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Australian Government
Office of Film and Literature Classification

 Committee Secretary
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

By email: laca.reps@aph.gov.au

Submission to the inquiry into technological protection measures exceptions

Thank you for the opportunity to make a submission to the Committee.

Summary of submission

The Office of Film and Literature Classification (the OFLC) requires an exception to the restriction on using anti-circumvention devices.

The exception we seek is to facilitate classification under the Classification Act and related legislative instruments and needs to encompass the classification functions of the Classification Board, the Classification Review Board and the OFLC.

Although the exception we seek is specific to classification functions, its wording should be sufficiently broad to cover emerging technologies such as HD DVD and blu-ray.

The Office of Film and Literature Classification

The Office of Film and Literature Classification is a Commonwealth statutory agency that supports the Classification Board (the Board) and Classification Review Board (the Review Board). The Board administers the national classification scheme including the classification of sale or hire films (DVDs and videotapes) and computer games¹ before their release to the Australian market.

¹ Computer game is defined in section 5A of the *Classification (Publications, Films and Computer Games) Act 1995*:

- (1) A computer game is a computer program and any associated data capable of generating a display on a computer monitor, television screen, liquid crystal display or similar medium that allows the playing of an interactive game.
- (2) A computer program, data associated with a computer program or a computer program and any associated data that:
 - (a) is capable of generating new elements or additional levels into a game (the original game) that is a computer game under subsection (1); and
 - (b) is contained in a device separate from that containing the original game;is also a computer game.

The national classification scheme commenced on 1 January 1996 and is a co-operative arrangement between the Commonwealth, States and Territories. By virtue of this arrangement:

- the Commonwealth is responsible for making classification decisions
- States and Territories are responsible for enforcing classification decisions and preventing access to unclassified material under complementary State and Territory legislation.

The *Classification (Publications, Films and Computer Games) Act 1995* established the Classification Board and the Classification Review Board. The Board makes initial classification decisions and there is an avenue of review to the Review Board in certain circumstances.

Classification decisions are made by applying the Classification Act, the National Classification Code and the Guidelines for the Classification of Films and Computer Games.

Submission

The OFLC is an Australian government agency that currently enjoys the benefit of the broad statutory licence in section 183 of the Copyright Act which extends to using circumvention devices to access and copy material.

We understand that changes to the Copyright Act resulting from AUSFTA will mean that government agencies will no longer be able to circumvent technological protections on copyright material unless there is a relevant specific exception or an additional exception is created.

The OFLC currently circumvents technological protection measures for the purpose of its **classification functions** under the Classification Act. The relevant classification functions are:

1. Classifying DVDs and videotapes
2. Classifying computer games
3. Classification training.

1 Classifying DVDs and videotapes

Before DVDs or videotapes may be sold or hired in Australia, they must be classified by the Classification Board.

Local film distributors submit DVDs and videotapes to the OFLC for classification. The Classification Board makes its classification decision after viewing the material.²

We also receive applications for classification from federal and state law enforcement agencies.³ These applications are for law enforcement purposes and we received 1,444 enforcement applications in 2004-2005.

² With interactive films, the Board may require the applicant to demonstrate the film.

³ Section 22A of the *Classification (Publications, Films and Computer Games) Act 1995*.

Many DVDs submitted for classification are not in Region 4 format and we view this material by using multiregional DVD players and DVD region free software (DVD43 and DVD Genie).

In some circumstances there is a right of review to the Classification Review Board from a decision of the Classification Board. The Review Board conducts a merits review of the Board's decision which means the Review Board views the DVD or videotape before reaching its own decision on the appropriate classification for the DVD or videotape.

2 Classifying computer games

As with DVDs and videotapes, computer games may not be sold or hired in Australia unless they are classified by the Classification Board.

In some cases, local games distributors submit computer games for classification accompanied by a recommendation of an authorised assessor. Authorised assessors make their recommendation after playing the game.

The OFLC trains authorised assessors but they are generally employed by distributors. Classification training is a prerequisite to appointment as an authorised assessor under the Classification Act.⁴

The Classification Board makes its classification decision after playing the game or having the applicant demonstrate the game play. If the application includes an authorised assessor's recommendation, the Classification Board takes the recommendation into account but may still need to play some or all of the game.

There is no regional coding for PC games but there is for other formats, for example, Xbox and PlayStation2. We have de-bug units to play these games for classification purposes.

Applicants often submit NTSC or gold master versions of games for classification. These games cannot be played with the standard consoles for the Australian market. If the OFLC does not already have a console that plays the game, the applicant supplies us with the appropriate console. The OFLC also has a number of de-bug units to enable it to play computer games submitted for classification.

In rare instances, the Classification Board obtains the opinion of an expert consultant to verify the contents of a computer game, for example, where there may be 'hidden' code.

⁴ The OFLC's Director may appoint an authorised assessor 'only if the person has completed training by the Office of Film and Literature Classification in the making of assessments' (section 17(5) of the *Classification (Publications, Films and Computer Games) Act 1995*).

3 Classification training

To fulfill our statutory classifications functions, we provide classification training to:

- Board members
- Review Board members
- authorised assessors⁵
- staff assessors
- relevant OFLC staff
- Australian Federal Police
- State police⁶
- Customs officials⁷
- Australian Communications and Media Authority's Online Investigations Team
- film, publications and computer games clients
- other industry groups.⁸

The OFLC compiles training material for its classification training by extracting clips of different classification types from DVDs, videotapes and computer games.⁹ The OFLC obtains the distributor's permission on the assumption the distributor is the exclusive licensee.

We ultimately use the digitised extracts of clips in Power Point for training delivery. We update training material with extracts from recently classified material to give the most current examples of classification decisions.¹⁰

The applications we use to compile training material from DVDs are: DVD Shrink, Fairuse Wizard 3.1, Irivertter and DVD Decrypter.

If videotapes are not in local format, we use a 20 metre composite video cable to degrade the Macrovision copyright signal and enable us to view the material.

In 2004-2005, the OFLC delivered 50 training sessions for industry, the Board, the Review Board, Australian Customs Service and OFLC staff.

In addition, the OFLC trained 21 persons, later approved as authorised assessors. There are currently 61 authorised assessors.

⁵During 2004-2005, the OFLC trained 21 people who were subsequently appointed as authorised assessors. In addition, the OFLC delivers refresher training to authorised assessors. There are currently 61 authorised assessors.

⁶ For example, the State Electronic Evidence Branch.

⁷ The Australian Customs Service refers certain objectionable material to the OFLC for advice.

⁸ For example, mobile phone and music industries.

⁹ The classification types for films are **G** (General), **PG** (Parental Guidance), **M** (Mature), **MA 15+** (Mature Accompanied), **R 18+** (Restricted), **X 18+** (Restricted) and **RC** (Refused Classification). The classification types for computer games are **G** (General), **PG** (Parental Guidance), **M** (Mature), **MA 15+** (Mature Accompanied) and **RC** (Refused Classification).

¹⁰ Community standards are relevant to classification decisions and may evolve over time. Section 11(a) of the *Classification (Publications, Films and Computer Games) Act 1995* requires taking 'the standards of morality, decency and propriety generally accepted by reasonable adults' into account in making classification decisions.

Exception for classification scheme

We understand the Free Trade Agreement with the United States means the government will introduce sanctions for circumventing technological protection measures attached to copyright material.

We also understand that there is scope for exceptions to the general prohibition against circumvention where an inability to circumvent for non-infringing uses of copyright material would have an adverse impact.

There is no specific exception in Article 17 for classification functions and we seek an appropriate exception for the national classification scheme.

Non-infringing use

We circumvent technological protection measures to access material in order to classify it, not to infringe copyright:

- we view DVDs and videotapes
- we play computer games
- we have the permission of distributors to copy material for training purposes (the distributors are generally the copyright owner's exclusive licensee for Australia)
- we sometimes engage expert consultants for computer games which may contain contentious material activated through, for example, code
- we access material for the sole purpose of carrying out the Board, Review Board and OFLC's statutory functions.

Adverse impact

We consider the proposed sanctions will adversely impact on our classification functions.

We classify a large volume of material and much of it is not in local format:

- In 2003-2004, the OFLC received over 4000 applications to classify sale or hire films (DVDs, enhanced CDs and videotapes) and made 3961 classification decisions. The number of classification applications in this category increased by 50% in 2004-2005.
- In 2003-2004, the OFLC received over 650 applications to classify computer games and made 654 classification decisions. During 2004-2005, the number of classification applications in this category increased by 16%.
- We also receive applications for classification from federal and state law enforcement agencies.¹¹ In 2004-2005, the OFLC received 1,444 classification applications for law enforcement purposes.

Applicants submit material for classification with a view to marketing and releasing classified material to the Australian market at the earliest opportunity. The material is often not available in local format at the time of classification.

¹¹ Section 22A of the *Classification (Publications, Films and Computer Games) Act 1995*.

Applicants are aware we use circumvention measures when they lodge material for classification that is not in local format: they are often the owner of the technology and provide us with the appropriate unit to view the product.

Also, the applicant is the local distributor by agreement between the distributor and the copyright owner. This agreement may permit the distributor to authorise use of appropriate devices to view material submitted for classification. However, it is unrealistic to expect the OFLC to be aware of the contractual arrangements between individual distributors and copyright owners.

We access material to fulfill our statutory functions, not for any financial gain or commercial purpose. Any restriction on our access to material submitted for classification would severely impair our ability to perform our statutory classification functions. The underlying premise of the national classification scheme is the classification of films and computer games before their release to the Australian market.

As a result, the OFLC requires an exception to the restriction on using anti-circumvention devices to fulfill its statutory classification functions. The exception we seek is:

- for classification functions under the Classification Act and related legislative instruments
- sufficiently broad to encompass incidental classification functions such as classification training and obtaining expert opinions from third parties
- specific to classification functions but sufficiently broad to cover emerging technologies.

Further information

If you have any queries or would like further information from us, please contact Sue Gabor on (02) 9289 7152.

We also have extensive information about the national classification scheme and our classification functions on our website at www.oflc.gov.au.

We would appreciate the opportunity to comment on any relevant exception the Committee proposes.

Yours sincerely

Des Clark
Director

21 October 2005