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**Electronic Frontiers Australia Submission to the House Standing
Committee on Legal and Constitutional Affairs Inquiry into Technological
Protection Measures Exceptions**

About EFA

Electronic Frontiers Australia Inc (EFA) is a non-profit national organisation concerned with the protection and promotion of the civil liberties of users of computer based communications systems and of those affected by their use. EFA was established in 1994, is independent of government and commerce, and is funded by membership subscriptions and donations from individuals and organisations with an altruistic interest in promoting civil liberties.

Intellectual property issues have increasingly become the concern of computer and Internet users, and developers of related technologies. EFA members and supporters come from all parts of Australia and from diverse backgrounds. They have a common interest in ensuring that copyright law, particularly as it applies in the digital environment, provides an appropriate balance between ensuring protection for copyright developers and freedom for copyright users and other developers.

Introduction

EFA believes that copyright law is and should be for the purpose of promoting creativity, innovation and development. The traditional means for achieving that end has been the granting of economic incentives through copyright ownership. It should be borne in mind that the "making and enforcement of law are not ends in themselves"¹ and that rights granted under copyright law should be treated as *means* and not as *ends*.

There is no doubt that sometimes copyright can have the effect of stifling rather than promoting creativity and of excessively regulating normal consumer behaviour. As such, copyright law has long recognised a range of exceptions to the enforcement of these rights.

The effect of Technological Protection Measures ('TPM')², and the 'anti-circumvention' laws which seek to protect them, is to render the exercise of these exceptions to copyright³ unlawful. The resultant balance of the copyright system is tilted dramatically in favour of copyright holders, and allows them to 'opt-out' of

¹ Mason P, speaking extra-judicially at the 3rd Annual Conference of the Association for Compliance Professionals of Australia Inc, 23 September 1999:

< http://www.lawlink.nsw.gov.au/sc/sc.nsf/pages/sp_230999 >

² For the purposes of this submission, the term 'TPM' will be used generically to refer to the class of technologies, regardless of whether any specific example has or would fall within the meaning of the term under the law of any country.

³ Including, but not limited to fair dealing.

exceptions to copyright, and to impose artificial and anti-competitive controls on the market for their products.

What are TPMs in the real world?

One of the more well-known TPMs is the **Content-Scrambling System ('CSS')** which is used to encrypt DVDs. CSS uses a weak 40-bit proprietary encryption algorithm, which was famously reverse-engineered in 1999 by a Norwegian teenager Jon Johansen, who produced 'DeCSS', one of the first 'circumvention devices'.

CSS attempts to ensure that the content of DVDs can only be decrypted and viewed using hardware devices or software produced by authorized manufacturers – that is, manufacturers who have licensed the CSS algorithm⁴ and who pay royalties for their use of it.

The CSS algorithm and its licensing system allow for a number of anti-consumer and anti-competitive restrictions on the use of DVDs. Perhaps the most famous restriction is the DVD 'region coding' system, which divides the world into a number of geographic regions. The United States of America lies within region 1, Australia lies within region 4.⁵ A DVD sold (or intended to be sold) in one region cannot be viewed or played using DVD players in a different region.

This effectively prohibits parallel imports and forces Australian consumers to buy DVDs locally, even if they could legitimately obtain the same DVDs from overseas much cheaper.

Other anti-consumer restrictions on the use of DVDs include the ability for manufacturers to prevent viewers from skipping, rewinding, or fast-forwarding through sections of DVDs, which typically include lengthy copyright warnings (sometimes in multiple languages), but can extend to promotional clips for Dolby Digital sound technologies, and could be applied to any scene in a motion picture. The capability exists to block consumers from fast-forwarding the 'boring' parts of a movie, or promotional advertising displayed before the movie, and to watch it from beginning to end, without fast-forwarding or skipping the scene.

Although CSS purports to be a technology to control or prevent the illegal copying of DVDs, it controls access to DVD content, not the *copying* of DVDs. The CSS-encrypted contents of a DVD can be duplicated verbatim, without decryption, onto new DVDs, which will then function exactly as the original DVD does. Because of a recent High Court decision, it is unclear as to whether CSS would qualify for protection as a 'technological protection measure' under Australian law.

⁴ From the DVD Copy Control Association.

⁵ Along with Central and South America, and Mexico.

Another TPM used on DVDs is the technology known as **Macrovision**.⁶ Macrovision is a mandatory feature in DVD players, and cannot be disabled.⁷ Macrovision acts by inserting signals into the video signal produced by DVD players, in a way which does not affect viewing on a normal television, but which causes severe interference and picture degradation if the video signal is recorded using a VCR or other device. This degradation effectively prevents the copying of material contained on DVDs to other media, whether for legal or illegal purposes.

SafeDisc, produced by Macrovision Corporation, is a TPM technology designed to prevent the copying of CD-ROM discs by including deliberately corrupted information onto protected CD-ROMs, which cannot be read or copied using commonly available software and hardware.

SafeDisc (and other similar TPMs) are currently used to protect many computer games and other software, and prevents legitimate purchasers of these products from making the backup copy they are entitled to make under s 47C of the *Copyright Act* to protect their investment in the software.

Typically, computer games require the CD-ROM from which they were installed to be inserted into the computer to run the game. This increases the amount of handling of the original CD-ROMs required, and the potential for the CD-ROM to become scratched and unusable. In that situation, the customer's investment in purchasing the product is wasted, and their only lawful recourse is to purchase another copy of the game at normal retail prices.

The High Court decision in *Stevens v Sony*

On 6 October 2005,⁸ the High Court of Australia handed down its decision in the case of *Stevens v Kabushiki Kaisha Sony Computer Entertainment* ('*Stevens*').⁹ This decision is highly relevant to the issues within this submission, and to anti-circumvention laws in general.

In *Stevens*, the High Court unanimously overturned the Full Court of the Federal Court of Australia, and restored the judgment of the trial judge, who held that the TPM used in the Sony Playstation was not a 'technological protection measure' within the meaning of s 10(1) of the *Copyright Act 1968* (Cth).

Central to this decision was the fact that the TPM used within the Playstation did not prevent an infringing copy from being made, it merely prevented such an

⁶ Produced by Macrovision Corporation.

⁷ Both requirements of the CSS licensing scheme.

⁸ The day before the deadline for submissions to this inquiry.

⁹ [2005] HCA 58.

infringing copy from being played on an unmodified Playstation – that is, it was an access control.

Stevens was decided on the law as it stood as of 4 March 2001. Significant changes have been made to the *Copyright Act* since that time, most notably as part of the implementation of the Australia-US Free Trade Agreement ('the FTA') in 2004.¹⁰

The effect of TPMs and anti-circumvention law on exceptions to copyright

The *Copyright Act* contains a number of exceptions to copyright, including for 'fair dealing'¹¹ and for making backup copies of computer programs.¹² These exceptions exist to balance the needs of users of copyright material against the rights of the owners of copyright in that material.

However, there are no corresponding exceptions to the anti-circumvention provisions in the *Copyright Act*. This allows copyright holders to 'opt-out' of these exceptions merely by applying some type of TPM to their work.

As a practical matter, these exemptions *do not apply* to works protected by a TPM.

The effect of the FTA-mandated changes

The FTA specifically requires Australia to introduce anti-circumvention protection for TPMs which control access to a protected work, such as the TPM within the Sony Playstation, or the CSS algorithm used on DVDs.

The effect of anti-circumvention protection for access controls was discussed by Kirby J in the *Stevens* judgement:

It could interfere with the fair dealing provisions in Div 3 of Pt III of the Copyright Act and thereby alter the balance struck by the law in this country. ...[it] would enable rights holders effectively to opt out of the fair dealing scheme of the [Copyright Act]. This would have the potential consequence of restricting access to a broad range of material and of impeding lawful dealings as permitted by Div 3 of Pt III of the Copyright Act. The inevitable result would be the substitution of contractual obligations *inter partes* for the provisions contained in the Copyright Act - the relevant public law. Potentially, this could have serious consequences for the operation of the fair dealing provisions of that Act.¹³

¹⁰ *US Free Trade Agreement Implementation Act 2004* (Cth).

¹¹ *Copyright Act 1968* (Cth) ss 40-43(2), ss 103A-103C.

¹² *Copyright Act 1968* (Cth) s 47C.

¹³ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58, [209]-[210] (Kirby J).

The scope for Article 17.4.7(e)(viii) exceptions

Article 17.4.7(e)(viii) of the FTA allows for exceptions from the anti-circumvention provisions 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 is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding.

In summary, any such exemptions must:¹⁴

- be confined to acts of circumvention of access control measures
- be limited to activities where the prohibition on circumvention has a credibly demonstrated likely or actual adverse impact on non-infringing uses of copyright material
- relate only to a particular class of copyright material; and
- not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures.

Also, any such exception granted would apply only to the circumvention itself, and would *not* apply to the provisions prohibiting the dealing with circumvention devices – meaning that even where an exception is granted, people may be unable to acquire the means to use that exception.

EFA's position on these exceptions

EFA believes that the anti-circumvention provisions in the current Australian law, and which Australia is committed to introducing under the FTA, have been introduced without proper consideration for balancing the rights of users of copyright material against the rights of copyright holders.

It is EFA's position that to protect the existing exceptions under the *Copyright Act*, there should be an exception from anti-circumvention provisions for the undertaking of any act which is not itself an infringement of copyright. There should also be an exception to allow persons to deal with and acquire circumvention devices for this purpose.

¹⁴ 'Review of exceptions for circumventing technological protection measures' information paper, page 2.

Obviously, exceptions of such width are not permitted by the FTA. It is EFA's position that the scope within the FTA for the creation of new exceptions to the anti-circumvention provisions are insufficient to properly protect the rights and legitimate interests of Australian users of copyright material.

For these reasons, it is EFA's submission to the committee that when giving consideration to proposals for new exceptions under article 17.4.7(e)(viii):

1. Exceptions should not be limited to persons in a particular class, eg researchers or the vision impaired;
2. Exceptions should be allowed for the circumvention of TPMs where the TPM includes or protects anti-competitive features, such as DVD and Playstation region coding;
3. Exceptions should be allowed that will protect existing specific exceptions under the *Copyright Act*, such as the exception to make a backup copy of a computer program contained in s 47C of the Act;
4. Exceptions should be allowed that will protect existing exceptions of more general application, including fair dealing;
5. Exceptions should be allowed that will promote the rights and legitimate interests of users of copyright material; and
6. To the greatest extent possible, the relevant provisions of the FTA should be construed in a way which will protect existing exceptions to copyright, and the rights and legitimate interests of users of copyright material.

Sincerely,

Dale Clapperton
Board Member and Convenor of the Intellectual Property Committee
Electronic Frontiers Australia