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Interactive Entertainment Association of Australia

**Submission to the House of Representatives Standing Committee on
Legal and Constitutional Affairs
Inquiry into Technological Protection Measures (TPM) Exceptions**

The Interactive Entertainment Association of Australia (IEAA) is the Australian not-for-profit trade association dedicated to serving the business and public affairs needs of digital entertainment companies that are responsible for sales, marketing, distribution and development of computer and video games software, hardware and accessories across all digital delivery platforms.

IEAA members are the leading organisations in the interactive entertainment industry in Australia and comprise:

- | | |
|------------------------|-----------------------------------|
| Activision | QV Software |
| Atari Australia | Red Ant |
| EIDOS Interactive | Sony Computer Entertainment |
| Electronic Arts | Take 2 Interactive |
| Microsoft Australia | THQ Asia Pacific |
| Mindscape Asia Pacific | Ubisoft Entertainment |
| Nintendo Australia | Vivendi Universal Games Australia |

This submission will provide the Committee with information about the Australian interactive entertainment industry (including details of the problem of piracy in Australia), a suggested approach for the Committee's Terms of Reference, and support for the IEAA's view that Committee should not recommend the introduction of any further exceptions to the TPM provisions.

1. Executive summary

- (a) Games copyright owners have the right under copyright law to control and enforce the unlawful copying, communication, distribution and importation of their works. The ability to protect these rights is of critical importance, particularly given the enormous threat to the industry from games piracy. Indeed, the Australia – United States Free Trade Agreement (FTA) does not permit any exception to the TPM provisions that would impair the ability of copyright owners to legally protect their TPMs.
- (b) Copyright law requires policy makers to balance the interests of copyright owners and users. In the context of the current inquiry, this balance means that any impact on non-infringing uses from the existence of TPMs should be balanced against the harm that would be suffered by copyright owners if TPMs were able to be circumvented.
- (c) TPMs are an essential part of the strategies used by copyright owners to both manage who may lawfully access games products (particularly in the online context), and to control piracy by protecting and enforcing their rights. All TPMs used by games copyright owners are required to be protected by the terms of the FTA.

- (d) As TPMs are designed primary to protect and control legitimate copyright rights, the impact to non-infringing uses from their existence is minimal. In contrast, the harm to games copyright owners from circumvention of these TPMs would be enormous, and would threaten the viability of the business models used by the industry. Games piracy would be rampant.
- (e) The IEAA encourages the Committee in considering its Terms of Reference to carefully balance any claimed threats to non-infringing uses against the harm that would be suffered by copyright owners if their ability to enforce their rights using technological means were undermined.
- (f) The IEAA believes there is insufficient evidence of an actual or likely adverse impact on non-infringing uses of games products to justify the introduction of new exceptions to the TPM provisions required by the Free Trade Agreement.

2. The interactive entertainment industry in Australia

The interactive entertainment industry in Australia offers four main categories of product offering:

- games designed to be played on consoles (such as Sony's PlayStation 2^R, Microsoft's Xbox^R or Nintendo's GameCube^R);
- games designed to be played on hand-held devices (such as Nintendo's GameBoy^R and new, network capable devices such as Nintendo's DS and Sony's PlayStation Portable device, as well as wireless telephone handsets;
- games designed to be played on PC or Macintosh; and
- games designed for networked gaming over computer networks.

There is a current trend towards the popularity of online games. An online game can be played over the internet, either through a console, wireless hand-held device or PC. Most, if not all, new games are released with some online network capabilities.

The traditional business model based on selling console based games is evolving with the proliferation of broadband and wireless Internet access, which supports online and networked gaming. New online business models include allowing consumers to make retail purchases online, subscription fee models which allow game play on certain sites, 'pay-per-play' which allows consumers to enjoy a 'one-off' experience, and interactive advertising. New technology and high speed Internet access create new markets and support games development but they also make unauthorised copying of material much easier.

Although interactive gaming is a relatively new phenomenon it is growing fast. The total market value of interactive entertainment in Australia increased by 43.5% between 2001 and 2003 and continues to grow. The Australian computer and video games industry grew by 5% in 2004, and research undertaken by Electronic Arts suggests that 53% of Australians now regularly play computer and video games. More information about the nature and growth of the Australian industry is provided at Appendix A to this submission.

Copyright and in the interactive entertainment industry

The interactive entertainment industry depends on strong copyright and other intellectual property protection as its lifeblood. The IEAA believes that the growth of the Australian industry can only become stronger as copyright laws increasingly recognise the needs of copyright

owners to enforce and protect their rights using a range of enforcement and technological protection strategies.

The Copyright Act protects games copyright owners in a number of ways:

- providing owners with the exclusive right to control the copying, communication, publication and adaptation of their products;
- providing rights to control the distribution of legitimate products, and to take action against the distribution and sale of pirate and counterfeit products;
- providing rights to prevent the importation of pirate and counterfeit products;
- allowing enforcement agencies and police services to take action against the manufacture, distribution and importation of infringing products; and
- providing protection for the technological measures used by copyright owners to protect, manage and control these core copyright rights.

Each of these rights is a core copyright right relied on by games copyright owners to produce, market and protect their interactive entertainment products. They form the basis of enforcement and anti-piracy strategies employed by the IEAA and the worldwide games industry to minimise and ultimately prevent the counterfeiting of computer and video games. They also underpin the technological protections used by the industry to protect these core copyright rights.

The removal or weakening of any of these rights will have a significant detrimental impact on the games industry and its ability to control and enforce its copyright, and lead to increased levels of piracy in Australia. Detailed information of the problem of piracy in Australia is provided in Appendix A to this submission. The harm to the games industry from piracy should not be underestimated, and the IEAA submits that the harm to copyright owners from any exception that would allow circumvention of TPMs should be carefully considered by the Committee in making its recommendations as any exceptions would greatly exacerbate the piracy problem in Australia.

Strategies used to protect copyright and combat piracy

It is important to appreciate that in the digital environment, strategies to protect the integrity of copyright are of critical importance to copyright owners. Copyright is no less of a private property right than ownership of a chattel or land. However, the ease with which copies of copyright works can be made in the digital environment has the capacity to damage the integrity of that private property right.

Analogies based on non-digital copyright products (such as books or LPs) are inapt in the digital environment. Prior to digitisation being widespread, copying of products was generally difficult and time consuming and resulting in an imperfect copy. That is not the case in the digital world. Perfect copies of copyright materials can be made and disseminated instantly. Yet the skill, labour and creative effort required to produce copyright works and other subject-matter is no less than it was prior to the digital age. Those who invest in the creation of copyright products in digital formats have identified in TPMs a means of preserving the integrity of the copyright subsisting in those products.

The interactive entertainment industry uses a number of strategies to protect and enforce its copyright rights and combat piracy:

- enforcement actions - eg, civil actions against persons who make, distribute or import infringing copies of copyright-protected games;

- enforcement partnerships - eg, working with police services and customs officials to track, identify and bring criminal actions against copyright pirates;
- education initiatives - eg, advertising and promotions educating consumers about copyright, and warning against the consumer risks and impact from purchasing counterfeit products;
- practical enforcement measures - eg, using a mixture of contract and TPMs to try and pro-actively manage the threat from piracy and prevent people from making and using infringing copies of games and circumventing the TPMs that protect network gaming and other online business models.

In addition, the industry is becoming increasingly reliant on its ability to use TPMs to inhibit the creation of infringing products and to prevent any infringing copies from being used by consumers.

The ability to enforce copyright rights against the circumvention of TPMs has become - and will continue to be - vital to the enforcement of the industry's core copyright rights. The IEAA submits that the Committee must consider the impact on the industry's enforcement initiatives - including its work with police services and the Australian Customs Service if TPMs were allowed to be circumvented.

3. TPMs used by IEAA members

The different types of digital entertainment products offered by the games industry were outlined in part 2 of this submission (ie, console, hand-held device, PC online and networked). TPMs are used by IEAA members to protect and encourage investment in copyright products, and are the 'digital linchpin' of the rights protection strategies used by the industry. TPMs are particularly important in relation to wireless, networked and online distribution of copyright works, as without a TPM, access to these works could not be safely provided online.

The IEAA submits that the broad nature of the products and protections used by the industry may not be commonly understood, due to the media attention that has been focussed on one particular type of TPM used by the industry. As such, the IEAA will both explain how the types of TPMs used by games designed to play on consoles operate and provide information about other forms of TPMs used for different product distribution channels.

Examples of TPMs applied to interactive games

Games discs - whether for computer or console use - are modified CD or DVD discs, or other forms of proprietary disc designed to operate on a particular type of console. The information on them is protected by patented technology, and in the case of DVDs, by separate DVD disc technology that prevents the copying of the DVD disc. In relation to games designed to be played on consoles or computers, the TPMs used are embedded in both the game disc and the console.

A simplified explanation of what occurs between games discs and games consoles is set out below:

- A TPM is embedded into the game disc. The TPM in the disc is an embedded code and/or manufacturing anomaly, which contains information that verifies that the disc has been legitimately produced¹.

¹ The embedded code in some TPMs also contains information about the particular television standard the disc is designed for (eg, a PAL television standard territory or an NTSC television standard territory)

- One type of TPM used by the industry operates so that the embedded codes included in the game disc cannot be read by a computer or a CD or DVD "burner". As a result, the embedded codes or anomalies cannot be copied by using a burner or computer with a CD-R or DVD-R writer.
- Another type of TPM used by the industry operates so that the games disc cannot be read by a standard CD-R or DVD-R writer², which prevents the entire disc from being copied.
- A TPM is embedded into an integrated circuit or other memory "chip" that is placed on the circuit board of a console during manufacture. This "chip" contains information about authentication and encryption protocols used on games that are designed for the console, which enables it to recognise legitimate games.
- When a game is loaded into a console, the TPM in the console can read and verify the TPM embedded in the game disc.
- The verification process usually consists of a series of automated 'questions and answers' from the console to the disc. The first series of 'questions' is generally related to the authenticity of the disc itself (ie, to establish that it is a legitimate product with the appropriate embedded TPM from the manufacturer). The majority of 'questions' asked of the disc are designed to identify its legitimacy. There are some questions which also 'question' the disc in relation to the territory for which it was manufactured.
- As the embedded codes on a legitimate disc cannot be read by burners and CD/DVD writers, the TPM embedded in the console will not receive the appropriate "answers" from a pirated game. As such, the console will not operate to enable a pirated game to be played.

Other types of TPMs include:

- the inclusion of embedded physical characteristics into CD formats that cause parts of the game to copy in poor quality or with parts of code missing (designed to make infringing copies unattractive or inoperative);
- the Dynamic Network Authentication System³, a copy protection and security system which verifies the TPMs embedded in games and consoles; and
- SecuROM, which controls and prevents physical copying of a game from a CD or DVD to a CD, DVD or hard drive.

It is important to note that as well as controlling and managing access to copyright products, these forms of TPM also have a function of directly controlling copying of games, or preventing this copying from occurring.

Circumvention of TPMs

There has been much publicity about the ability to use modification devices, or "mod chips" to circumvent the operation of the TPMs used by games manufacturers. However, it is important to note that there are also many other types of TPMs used by the industry, which can also be circumvented by various methods, including software code 'hacks' that are made available on the Internet or on peer-to-peer networks. Any circumvention of these types of TPMs would have a debilitating effect on the industry's ability to prevent games piracy.

In relation to the specific type of circumvention device that has received the most media attention in Australia, a mod chip is an integrated circuit chip that can be installed into a games

² The Committee should note that some sophisticated DVD writers may be able to copy the disc, but they cannot replicate the copy coding needed for the console to recognise the disc as genuine.

³ A Sony TPM

console to enable the user to bypass the manufacturer's chip containing the TPM. They are usually installed by dismantling the console, possibly unsoldering components on the circuit board, and installing the mod chip onto the circuit board. Other types of circumvention devices, commonly called 'soft mods', are able to reprogram the security system to achieve a similar effect.

The mod chip is designed to 'fool' the console into thinking it is receiving legitimate "answers" when the games disc is interrogated by the legitimate TPM when the disc is inserted into the console. The mod chip intercepts the signals from the embedded codes on the game, and sends signals to suggest that the disc that has been inserted is a genuine disc.

It is the experience of IEAA members that the majority of people who install mod chips do so to bypass the "legitimate product" embedded codes, to enable pirated discs to be played on the console. The IEAA is not aware of any significant percentage of mod chip users who do so to bypass purely the secondary "territory" embedded codes.

It is also important to understand that the TPM in a games console is primarily designed to interrogate and establish the legitimacy of discs, and to prevent the playing of pirated discs on the console. A court in the United States has found that this type of TPM as used by Sony was a TPM that controlled access to a system to protect a registered copyright, and circumvention was likely to be prohibited under the DMCA (the case considered an application for an injunction)⁴.

The IEAA submits that it is critical for the Committee to recognise that due to the variety of types of TPM used by the interactive entertainment industry it is not possible to simply refer to a single type of TPM used by the industry in considering the Terms of Reference. In addition, the range of TPMs used will increase as the lines 'blur' between products that can be considered to be 'games' and multimedia. For example Sony's PlayStation Portable and upcoming PlayStation 3 platforms and Microsoft's soon to be released XBOX 360^R represent the convergence of film, games, computer software and sound recordings in the entertainment offerings available to consumers. In addition, many product releases in the film industry now contain interactive game elements, and many games products now are accompanied by feature films or film sequences. All TPMs used to protect these games products and converged entertainment products have the purpose of controlling access to the product and protecting the copyright rights of the copyright owner.

As such, in assessing whether a sufficient case has been made for any exception, it is important that the Committee precisely define the TPM that is allegedly causing harm to a non-infringing use. For example, it would not be practically possible for the Committee to generally refer to 'TPMs used to protect computer and video games' as this would capture a wide range of TPMs that operate in different ways and protect copyright using different means. The IEAA submits that advocates of an exception should be required to precisely define the TPM that is the subject of any concern.

4. An approach to the Terms of Reference

The Committee's Terms of Reference require it to consider whether any additional exceptions should be introduced to the FTA TPM provisions regarding the use of a circumvention device or service to circumvent an access code.

Article 17.4.7(e)(viii) of the FTA sets the framework for the Committee's inquiry, allowing exceptions to enable:

⁴ *Sony Computer Entertainment America Inc v Gamemasters* 87 F. Supp. 2d 976 (1999 U.S.)

"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 ..."

Article 17.4.7(f)(i) of the FTA, in conjunction with Article 17.4.7(a)(i), place additional constraints on the Committee's deliberations. The FTA only permits an exception in relation to a TPM that is an access code (ie, not a TPM used as a measure to protect any copyright). In addition, the FTA prohibits any exception that impairs:

"the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological protection measures" (Article 17.4.7(f)(i))

"Effective technological protection measure" is defined by Article 17.4.7(b) to mean any technology, device or component that in the normal course of its operation controls access to a protected work, performance or phonogram or other subject-matter, or protects any copyright.

The IEAA submits that these FTA provisions should govern the Committee's consideration of its Terms of Reference, rather than the existing provisions of the Australian Copyright Act (and in particular the existing definition of "technological protection measure"), which the IEAA submits do not currently reflect the terms of the FTA and will need to be amended.

The IEAA submits that the FTA provisions require the Committee to consider four tests in determining whether to recommend any new exception:

- Does the TPM in question fall the definition of "effective technological protection measure" in Article 17.4.7(b) of the FTA? (**TOR Test 1**)
- If the technology in question is a TPM that is an access code, does the contemplated exception relate to a "particular class" of work or other subject-matter? (**TOR Test 2**)
- Has an actual or likely impact on a non-infringing use been credibly demonstrated? (**TOR Test 3**)
- Would allowing the exception impair the effectiveness of legal protection and remedies against the circumvention of TPMs? (**TOR Test 4**)

The IEAA submits that ultimately, TOR Tests 1 and 4 require a factual inquiry and determination by the Committee. In addition, following the *Stevens v Sony* decision, in applying TOR Test 1, the Committee must consider whether the language of Article 17.4.7(b) requires the technological protections used by the games industry to be treated as TPMs.

TOR Tests 2 and 3 require the Committee to consider and form a view on the appropriate interpretation of the language of Article 17.4.7(e)(viii), and the evidentiary burden and standards that will be required for stakeholders to make a case for or against the inclusion of any new exception to the TPM provisions regarding access codes.

The IEAA submits that the Committee may obtain some helpful insights on the possible application of TOR Tests 2 and 3 from the experience of the United States Copyright Office and Register of Copyrights in their determination of a similar provision to Article 17.4.7(e)(viii) in the *Digital Millennium Copyright Act (DMCA)*.

The IEAA understands that the United States approach to this exercise has been largely adopted by the Government of Singapore in its announcement of a similarly structured inquiry into TPM exceptions due to be conducted in 2006.

Applying TOR Tests 2 and 3 - relevant overseas experience

The United States Copyright Office (**Copyright Office**) looked at each element of the language of Article 17.4.7(e)(viii) in its deliberations in 2000 and 2003. It has also recently announced that it will follow the same approach in its 2005 rulemaking procedure⁵.

The IEAA submits that due to the similarity of the investigations required to be conducted, the Committee should largely adopt the analysis of the Copyright Office in its own approach to the Terms of Reference, and particularly TOR Tests 2 and 3.

As a general comment, the IEAA notes that the Copyright Office found that the evidentiary burden in relation to establishing the need for any exception under Article 17.4.7(e)(viii) should lie on the person claiming that the exception should be introduced⁶. The IEAA agrees with this approach, and submits that it should be accepted in the current inquiry.

Impact on non-infringing uses

The Copyright Office followed three key principles in applying this legislative requirement:

- proponents must be able to establish a substantial threat to non-infringing works. Any evidence in support must be 'highly specific, strong and persuasive'⁷;
- de minimis problems, isolated harm and mere inconvenience is not sufficient to be a credible demonstration of an actual or likely impact on non-infringing uses;
- the continued availability of works in unprotected formats is sufficient to refute a claimed exception as there is no general right for users to access works on the device or machine of the user's choosing⁸.

Importantly, the Copyright Office also specifically required its assessment of any harm to non-infringing uses to be balanced with and assessed against any harm to copyright owners if circumvention of TPMs were to be permitted, by assessing the impact of circumvention on the market for and value of copyright works⁹:

*'In sum, the adverse effects on the non-infringing use must be balanced with the effect of circumvention on the market for or value of the copyright works...
...Given the potential for harm to the market for or value of a work if it should be redistributed over the Internet or placed on a peer-to-peer file sharing service, an exemption for a class of works cannot be taken lightly since the result may be that the incentive to distribute the work in digital formats may be diminished.'*¹⁰

⁵ Library of Congress copyright Office Notice of Inquiry. *Exemption to Prohibition of Copyright Protection Systems for Access Control Technologies*, October 3 2005 <http://www.copyright.gov/fedreg/2005/70fr57526.html>

⁶ Recommendation of the Register of Copyrights in RM 2002-4; Rulemaking on Exemptions from Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies (**2003 Recommendation**), page 10

⁷ 2003 Recommendation at page 11

⁸ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 65 Fed. Reg. 64, 555 9October 27, 2000) (**2000 Recommendation**), page 64569

⁹ 2003 Recommendation at page 12

¹⁰ 2003 Recommendation at page 114 and page 133

The IEAA submits that these considerations are equally applicable in the Australian context, and should be considered by the Committee in assessing the Terms of Reference and specifically its approach to Test 3.

Particular class of work

The Copyright Office also identified four core principles to govern its consideration of the 'particular class' requirement required by TOR Test 2:

- A 'particular class of works' must be based on the attributes of the works or other subject-matter themselves¹¹;
- It is not permissible to classify a 'particular class' by reference to the intended use or user of the works;
-
- Defining a class of works by reference to a copyright subject matter such as literary works or computer software is too broad. The Copyright Office found that "circumvention of all literary or audio-visual works or even all computer programs and video games could cause significant harm without some limiting principle"¹².

Again, the Copyright Office found that in assessing whether a case had been made out for an exception in relation to a particular class of works, the decision maker must take into account the adverse impact the exception would have on the market for or value of the copyright works protected by the TPM, and define the 'particular class' accordingly¹³.

In a specific finding regarding the games industry, the Copyright Office found that:

*'...a decision to tailor the class carefully is supported by clear evidence in the marketplace that computer programs and video games are a significant part of the works distributed unlawfully over the Internet and through the reproduction and distribution of unauthorised copies. Sensitivity to such widespread illegal trafficking is obviously critical to this rulemaking process, since these concerns formed the impetus for providing copyright owners with the protections afforded by the [TPM provisions]'*¹⁴

The IEAA submits that these considerations are equally applicable to the Australian context, and encourages the Committee to adopt the approach of the Copyright Office in its deliberations and in particular, in relation to TOR Test 3.

5. TOR Test 1 - assessing the technologies used by games copyright owners

Article 17.4.7(b) defines a TPM as:

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

The Committee will be required to determine whether the technological protections used by the games industry "technological protection measures" for the purposes of the FTA. The IEAA submits that the answer to this question must be 'yes'.

¹¹ 2003 Recommendation at page 11

¹² 2003 Recommendation at page 62

¹³ 2003 Recommendation at page 12

¹⁴ 2003 Recommendation at page 62

The FTA requires the protection of any technologies that are either:

- (a) measures that are used to control access to a work or other subject-matter - or Access TPMs; or
- (b) measures used to protect any copyright - or Copyright TPMs.

The Committee will be required to determine whether the TPMs used by the games industry are "effective technological protection measures" for the purposes of the FTA. All games produced by IEAA members are protected by copyright, and all TPMs used by the games industry control access to the work and protect that copyright. As such, the IEAA submits that all technologies used by games copyright owners to protect their works must be considered to be "effective technological protection measures" for the purposes of the FTA.

As the Committee would be aware, the *Stevens v Sony* decision¹⁵ found that the now superseded PSONe TPM was not a TPM as currently defined in the Australian Copyright Act on the basis that it was found not to directly 'prevent or inhibit' a copyright infringement. However, the IEAA submits that this result cannot be sustained in accordance with Australia's obligations under the FTA as there is no requirement in the language of the FTA that an Access TPM be linked to any purpose of protecting copyright, or preventing or inhibiting an infringement of copyright. Rather, the only limitation placed on the Access TPMs protected by the FTA is that the measure must control access to a protected work or other subject matter¹⁶.

As a result, the High Court judgment in *Stevens v Sony*, dealing as it did with technology that is now outmoded, and a statutory regime that does not reflect Australia's treaty obligations under the FTA, should be treated as largely irrelevant for the Committee's present purpose. The IEAA submits that the only relevance of the case is that it highlights the gap between the existing provisions in the Copyright Act and those required by the FTA¹⁷.

6. TOR Test 2 - a 'particular class' of work or subject-matter?

As the Terms of Reference do not refer to any specific proposal for reform, it is difficult for the IEAA to comment in the abstract about exceptions that may be proposed by stakeholders in relation to a particular class of works that may include works or other subject-matter owned by game copyright owners.

As a result, the IEAA may take the opportunity to provide further information to the Committee in response to specific proposals or claims made through the course of the Committee's inquiry.

The IEAA notes its comments above in relation to the approach of the US Copyright Office in defining a particular class of work or other subject-matter. Specifically, the Copyright Office found that it was too broad to identify a copyright category such as computer software or a

¹⁵ *Stevens v Kabushiki Kaisha Sony Computer Entertainment* 2005 HC 58, 6 October 2005

¹⁶ As opposed to, for example, controlling access to non-copyright products such as printer cartridges or electric garage door openers (see the rejection of these technologies as Access TPMs by US courts *Lexmark v Static Controls Corp* - 387 F3d 522 (6th Cir 2004); *Chamberlain Group v Skylink Technologies* - 381 F3d 1178 (Fed Cir 2004); *Storage Tech v Custom Hardware* - 2005 US App LEXIS 18131 (Fed Cir Aug 24,2005).)

¹⁷ The IEAA also notes for the Committee's benefit that due to changes to the Copyright Act and developments in technologies used by the games industry since the *Stevens v Sony* case was commenced, that despite recent media reports, the Committee should not consider that it is the case that it is currently legal under Australian law to deal in devices and services designed to circumvent the technological protections used by the games industry.

cinematograph film as a "class of works" for the purposes of any TPM exception, due to the substantial harm that would be caused to copyright owners.

The IEAA also notes the broad range of TPMs used by the interactive entertainment industry. As discussed above, the IEAA submits that it is appropriate that any proponent of an exception to the TPM exceptions for a particular class of work also be required to specifically refer to the particular TPM alleged to cause the alleged harm.

The IEAA submits that it would not be appropriate for the Committee to contemplate an exception that applied to any or all TPMs used by games copyright owners. This would have the effect of allowing circumvention of all TPMs, irrespective of whether they operated on consoles, were embedded in game storage devices or operated to manage access and payment for networked and online game products. The IEAA urges the Committee to take great care to ensure that the TPMs that underpin the varied business models used by sectors of the games industry are not undermined.

The IEAA would also strongly encourage the Committee to reject any proposals that would effectively apply to all TPMs used by a particular copyright industry sector. For example, computer, video and networked games can be classified as both 'cinematograph films' and 'literary works' (computer programs) under the Copyright Act. Any exception allowed to either of these broad categories of copyright subject-matter would encourage a significant increase in piracy activities across a wide range of copyright products, and cause serious and irreversible damage to the enforcement activities of many copyright owners, including those enforcement activities conducted in conjunction with public authorities such as the Australian Federal Police and the Australian Customs Service.

7. TOR Test 3 - adverse impact to non-infringing uses?

Again, in the absence of specific proposals for reform, it is difficult for the IEAA to provide meaningful comments to assist the Committee in its inquiry. However, the IEAA notes that one of the categories of activity listed for potential consideration by the Committee in its Terms of Reference is any activities conducted in relation to so-called "region coding" of digital technologies.

The US Copyright Office required any harm to non-infringing uses to be balanced against the harm that would be caused to copyright owners if an exception were to be granted. The IEAA submits that this balancing approach should be adopted by the Committee in applying Test 3 of the Terms of Reference. The IEAA believes that this approach is very consistent with the approach traditionally adopted in Australia, which is to balance the rights of copyright owners and users in making copyright policy decisions.

The IEAA submits that the Committee should undertake a 'balancing act' in assessing whether any harm caused to non-infringing uses by a particular TPM outweighs the harm caused to copyright owners if an exception to the TPM provisions were to be introduced.

Assessing any harm to non-infringing uses

The IEAA acknowledges that there may be arguments put to the Committee in relation to the possible impact of the TPMs used on games consoles for consumers that have purchased legitimate discs overseas. As such, the IEAA recognises that some stakeholders may allege that this aspect of the industry's copyright control measures may have some adverse impact on non-infringing uses.

The IEAA submits that the class of consumers who may be affected in this regard would be extremely small. Australian consumers can play legitimately acquired discs in Australia from over 100 countries that use the PAL television system - including New Zealand, the United Kingdom, the European Union and the Middle East). Any consumer who purchases discs on overseas travel to these countries will experience no problem in attempting to play the overseas purchased disc on an Australian games console.

The only class of consumers who may be affected in this regard would be those who have travelled to a region which uses the NTSC television standard. As games consoles are coded in relation to the television standard used in the territory, there will be some limited impact for purchases made in these territories. The IEAA notes that there is also nothing to prevent consumers from purchasing hardware from jurisdictions to enable the discs to be played.

The IEAA draws the Committee's attention to the finding of the US Copyright Office in this regard, in relation to the requirement that the harm to non-infringing uses be substantial, and more than 'de minimis', isolated, or at the level of mere inconvenience. Further, any inconvenience or harm to a small class of users must be balanced against the harm to the copyright owners if circumvention of TPMs were permitted.

The US Copyright Office specifically looked at the issue of TPMs on consoles and DVD players that contain elements of region coding technology, and specifically region coding used in console-based video games. In relation to the territorial aspects of the TPMs used by the games industry in console-based games, the US Copyright Office specifically examined whether these had any adverse impact on non-infringing uses in its 2000 and 2003 rulemaking processes, and found that any claims of harm to non-infringing uses could not be supported by any substantial evidence.¹⁸

The IEAA submits the minimal level of harm to non-infringing uses caused by the type of TPM used in games consoles must be weighed against the harm to copyright owners if games console TPMs, or games TPMs in general, were able to be lawfully circumvented.

The US Copyright Office looked at this issue and reached a very definite conclusion in relation to content stored in DVD format:

*'Where the harm is a mere inconvenience experienced with an unknown - but apparently small - quantity of available.....titles and an exemption might entail allowing circumvention of the access control contained on a majority of DVDs, the balance weighs against an exception. The benefit to users is the avoidance of a mere inconvenience. The harm, on the other hand, would be to threaten the security of the DVD format.'*¹⁹

In exercising the 'balancing act' in relation to region coding, the Copyright Office found that:

- Territorial coding of audiovisual works on DVDs serves a legitimate purpose as an access control²⁰;
- The use of region coding encourages the distribution and availability of digital audiovisual works, including games²¹;

¹⁸ See submission of the International Intellectual Property Alliance to the current review for a more detailed analysis of the Copyright Office's findings

¹⁹ 2003 Recommendation at page 114

²⁰ 2000 Recommendation at page 64569

²¹ 2000 Recommendation

- The TPMs used by copyright owners, including game copyright owners, have only a de minimis impact on non infringing use, due to the numerous other options available for individuals seeking access to foreign content²²;
- There are "relatively inexpensive options", other than circumvention through which members of the public may access and view out-of-region products²³;
- The small number of consumers affected and the ready availability of other mechanisms to view out of region products (eg, on a computer) renders allegations of adverse effects mere inconveniences²⁴.

As such, the Committee found that there was no evidence of real harm to non-infringing uses and that any harm that could be shown did not outweigh the harm caused to copyright owners from an exception.

The IEAA submits that the same considerations apply in Australia, and that there is insufficient evidence available of widespread harm to non-infringing uses from the existence of the games industry's TPMs to justify an exception to the TPM provisions in accordance with the FTA.

8. TOR Test 4 - impairment of legal protection or remedies?

The IEAA submits that even if the Committee were to contemplate introducing a limited exception to the TPM provisions to address the situation of 'out-of-jurisdiction' consumer purchases in relation to a particular type of TPM, such an exception would not be permitted by Article 17.4.7(f)(i) of the FTA which provides that an exception is not permitted if it would impair the ability of copyright owners to achieve legal remedies in relation to their TPMs and any circumvention of those TPMs.

The IEAA submits that it would not be practically possible to:

- (a) limit any exception to a class of consumer who could establish that they had purchased legitimate material from a foreign jurisdiction;
- (b) limit the exercise of that exception purely to region coding elements of the TPM, and to protect the copyright protection elements of the TPM;
- (c) prevent individuals from playing pirated discs on consoles that had been modified in accordance with the exception;
- (d) prevent individuals from using a circumvention device or service to break the TPMs on locally acquired products; and
- (e) prevent individuals within that class of consumer from distributing the circumvention device to individuals outside that class of consumer.

In addition, allowing a small class of consumers to obtain a circumvention device for region coding purposes would also enable those same consumers that had acquired the circumvention device to freely copy and acquire infringing versions of the disc in the knowledge that their consoles would now treat those infringing discs as legitimate.

²² 2000 Recommendation

²³ 2003 Recommendation pages 120-124

²⁴ 2003 Recommendation at page 123

In short, the practical consequences for the industry would be extremely negative, and the ability of copyright owners to protect the integrity of their rights using TPMs would be practically and effectively undermined as legal remedies in relation to circumvention devices and services would be for all practical purposes removed. The IEAA submits that such an outcome is at odds with the plain language of the FTA and cannot be justified on any basis.

The IEAA refers the Committee to the policy deliberations undertaken by the Australian Government at the time of introducing the Digital Agenda Act. At that time, the Government considered whether to introduce wide spread exceptions to the new provisions giving copyright owners the rights to enforce circumvention activities in relation to their TPMs. In formulating its 'permitted purpose' exceptions, the Government declined to introduce exceptions for activities that could be considered for 'entertainment' purposes. Further, the Government ensured that public interest access to research, study and educational material could only be obtained via institutions such as schools and libraries. The IEAA understands that this was in part due to a recognition that to allow individuals to have widespread individual access circumvention devices or services would be the equivalent to undermining the operation of the new TPM provisions.

The IEAA submits that it is not practically possible to limit the use of a circumvention device or service to a particular class of person. As such, any exception contemplated in relation to access to circumvention devices or services for games TPMs for a small class of consumers would be the practical equivalent of making those circumvention devices or services available to the world at large. The IEAA submits that this would be a result fundamentally inconsistent with Australia's obligations under the FTA.

9. Conclusion

Strong TPM provisions are essential for copyright owners to protect their copyright, to facilitate effective copyright enforcement strategies and the prevention of piracy. The TPMs used by the interactive industry are designed to protect copyright rights, to inhibit the ability of users to make pirated copies of games products and to ensure that there are significant impediments to the use of unlawful copies.

The IEAA does not believe that the terms of the FTA permit any additional exceptions to be introduced in relation to the TPMs used by the games industry to protect their products. In addition, the IEAA draws the Committee's attention to the widespread and serious harm that would be suffered by the industry if exceptions to the TPM provisions were allowed and games piracy were permitted to increase.

The IEAA strongly requests the Committee to consider this submission and protect the interests of Australia's developing games industries.

The IEAA would be happy to provide any further information that may assist the Committee in its inquiries. The IEAA would also be happy to attend any public hearings to answer any questions the Committee may have about this submission.

A handwritten signature in black ink, appearing to read 'Chris Hanlon', is written over a horizontal line.

Chris Hanlon
Chief Executive Officer
Interactive Entertainment Association

21 October 2005

Appendix A - The interactive entertainment industry in Australia and the problem of piracy

A. The Australian industry

In 2003 the total value of the Australian interactive entertainment market was estimated to be AUD\$796 million, with \$462 million representing games software and \$334 million for hardware such as consoles and peripheral devices. This represents a spend by Australian consumers of \$2.05 million per day, or \$100 per household per year. In 2004, the Australian industry generated sales of AUD\$787 million.

In terms of both consumer appetite and games development, Australia is a key player in the global games industry. Australian interactive games developers are increasingly achieving international recognition for being sophisticated, dynamic and at the forefront of technological and conceptual advancement. Employment in Australia's interactive entertainment industry is growing, along with increased amounts of international investment. Australia has over 40 games development companies, that in the past 20 years have created over 200 titles. Annual export revenues from the Australian games industry are AUD\$100 million, making this an important emerging industry.

B. The nature of piracy in the games industry

Counterfeiting - or piracy as it is commonly called - is the unauthorised duplication of a product protected by one or more intellectual property rights. In the Australian computer and video games industry, piracy commonly occurs in two forms.

- Game discs are illegally copied and "burnt" to a CD or distributed online, eg via a peer-to-peer network;
- Game consoles are "mod-chipped". This involves modifying the printed circuit board in a games console and installing a device to circumvent the technological protection measures built in to the console;
- Access codes are 'hacked', to enable consumers to avoid paying subscription fees or 'pay per play' charges.

The impact to copyright owners from the use of circumvention devices such as password hacks or mod chips is that they can no longer prevent the use and playing of pirate games or recoup the charges necessary to sustain online business models. The wide availability of mod chips is the biggest threat to the games industry and will lead to a significant increase in the value and use of pirated products, leading in turn to increased piracy rates in Australia and internationally.

Despite the positive growth for the emerging Australian interactive entertainment industry, piracy remains a significant threat. The results of an AC Nielsen survey conducted as part of the Allen Consulting Group research showed that 18% of Australian would knowingly purchase pirated goods if they were slightly cheaper than the original product. This rises to 40% if the goods are 75% cheaper and almost 50% if the product were free. Up to 17% of households had knowingly purchased pirated computer or video games.

Given that most pirated games sell for as little as 15% of the price of a legitimate game, piracy levels cause a serious threat to the industry's ability to recoup its game development costs and generate a normal return on its investments. The industry needs to rely on strong enforcement provisions in copyright legislation and the legal protection of TPMs to manage the significant threat from games piracy.

To date, the industry has responded to the impact of piracy by investing around AUD \$1million per annum and conducting its own investigations into counterfeiting and other forms of games piracy. This typically involves setting up a database of suspects, matching information to identify

large piracy suspects and collecting evidence with a view to initiating a civil action or criminal prosecution.

In the period from mid-1999 to the end of 2003, around 3,500 suspects were identified, 1,500 investigations were conducted and 150 civil actions and 30 criminal prosecutions were commenced. 15% of all suspects were directly involved in installing and/or selling products (such as 'mod-chips') used to circumvent the TPM copy controls used by copyright owners to protect their works. This investment is maintained by IEAA members each year as the piracy problem continues to significantly impact business.

C. The cost of piracy for computer and video game companies

Piracy is not a victimless crime and it is now acknowledged to be a serious problem in Australia and internationally. In 2003, the Allen Consulting Group released a report "*Counterfeiting of Toys, Business Software and Computer and Video Games*" that quantified the costs of piracy in Australia. A copy of this report is provided with this submission for the Committee's reference.

The costs of piracy in Australia were conservatively identified by Allen Consulting Group as follows:

- Lost gross sales from counterfeiting cost the industry around \$100 million per annum.
- Each year, computer and video game suppliers lose \$21.8 million in profit due to counterfeiting
- Each year, computer and video game retailers lose \$4.3 million in profits due to counterfeiting
- This represents the loss of 200 full and part time jobs, often for young Australians
- The value of brands is diminished. Legitimate IP holders have enormous investments in brands, people and distribution systems that are eroded by the activities of counterfeiters.

A recent "*Piracy Study*" by the Interactive Data Corporation (IDC) commissioned by the Business Software Alliance (BSA), May 2005 found that for every two dollars' worth of software (including games software) purchased legitimately, one dollar's worth was obtained illegally. This represents a significant loss of revenue for games companies and associated industries.

The same study actually showed that piracy levels in Australia were increasing. A Global Piracy League Table contained in the study showed that piracy levels in Australia in 2003 were estimated at 31%, with estimated losses of US\$341M. In 2004, the estimated piracy level had increased to 32% of the total market, with estimated losses of US\$409M. A copy of this study is provided for the Committee's information.

D. The cost of piracy for consumers and society

In addition to the piracy costs to the games industry, piracy also has a detrimental impact on Australian games consumers. For example, consumers are frequently misled at the point of purchase. The two most common complaints from consumers who have unwittingly purchased a pirate game are that the product either will not load on the consumer's games console or computer, or that the purchased product contains material that is totally unrelated to what is represented on the product's cover. It is not uncommon for piracy to be uncovered when consumers seek a refund from legitimate game companies for faulty product that they did not realise was actually a pirated product.

It is also now clearly recognised by law enforcement officials that other illegal activities go hand-in-hand with copyright piracy in all its forms, but including games piracy. Well documented raids in Australia have found that game piracy provides the cash flow to subsidise other crime, including credit card fraud, identity fraud, vehicle re-birthing and the distribution of pornography.

Piracy also has significant impacts on legal protections for consumers, such as Australia's classification system. Pirated discs do not generally comply with classification schemes designed to protect and inform consumers making product selection choices. Circumvention of region coding technologies also impairs the effective operation of the classification system, allowing games classified in other countries to be played in Australia. This is particularly important in situations where products may have been classified as unsuitable for children in Australia, but that are unclassified or of a lower classification standard in other countries.

E. The cost of piracy for Governments

Piracy is also becoming a critical issue for Governments around the world. In the Australian context, piracy levels can have a direct impact on the economy and Government revenues. For example, the Allen Consulting Group Report found that a one third reduction in counterfeiting (over 5 years) in the Australian toy, software and video games industry would result in a GDP gain of \$41 million per year and a real government tax revenue gain of \$34.4 million per year.

A 2003 IDC economic impact study commissioned by the BSA concluded that lowering piracy by 10 percentage points over four years would add more than one million jobs and US\$400 billion in economic growth worldwide.

The impact of piracy levels and international perceptions in relation to intellectual property enforcement can also have an impact on investment flows into Australia, and specifically to investment in Australian copyright related industries such as the interactive entertainment sector. This has been recognised by Government funded inward business attraction agencies like *Invest Australia*, which points to the critical need for strong copyright laws and enforcement to underpin inward investment in Australia.