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SISA Submission to the Review of Technological Measures Exceptions by the House of Representatives Standing Committee on Legal and Constitutional Affairs ("TPM Review")

October 2005

Supporters of Interoperable Systems in Australia (SISA) is pleased to make this submission to the TPM Review.

About SISA

Supporters of Interoperable Systems in Australia (SISA) is an industry body of IT companies that supports open systems in Australia.

We believe that copyright laws must be carefully balanced to maximise innovation and competition in the IT market. Copyright should provide sufficient protection to encourage the development of new software, systems and products, without being over-extended to the point where it creates barriers to competition, interoperability, and the efficient operation of the industry.

SISA was closely involved in the process that resulted in the introduction of exceptions allowing reverse engineering of computer programs for purposes such as interoperability and error correction (Div 4A of the Copyright Act). We remain strongly supportive of those provisions.

Background

SISA has been a consistent supporter of the Government's commitment to maintaining an effective and relevant copyright law that achieves an appropriate balance between the rights of copyright owners and users.

In relation to laws ("**anti-circumvention laws**") designed to prevent the circumvention of technological protection measures ("**TPMs**"), SISA has supported the approach taken by Australian law-makers, which treats TPMs as an important means of enforcing the delicate copyright balance, but tries to avoid creating a new layer of protection that extends the copyright monopoly in ways that are harmful to education, research, consumers, competition and innovation.

Although not perfect, s116A was a fair attempt at striking the right balance, by proscribing most dealings in circumvention devices, but allowing certain legitimate users to obtain and use those devices for non-infringing "permitted purposes". Most importantly, s116A demonstrates that Australia's anti-circumvention laws are designed to support measures that prevent *infringement* of copyright, not measures that seek to prevent lawful, non-infringing use of copyright material. As the High Court commented in the *Stevens v Sony* case handed down this month:

...it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it.

The Australian approach to anti-circumvention laws is perfectly consistent with the requirements of the WIPO Copyright Treaty, which, under Article 11, requires Australia to provide effective legal remedies against the circumvention of TPMs that restrict acts which are not authorised by the rightsholder *or permitted by law*.

In other words, the Treaty requires some form of anti-circumvention laws for TPMs that restrict infringement, but does not require anti-circumvention laws for TPMs that restrict lawful or non-infringing uses of copyright material.

Indeed, the notes to the original draft text (“Basic Proposal”) for the Treaty included a comment (Note 13.05) that each country implementing the Treaty

...may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain.

AUSFTA Art 17.4.7

Against this background, we are now in the difficult position of having to revisit these laws as a result of the highly complex provisions of the AUSFTA. Article 17.4.7 sets out a new set of requirements for anti-circumvention laws, and in so doing, carries a high risk of upsetting the careful policy balance currently reflected in Australian law.

In simple terms, it seems that Article 17.4.7 is an attempt to impose the US approach to the implementation of Article 11 of the WCT. Unfortunately for Australia, the US approach cares little about allowing rightsholders to extend the copyright monopoly via TPMs, and will require Australia to remove several important “permitted purpose” exceptions from s116A.

If we accept that Australia “got it right” with its balanced approach to 116A (which SISA strongly submits is the case), then the current TPM Review is absolutely critical for ensuring that the rights of legitimate, lawful users of copyright material are preserved to the greatest extent possible.

In order to ensure that TPMs are used to enforce, but not to extend, copyright protection, SISA urges the Committee to recommend as many 17.4.7(e)(viii) exceptions as possible, consistent with Australia’s historical approach to this important issue.

TPM Exceptions for Computer Programs

Currently, under s116A, several software-related exceptions are recognised as “permitted purposes” for which dealings in circumvention devices are lawful:

- Reproducing computer programs to make interoperable products (s47D)
- Reproducing computer programs to correct errors (s47E)
- Reproducing computer programs for security testing (s47F)

Each of these exceptions is vital for a competitive, open, efficient and innovative software industry.

Although Article 17.4.7 of AUSFTA appears to provide for the continuation (at least in part) of the interoperability (s47D) and security testing (s47F) exceptions, it does not include a specific exception for error correction.

In SISA's submission, there is a clear public interest in allowing users to circumvent TPMs (and have access to devices that allow them to do so) where their purpose is to correct errors in a computer program in accordance with their rights under s47E. If users do not have this right, then a person or business could spend good money on a package of software (potentially millions of dollars in the case of businesses), only to discover that there are critical errors in the program which the vendor fails or refuses to correct. If that program is protected by TPMs, and the user has no lawful means of "unlocking" those TPMs, then they will be unable to analyse and correct the errors, and thus unable to use the program. In other words, without an exception, TPMs could easily be used to frustrate the consumer's legitimate right to engage in "self help" where a "buggy" program needs fixing.

Division 4A also provides an exception that makes it lawful to reproduce and run a computer program for the purpose of studying the ideas behind the program and the way in which it functions (s47B(3)). In SISA's submission, the study of the ideas and functions of a computer program is another area where circumvention of TPMs should be allowed. Without such an exception, a vendor could use TPMs to obfuscate functionality, with the result that a lawful licensee and user of the program has no effective way of understanding how the program works. If that program came to play a critical role in the user's IT infrastructure, and the vendor ceased to support the product, TPMs could make it impossible for the user to study the functionality of the program in order to develop an alternative to the unsupported product.

SISA Supports the ADA Position

As a member of the Australian Digital Alliance, SISA also supports the submission of the ADA in relation to the TPM Review.

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