreciates the opportunity to present its views as the Committee examines the important issues raised by the Terms of Reference.

2. EXECUTIVE SUMMARY

- 2.1 Film copyright owners see the ability to control the rights granted to them by copyright laws as the most effective mechanism to protect against the illegitimate copying, distribution and importation of films. As producers, distributors and owners of copyrighted works, AFACT members have a significant interest in any proposed exceptions to the rights of copyright owners to protect their works in digital formats.
- 2.2 The use of TPMs is a key strategy used by film copyright owners to protect and enforce their copyright and to minimise the harm to the industry and consumers from copyright theft. TPMs enable copyright owners to both manage the access that is granted to films and to protect those films against infringement. The ability to protect products in digital formats is fundamental to the commercial decision to make these products available for distribution to consumers in digital formats, which provides consumers with greatly enhanced range of film products to the consumer and a wider range of choices and price points as to how those products can be consumed.
- 2.3 All forms of TPM used by the film industry are required to be protected by the definition of "effective technological protection measure" in the Australia-United States Free Trade Agreement (**FTA**).
- 2.4 In this submission, AFACT provides information about the rights given to film copyright owners, the strategies used to protect these rights, and the nature and function of the technological protection measures (**TPMs**) used as part of these strategies.
- 2.5 The submission also addresses the Committee's Terms of Reference and recommends a framework the Committee may choose to adopt in addressing its Terms of Reference. In particular, AFACT notes that in examining whether the use of a TPM creates an adverse impact on non-infringing uses of copyright materials, the Committee is also required to consider whether the introduction of any exception would impair the ability of copyright owners to protect their TPMs or achieve legal remedies against the circumvention of their TPMs.
- 2.6 AFACT submits that the Committee may find it useful to consider the policy principles adopted by the Australian Government in introducing the *Copyright Amendment (Digital Agenda) Act 2000* (**Digital Agenda Act**) and the approach of the United States Copyright Office (**USCO**) in its similar review.
- 2.7 It is clear from the Digital Agenda Act and the USCO approach that it is critical for the Committee to take into account the practical realities for copyright owners that flow from a decision to enable wide consumer access to a circumvention device or service. If this access cannot be practically constrained, the end result for copyright owners would be the practical equivalent of removing the legal protections for TPMs.
- 2.8 AFACT would appreciate the opportunity to comment on any specific proposals for exceptions that the Committee may wish to consider, in particular to provide input as to the likely impact on the film industry from the introduction of any exception.

3. THE RIGHTS GIVEN TO FILM COPYRIGHT OWNERS

3.1 The *Copyright Act 1968 (Cth)* (**Copyright Act**) grants film copyright owners three core sets of rights:

- to exclusively control copying, communication and public performance of their films;
- to prevent and control infringement by sale and distribution of pirated and counterfeited products (**Distribution Rights**);
- the right to control the importation of film products into Australia, including the right to determine the territories and timeframes in which films are distributed (**Importation Rights**).

These three categories of rights are referred to in this submission as Film Copyright Rights.

3.2 The importance to the film industry of being able to control and protect Film Copyright Rights has been expressly recognised by the Australian Parliament. In addition to controlling the making, sale and distribution of infringing copies, Parliament has also specifically recognised the right of film copyright owners to protect against the importation (including parallel importation) of infringing film products¹.

3.3 All three categories of rights fundamentally underpin the development, production, marketing, licensing and distribution of films and the success of the film industry both in Australia and internationally. The protection of all three sets of rights is the centrepiece of the film industry's anti-piracy and copyright control strategies.

4. STRATEGIES FILM COPYRIGHT OWNERS USE TO PROTECT THEIR RIGHTS

4.1 There are four main strategies used by film copyright owners to protect their rights:

- Enforcement of Film Copyright Rights via civil and criminal proceedings (in conjunction with police services and the Australian Customs Service);
- Global and Australian-based anti-piracy education and awareness initiatives;
- Contractual arrangements establishing legitimate manufacture, distribution and importation arrangements and governing the private use of film products; and
- Self-help measures, such as using electronic rights management information (RMI), digital rights management systems and TPMs to protect copyright, and to prevent and inhibit piracy and other forms of unauthorised distribution and importation.

The successful implementation of all four strategies is critical to the well being of the Australian and global film industries.

4.2 Information about AFACT's enforcement activities and anti-piracy initiatives is provided in Annexure A to this submission. However, AFACT would like to draw the Committee's attention to the efforts of Australian law enforcement agencies, who work hard to protect the film industry and the Australian public from criminals engaged in

¹ The Explanatory Memorandum to the *Copyright Amendment (Parallel Importation) Bill 2002*, paragraph 25 makes it clear that it will breach the Importation Rights of film copyright owners to import products that form the main business of the film and television industries – namely, full length feature films and products produced for television half hour segments or longer – that have been licensed for manufacture and sale in territories outside of Australia.

copyright crimes, particularly in relation to the wilful breach of Distribution and Importation Rights. AFACT and its members greatly value this assistance, and would not wish to see any exceptions to the TPM provisions that undermine the results being achieved by law enforcement agencies.

5. PURPOSE OF TPMS

5.1 The TPMs used by film copyright owners serve two important purposes:

- protection of copyright; and
- commercial management of copyright

Protection of Film Copyright Rights

5.2 The use of self-help measures, and particularly technological protections such as RMI and TPMs, is an important element of the broader strategy employed by film copyright owners to protect their products, enforce their Licensing, Distribution and Importation Rights, and identify and take action against pirate, counterfeit and parallel imported products (**Unlawful Products**) and to enable expansion into new markets and media. TPMs serve two important roles in protection. They assist in the prevention of copyright infringement in the first place, which has a secondary benefit of reduced enforcement costs for industry and Government, with less impact on public resources such as police and customs services and the courts.

5.3 The film industry places great importance on its ability to use technological controls to minimise and eventually prevent the piracy of its intellectual property. As an example of this commitment, the industry in the United States has recently established a non-profit research and development company called Motion Picture Laboratories Inc (MovieLabs). MovieLabs will be tasked with the development of new technologies to protect the distribution of films and other works, as well as to protect against the electronic theft of film products, particularly on the Internet. Projects envisaged by MovieLabs include developing technologies to detect and prevent camcorders from making pirate copies of films in cinemas, data network traffic management tools to better protect products from being unlawfully distributed on peer-to-peer networks, and client software detection tools.

5.4 The need to protect copyright owners from harm caused by the wide availability of circumvention devices and services to circumvent the legitimate TPMs used by copyright owners has been recognised by WIPO, international Governments in instruments such as the European Union Copyright Directive and by the Australian Government in the *Copyright Amendment (Digital Agenda) Act 2000 (Digital Agenda Act)*. It has also been formally recognised as an integral part of the agreement between the Australian and United States Governments in the FTA.

5.5 The wide availability of circumvention devices and services would not only lead to dramatic increases in the 'direct' infringement of owners' rights (for example, a dramatic increase in the making of 'pirated' copies of films), but would also dramatically undermine the industry's ability to control and monitor counterfeit products, and enforce and control Distribution and Importation Rights, as the identification, testing and analysis of TPMs encoded onto discs at the border is an effective way to enforce Importation and Distribution Rights.

Management of Film Copyright Rights

- 5.6 TPMs also play a critical role in the 'digital bargain' in which a regime was created in which copyright owners can make their works available in digital formats. In other words, the ability to protect products in digital formats is fundamental to the commercial decision to make these products available for distribution to consumers in digital formats. In this sense they provide an important means of managing copyright, and provide a wider range of choices at different price points and greatly enhanced range of film products to the consumer.
- 5.7 Until the comparatively recent introduction of new technologies such as photocopiers, video and DVD recorders and the Internet, copyright owners obtained significant protection from the fact that the means of making and disseminating copies of their works required significant financial or technical capabilities, or both, in order for reproductions of their materials to be made. In these circumstances, protection against unauthorised access by consumers to copyright materials was not a significant issue for copyright owners. However the widespread physical access to works and subsequent ability to copy and distribute, previously beyond the capability of the public, has now become an everyday occurrence.
- 5.8 Digital technology now allows consumers a simple, very fast way to make digital quality physical copies of copyright material, which can now be copied both via a fixed medium, such as in an optical disc, or from an electronic transmission. Digital technology, by allowing an efficient and almost perfect reproduction and easy communication, also allows the copyright owner to disseminate products in non-traditional forms. For example it allows a copyright owner to deliver the work to a user to enable it to be viewed only, or to be downloaded for a specific period, or to be downloaded and maintained indefinitely. A copyright owner can apply different price points to each of these actions and provide consumers with a range of flexible choices around their use and enjoyment of the film. This is of considerable benefit to both producers and consumers of digital products.
- 5.9 In order for these digital delivery models to be utilised it is vitally important that the copyright owner has the necessary control over access to their works, in order to protect their copyright. In this context, access control and copyright protection are synonymous. Through the use of access controls, copyright owners have been able to make more products available to consumers than ever before. Unless copyright owners can continue to protect these fundamental access codes, the significant benefits of digital technology, which enhances the consumer's ability to access material, will cease to be available.
- 5.10 This issue was addressed by the US Copyright Office in its notice of enquiry into the 'Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies' which was issued on 3 October 2005. In that paper the Copyright Office said:

'Another consideration relating to the availability for use of copyrighted works is whether the measure supports a distribution model that benefits the public generally. ... If there is sufficient evidence that particular classes of works would not be offered at

all without the protection afforded by technological protection measures that control access, this evidence must be considered.'

- 5.11 In assessing the value of technological protection measures, a useful question for the Committee to ask is whether 'but for' the operation of the technological protection measure, a product would continue to be made available in digital format.

6. CATEGORISATION OF TPMS

- 6.1 As noted above the FTA refers to an effective technological protection measure as one which:

- controls access to a protected work; or
- protects any copyright

- 6.2 However, as can be seen from the preceding section, in practice this dichotomy is difficult to follow, as TPMs rarely have a singular purpose or function.

- 6.3 A TPM which operates to prevent the unauthorised copying, communication, or re-distribution of a film made available to a consumer in a particular format (such as a DVD) protects copyright. However, it also is designed to prevent unauthorised access - a fundamental prerequisite to the protection of copyright. A TPM which prevents access (such as an access control on a film that can be downloaded over the Internet on a 'pay-per-view' basis or a DVD which contains regional coding) also protects copyright - as any breach of the access code to obtain unauthorised access will also generally infringe Film Copyright Rights.

- 6.4 It is therefore necessary in the vast majority of cases to view both access and copyright protection measures as necessary components of rights management systems which are crucial in the digital age.

7. THE COMMITTEE'S TERMS OF REFERENCE

- 7.1 The Committee's Terms of Reference require it to examine whether, in implementing the FTA TPM provisions, Australia should include any exceptions to the TPM provisions that would enable circumvention of access codes in limited circumstances.
- 7.2 AFACT submits that all forms of TPM used by AFACT members would be protected by the FTA. The FTA definition of an "effective technological protection measure" does not require that any access control measure that protects a copyright product, operates by itself to prevent the copying of a copyright work. For this reason the language of Article 17.4.7(b) of the FTA mean the decision in *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 is of marginal relevance to the questions that Committee has to answer. Rather, the FTA requires Australian copyright law to protect:

"... any technology, device or component that, in the normal course of its operation, controls access to a protected work ... or controls any copyright²"

² FTA Article 17.4.7(b)

- 7.3 In light of the above, AFACT submits that in applying its Terms of Reference, the Committee should proceed on the basis that the TPMs used by film copyright owners are:
- protected as "effective technological protection measures" for the purposes of the FTA;
 - primarily designed to control and enforce the Licensing, Distribution and Importation Rights granted to film copyright owners by the Australian Copyright Act; and
 - an integral part of the anti-piracy and copyright enforcement strategies used by the film industry to protect its products.
- 7.4 AFACT also notes that this is not an inquiry into the scope of the rights granted to copyright owners. Nor is this an inquiry into the merits of existing policy and enforcement decisions in relation to Distribution and Importation Rights. Rather, this is an inquiry in relation to the obligations in relation to TPMs contained in the FTA. Specifically, the Committee is required to assess whether there is a credibly demonstrated case for the introduction of any exceptions - in addition to those prescribed by the FTA - to the protections granted to copyright owners in relation to the measures used to protect their rights.

Article 17.4.7(e)(viii) of the FTA - Access Codes

- 7.5 The Committee is required to consider whether Australia should introduce any additional exceptions based on Article 17.4.7(e)(viii) of the FTA (the Article), which provides that Australia may introduce an exception to enable the use of a circumvention device to circumvent a TPM that is an access code, for:
- "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 can be credibly demonstrated in a legislative or administrative review or proceeding ..."*
- 7.6 The Committee is only permitted by the terms of the FTA to recommend exceptions to any TPM used by copyright owners that is an access code or process (**Access Code**)³. However, the Committee is not permitted to recommend an exception to the TPM provisions where the exception would:
- "... impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures"⁴.*
- 7.7 This means that in assessing whether any exception should be permitted to the TPM provisions regarding the Access Codes used by film copyright owners, the Committee must specifically consider whether to allow an exception would impair the ability of copyright owners to enforce their TPM rights or take action against the circumvention of any form of TPM.

³ See Article 17.4.7(a)(i) and 17.4.7(f)(i)

⁴ Article 17.4.7(f)

8. A FRAMEWORK FOR THE COMMITTEE'S INQUIRY

- 8.1 AFACT submits that the Article and the Terms of Reference require the Committee to address three key questions:
- whether there is a credibly demonstrated actual or likely threat to non-infringing uses from the TPM provisions required by the FTA and a particular TPM used by film copyright owners;
 - whether the non-infringing uses allegedly at threat relate to a "particular class" of copyright work or other subject-matter; and
 - whether any exception would impair the adequacy of the legal protection for TPMs, or the legal remedies against the circumvention of TPMs.
- 8.2 Recent enquiries by the United States Copyright Office (**USCO**) on a similar basis to the current inquiry may also provide a framework for the Committee in addressing these questions.

The USCO approach

- 8.3 The USCO was required by s.1201 of the Digital Millennium Copyright Act to recommend exceptions to the prohibition on circumvention of access control measures, in similar terms to the inquiry required to be performed by the Article and the Committee's Terms of Reference. The following principles can be distilled from the USCO's inquiries, and AFACT believes they would also usefully apply to the current review:
- The evidentiary burden of establishing a threat to non-infringing use lies with the person claiming the threat⁵;
 - In establishing a 'threat' to non-infringing uses, it is not sufficient to point to *de minimis* problems, isolated harm or mere inconvenience, and the person claiming the threat must show that there is no alternative means to pursue the non-infringing use⁶;
 - In evaluating claims of "likely" future impact, highly specific, strong and persuasive evidence is required⁷;
 - It is not permissible to classify a "particular class of work" by reference merely to the type of user or use⁸;
 - Ultimately, in assessing any harm, it is essential to balance the benefits of technological measures against any harm caused to users from their existence and the adverse effects any exemption may have on the market for or value of copyright works⁹.

⁵ Recommendation of the Register of Copyrights, RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention on Copyright Protection Systems for Access Control Technologies, page 10.

⁶ Ibid, page 11

⁷ Ibid

⁸ Such as by reference to use of a work for 'scholarly research' or by students, Ibid

⁹ Ibid, page 12

The Digital Agenda Act approach

- 8.4 The current inquiry and the implementation of the FTA TPM provisions must also be viewed in the context of previous consideration of these issues by the Australian Government at the time of introducing the Digital Agenda Act. At that time, the Australian Government carefully considered whether any exceptions could be justified to new provisions against the manufacture, supply and other activities in relation to circumvention devices. As part of the policy balance struck by the Digital Agenda Act, the Government recognised that to allow widespread exceptions to TPM provisions would make the provisions effectively inoperable, causing irreparable harm to copyright owners.
- 8.5 AFACT submits that the Digital Agenda Act policy balance can be distilled to the following principles:
- enabling private citizens to have general access to circumvention devices and services would make the TPM provisions in copyright legislation inoperable;
 - any individual access to circumvention devices and services must only be in circumstances where the nature of the copyright work inherently leads to a need to exercise a copyright exception (such as the need for error correction or security testing of computer software); and
 - if other public interest access to circumvention devices and services is to be granted, it should generally be given only via institutions such as libraries, archives and educational institutions for the public interest purposes of research and study, inter-library loan and preservation of manuscripts and artistic works
- 8.6 AFACT submits that these Digital Agenda Principles might also provide a useful reference for the Committee in responding to the Terms of Reference.

9. ASSESSING THE NEED FOR EXCEPTIONS

- 9.1 This submission will address the questions identified above for consideration by the Committee to support AFACT's view that there is not currently any justification for the introduction of any exceptions in addition to those specifically listed in the FTA. In looking at these questions, AFACT has found it useful to consider the approach of the USCO.
- 9.2 AFACT notes that in preparing these comments, in the absence of any specific proposals for reform it has been necessary to comment in the abstract. As such, AFACT has focussed on the approach it submits the Committee should take in addressing its Terms of Reference and some of the issues that may be raised by stakeholders identified in the Terms of Reference.
- 9.3 AFACT would appreciate the opportunity to comment on any specific proposals for reform contemplated by the Committee through the course of its inquiry.

10. QUESTION ONE – AN ACTUAL OR LIKELY THREAT TO NON-INFRINGEMENT USES?

10.1 AFACT notes the first four principles from the USCO's approach:

- that the evidentiary burden is on the person claiming that a TPM poses a threat to non-infringing uses,
- that highly specific, strong and persuasive evidence is required to establish that a TPM causes an adverse impact to non-infringing uses;
- it is not sufficient to point to *de minimis* problems, mere inconvenience or isolated harm; and
- any harm to non-infringing uses must be weighed against the harm to copyright owners if an exception were allowed.

10.2 AFACT submits these principles should be similarly applied in the current inquiry. The standards set out by the USCO are appropriate to ensure compliance with the provisions of the FTA and the requirement in the Article that any alleged harm to non-infringing uses must be "credibly demonstrated". In particular, this approach is consistent with the common principle in Australian copyright law that copyright policy must carefully balance the interests of copyright owners and copyright users.

10.3 TPMs are designed to prevent *infringing* uses of copyright material. For example, the majority of TPMs are designed to only operate to prevent users from doing activities in relation to a film that are prohibited by copyright law. TPMs are not designed to prevent legitimate uses of copyright material. Indeed, the use of TPMs facilitates access to products in new and consumer focussed formats. For the overwhelming majority of consumers in Australia, TPMs used by the film industry will have no impact on non-infringing uses at all.

10.4 AFACT acknowledges that the use of TPMs that include an aspect of region coding functionality may have some limited impact on consumers who wish to import legitimate products for private, non-commercial purposes from places outside Australia.¹⁰

10.5 This class of consumers is extremely small compared to the overall size of the Australian market. Further:

- any inconvenience to a limited sector of the Australian market should be considered against the majority of consumers for whom TPMs pose no threat at all to non-infringing uses;
- any inconvenience for a small class of consumers must be compared to the significant and serious harm posed to copyright owners if the primary technology used to control Distribution & Importation Rights were able to be circumvented; and
- products which are likely to be of interest to Australian consumers at large are generally released in Australia. As such, the class of consumers affected is likely to be very small.

¹⁰ AFACT notes that many imported products, particularly sourced by tourists in Asian markets are in fact pirate or counterfeit products and should be discounted for the purposes of this inquiry.

- 10.6 AFACT submits that any alleged harm to non-infringing uses must, in the language of the USCO, be properly considered to be *de minimis*, or of the level of 'mere inconvenience'. As a result, there appears to be no justification for a finding that a threat to non-infringing uses has been 'credibly demonstrated'.
- 10.7 This is particularly the case when *de minimis* harm to the public is balanced against the massive degree of harm that would be caused to copyright owners if any exceptions were to be introduced. This harm includes:
- inability to use self-help measures to protect Distribution and Importation Rights granted to the copyright owner;
 - increased difficulties in enforcement at the border (region coding in the disc assists in determining if the product is infringing in circumstances where the packaging itself is counterfeited);
 - undermining online business models and the ability to protect films in digital formats;
 - the lack of practical ability to confine use of circumvention devices and services to a small class of users – with the practical result of making the ability to circumvent universal and the TPM effectively inoperative.

11. QUESTION TWO – DO THE NON-INFRINGEMENT USES RELATE TO A "PARTICULAR CLASS" OF WORK?

- 11.1 AFACT notes that any exception to the TPM provisions regarding Access Codes permitted by the FTA must relate to a 'particular class' of works, performances and phonograms.¹¹ The USCO has interpreted this to mean that a 'particular class' must be based upon attributes of the works themselves, and not by reference to external criteria such as the intended use or uses of the work (eg, libraries or 'scholarly research').
- 11.2 In addition, the USCO suggested that a 'particular class' should generally be a subset of a category such as 'cinematograph film' or 'literary work'. It found that classifying a work solely by reference to the medium on which the works are distributed (eg, DVDs), or even the access control measures applied to the work is beyond the scope of the phrase 'particular class of work' as being too broad and not sufficiently descriptive of the particular non-infringing uses that it may be deemed necessary to protect.¹²
- 11.3 AFACT submits that the USCO approach is appropriate to be followed in Australia, given the harm to copyright owners that would be caused if widespread circumvention were permitted to occur. For example, any exception that was defined to apply to 'cinematograph films' would be the practical equivalent of undermining all TPMs used by film copyright owners.
- 11.4 AFACT also notes the decision by the USCO not to permit a 'particular class' to be defined by the nature of the users in question. AFACT strongly supports this approach, due to the practical difficulties of confining access to circumvention devices to the particular class. For example, how could any exception be practically confined

¹¹ AFACT notes that although films are protected as 'cinematograph films' in Australia, it clearly was intended to capture film as a 'work' in the FTA.

¹² *Determination of the Library of Congress and the Text of the Regulation*, Federal Register Vol 68 No 211, 31 October 2003, page 62012

to a class of consumers who have purchased legitimate product overseas for private and non-commercial use?

- 11.5 As the Digital Agenda Principles recognised, permitting access to some individuals is the equivalent of undermining the operation of all TPM provisions, given the 'multi-purpose' nature of many TPMs. The fact that the circumvention of one aspect of a TPM is likely to lead to the disabling of the aspects of TPMs that prevent illegitimate copying. In addition, in the context of digital distribution models permitted by digital rights management systems, there would be no practical means to protect the works online, which would remove the incentive for copyright owners to make their works available in digital formats, resulting in the inability of consumers to access products in the formats they are increasingly finding most convenient.

12. QUESTION THREE – WOULD AN EXCEPTION IMPAIR LEGAL PROTECTION/REMEDIES FOR TPMS?

- 12.1 The Digital Agenda Principles recognise that to preserve the effective operation of the TPM provisions, it is generally necessary to prohibit the use of circumvention devices and services by private citizens. This is because it is practically impossible to enforce any exception for individuals, and the effect of any exception is tantamount to giving a circumvention device or service to every person in Australia. The effects on copyright owners and consumers if such a move were to occur would be catastrophic. In the particular case of online and other digital delivery platforms such as digital television, the removal of the ability to protect works in digital format would strike at the heart of the 'digital bargain' by which copyright owners are willing to allow their works to be distributed online.
- 12.2 As noted above, AFACT submits that the Committee should recognise that to allow access to circumvention devices for some classes of users in circumstances where it is not practically possible to confine the use of a circumvention device or service to that class is likely to breach Article 17.4.7(f) of the FTA in that it would make the legal remedies available to copyright owners in relation to TPMs and circumvention devices and services practically ineffective.

13. CONCLUSION

- 13.1 AFACT and its member companies rely on TPMs in protecting against film copyright infringement. To allow the widespread use of circumvention devices and services would lead to massive increases of piracy and digital copyright infringement, and resultant devastating harm to the Australian and international film industries, through reduced ability to enforce their rights, reduced revenue streams and subsequent negative impact on investment and film production capabilities.
- 13.2 AFACT submits that a careful analysis of the Committee's Terms of Reference, the FTA, the Article or the approach taken by the USCO does not support the introduction at this time of any exceptions to the TPM provisions other than those specifically listed in the FTA. If the Committee believes that the new provisions required by the FTA may have some adverse impact on some public interest uses, AFACT submits that the Committee should seek specific information from industry on the likely impact of the specific exception under consideration.

AFACT appreciates the opportunity to present its views to the Committee, and would appreciate the opportunity to answer any questions the Committee may have, either in person or at public hearings.

Adrienne Pecotic
Executive Director
Australian Federation Against Copyright Theft

21 October 2005

ANNEXURE A

The Australian Federation Against Copyright Theft

The Australian Federation Against Copyright Theft [AFACT] was established in January 2004 by the Motion Picture Association (MPA), to protect the film industry in Australia from the adverse effects of audio visual copyright theft. AFACT states as its principal objective to work closely with industry, government, law enforcement and educational institutions in Australia to address copyright theft and protect the interests of the film and television industry and Australian movie fans.

AFACT is affiliated with MPA offices around the world also charged with the monitoring, investigation and reporting of incidents of movie counterfeiting and unauthorized copying of copyright and trademark films, often referred to by the generic term 'movie piracy'. The MPA members include the major film studios Disney/Buena Vista, MGM, Paramount, Sony/Columbia, Twentieth Century Fox, Universal and Warner Bros.

AFACT is also associated with Australian based film producers, distributors, and exhibitors as well as the video and optical disc replicators and distributors. Village Roadshow and Roadshow Films Pty Ltd joined the Federation in February, 2004.

AFACT collates information on the incidence of movie counterfeiting and unauthorized copying of copyright and trademark films in Australia and operates an 1800 free call number to receive reports of alleged infringing activity from members of the public. AFACT investigates alleged illegal activities and initiates deterrent warnings, civil actions and referral of matters to police as necessary.

The Film Industry in Australia

Three main industry sectors in Australia rely on the trade in cinematographic films and television programs [films] produced in Australia and overseas [principally the U.S. and U.K.] to sustain their economic activity, and employ approximately 50,000 Australians. This trade is made possible through the legal framework and protection of intellectual property in the films comprised in the Copyright and Trade Mark legislation. The Australian Bureau of Statistics describes these sectors as Film and Video Production Services, Film and Video Distribution Services, and Television Services.

Film and Video Production consists of people in businesses/organizations mainly engaged in the production of films on film or digital media [including tape and disc] for theatre or television projection. This class also includes such services as casting, film editing and titling. Film and video production is a collaborative exercise requiring a large capital investment employing many people in development and production of the original film. The investors in the film and the principal creative personnel such as Producer, Director, Script Writers, Actors and Composers obtain income from the distribution, sale, exhibition and televising of each authorized copy of the film in Australia and around the World.

Film and Video Distribution consists of people in businesses/organizations mainly engaged in leasing or wholesaling films on film or digital media to organizations for exhibition, broadcast and sale. This class also includes agents mainly engaged in leasing

and wholesaling films to organizations, retailers and exhibitors. This sector obtains income by retaining a portion of the sale price of the cinema ticket, video or DVD, or by charging the consumer a fee for rental or viewing of authorized copies of the film.

Information collated by the Australian Video Software Distributors Association, Australian Video Rental Retailers Association and collated by the Australian Film Commission indicate there are approximately 2,500 video/DVD rental stores in Australia, 90% of which are operated by small businesses and franchisees. In 2000 Australian Bureau of Statistics (ABS) noted this sector comprised 11,615 Australians 75% of whom were casual or part time employees.

Information from the ABS and the Motion Picture Distributors Association of Australia [MPDAA] indicate that in 2000 there were 1,540 cinema screens operated in Australia with 35% operated by independent exhibitors. The cinema exhibition sector employed 9,282 Australians 81% of whom were casual employees.

Movie Piracy and Copyright Theft

Following is an outline of the current status of movie piracy and copyright theft of cinematographic film in Australia. Changes to Copyright law that facilitate private copying of film can be expected to aggravate the losses already being suffered by the industry due to piracy, and both complicate and compromise the enforcement efforts of State and Federal Police in this area.

Value of the Illegal Trade in DVDs in Australia & Loss to Legitimate Industry

Most recent industry estimates¹³ calculate that movie piracy cost the film industry in Australia in excess of \$400 million in potential revenue in 2004 across all industry sectors. Losses comprise lost cinema ticket revenue, video/DVD sale and hire, television subscription and viewers, loss of concession sales [chips, drinks etc.] and tax revenue. In addition there is loss from unauthorized copies of films copied, distributed and downloaded by the internet without manifesting in optical disc or video tape copies of the films.

The illegal distribution of unauthorized copies of movies rose from 4% in 2000 to around 10% of the legitimate market in 2004. Police across Australia have more than doubled the number of illegal discs seized in 2004 compared to 2003. Discs comprise mostly DVD-R copies as DVD-R technology has increased its share of the pirate optical disc market. Australian Customs seized over 40,000 pirate DVDs imported into Australia in 2004, a 185% increase compared to the 14,000 seized by Customs in 2003.¹⁴

Global Growth In Illegal DVD Manufacture & Trade

The Motion Picture Association [MPA] operates anti-piracy offices in 13 countries in the Asia/Pacific region and the member companies estimated their loss in excess of US\$896 million in potential revenue regionally in 2004. MPA reports that in 2004 their operations investigated more than 25,500 cases of movie piracy and assisted law enforcement officials in conducting nearly 12,000 raids. These activities resulted in the seizure of

¹³ Australian Film Industry Anti-Piracy Forum July 2005

¹⁴ AFACT records

approximately 49 million illegal optical discs, and the initiation of more than 8,000 legal actions.

Statistics maintained by AFACT and previously by the AFVSO indicate that unauthorized copies of films seized throughout Australia increased from 5,650 in the year 2000 to 61,550 in 2003. The seizure figure more than doubled in 2004 to 148,937 with first quarter figures for 2005 already amounting to 77,644. This is a physical count undertaken by investigators and staff authorized by and under the control of AFACT during or shortly after each police or industry operation, together with seizure figures provided by Australian Customs Services.

Further statistics maintained by AFACT building on those previously maintained by AFVSO since 1982 calculate a percentage rate of counterfeit and unauthorized material in the market place. This historically has been evaluated from volume of product seized by Police, together with voluntary surrenders and observations, compared to genuine product distributed to retailers. Of more recent times, the number of substantiated complaints from consumers has been part of the evaluation.

It is accepted that this is not an exact science, however the figure of 4% and less, was fairly consistent from 1990 to 2001. Taking into account the increase of product seized in 2003 and 2004, AFACT estimates a 10% piracy rate as at end 2004. AFACT anticipates this percentage loss may rise when calculated as part of an independent research survey due for completion in late 2005.

The increasing prevalence of copyright crimes correlates with the increasing popularity of the DVD format with the Australian consumer, and the increasing tendency for the Australian consumer to seek to buy DVD copies of films to own at home, as well as continuing to rent films on DVD format from video stores. The increasing prevalence also correlates with a large increase in the number of unauthorized films on DVD format being produced in the Asian region and exported around the world including Australia.

Manifestation of Illegal DVD Manufacture & Trade

A sharp increase in the prevalence of movie piracy offences followed the introduction of optical disc technology, in particular the Digital Versatile Disc [DVD] and the Recordable Digital Versatile Disc [DVDR]. Statistics maintained by AFACT and the AFVSO confirm this increase.

AFACT records indicate there is an increasing trend since 2002 for unauthorized copies to be imported from Asia in the DVD format [as observed by Australian Customs Services] or illegally downloaded from the internet. In many instances this involves Films that have not yet reached the cinemas in Australia and are several months prior to legitimate video or DVD release. These are then copied onto DVDR format for illegal distribution in Australia.

During 2004, MPA Regional Office in Singapore concluded that Melbourne was host to the largest concentration of market stalls selling counterfeit copies of Films under one roof in the Asia Pacific Region. The number of market stalls trading in counterfeit DVD Films at the relevant location rose from a low of 15 to over 135 prior to being addressed by joint AFP and Victoria Police enforcement action in November 2004.

In areas where Police and industry representatives have had success in reducing the overt prevalence of the crime at local markets, manufacturers and distributors of illegal discs have moved to covert operations frequently distributing lists of film titles through closed networks of customers by email or workplace, and selling illegal copies of films burned to order on DVD recordable discs.

Organized Crime

Despite the recent increases in this crime in Australia, the MPA reports that Australia maintains one of the lowest piracy rates in the Asian region. However due to the high profit on unauthorized copies of DVD films sold in Australia, the legitimate industry suffers one of the highest revenue losses in the region and Australia is observed to be a prime export target for unauthorized copies of films from Malaysia, China, Indonesia and Taiwan.

Due to the large profit margins, organized crime groups have moved into the film piracy racket with the distribution and sale of counterfeit DVD's become increasingly better organized. The move into the counterfeit industry by such organized crime groups has seen them use threats of physical violence, damage industry investigators property, issue death threats against industry investigators as well as attempt to bribe industry investigators to stay away from certain markets and sales areas.

Effect of Illegal DVD Manufacture and Trade on the Legitimate Industry

AFACT is contacted by video store owners, cinema owners, producers and other persons involved in the film industry on a weekly basis concerned that film piracy is seriously affecting their business and they are suffering losses they cannot sustain. Those most seriously affected are operating small businesses, especially in regional and suburban areas where film piracy, especially in local markets, has become entrenched.

The damage to the industry is particularly acute when legitimate traders rely on the sale or exhibition of high volumes of 'blockbuster' new release movies to sustain their cash flow and revenues – exactly the film titles most targeted for illegal manufacture and trade. The ready availability of unauthorized copies of these titles both from criminal hard copy sources and over the internet to consumer homes, often prior to legitimate first release, is of material impact on the revenue stream in Australia to small and large businesses alike, within the film industry and the retail sector.