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21 OCT 2005

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Submission No. <u>41</u>
Date Received <u> </u>

BSAA *Business Software Association
of Australia*

**SUBMISSION TO THE HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND
CONSTITUTIONAL AFFAIRS INQUIRY INTO
TECHNOLOGICAL PROTECTION MEASURES (TPM)
EXCEPTIONS**

**PRESENTED BY BUSINESS SOFTWARE ASSOCIATION
OF AUSTRALIA (BSAA)**

OCTOBER 2005

1 About BSAA

- 1.1 The Business Software Association of Australia (BSAA) represents leading software companies in Australia including Adobe, Apple, Autodesk, Microsoft and Symantec.¹ According to a PriceWaterhouseCoopers study, the packaged software industry in Australia generates sales of more than \$3.5 billion dollars a year, creates more than 25,000 jobs and pays more than \$850 million a year in taxes.²
- 1.2 The BSAA very much appreciates the opportunity to participate in this inquiry into technological protection measures exceptions conducted by the House of Representatives Standing Committee on Legal and Constitution Affairs.

2 Summary of BSAA's submission

- 2.1 The Committee should be wary about recommending any exceptions to circumvention because of the impact which exceptions have on legitimate enforcement of IP rights. In particular, TPMs cannot distinguish between infringing and non-infringing uses and so creating an exception creates an opportunity for infringing use.
- 2.2 BSAA opposes any additional exceptions in relation to the activities of open source software developers or in relation to region coding. BSAA is not aware of any evidence suggesting the need for any other exceptions.
- 2.3 BSAA believes that the experience of the US Copyright Office in considering these issues is extremely valuable and urges the Committee to pay particular regard to the approach and conclusions of the US Copyright Office.

3 Copyright Piracy and the Importance of Technological Protection Measures

- 3.1 Copyright is the lifeblood of the business software industry. Without copyright protection software companies would not be able to recoup the hundreds of millions of dollars which are spent each year in research and development of new software products.
- 3.2 In Australia, an estimated 32% of business PC software in use is unlicensed (ie illegal). This is higher than other major developed countries. By comparison, the piracy rate in the US is 21%, New Zealand 23% and the UK 27%³.
- 3.3 While Australia's software piracy rate has declined since the early 1990s, it has not declined since 2002 when international BSA research estimated 32% of PC software in

¹ The BSAA is affiliated with the Business Software Alliance (www.bsa.org) which is dedicated to promoting a safe and legal digital world. BSA is the voice of the world's commercial software industry and its hardware partners before governments and in the international marketplace. Its members represent one of the fastest growing industries in the world. BSA programmes foster technology innovation through education and policy initiatives that promote copyright protection, cyber security, trade and e-commerce.

² PriceWaterhouseCoopers study "The Contribution of the Package Software Industry to the Australian Economy December 1998.

³ International Data Corporation (IDC) global piracy study conducted on behalf of the Business Software Alliance, 2004. Released May 2005. (Based on 5,600 interviews in 56 countries and comparison of PC and software shipments in 86 countries)

Australia was unlicensed⁴ and is only marginally lower than 1995 when the rate of piracy in Australia was 35%.

- 3.4 In some sectors, piracy rates are considerably higher than the average. For instance, 66% of graphic designers and 50% of Computer Aided Design (CAD) users said they used or knew someone using illegal software in their organisation, according to an in-depth 1998 sectoral survey.⁵
- 3.5 According to IDC research conducted for BSA in 2004, "piracy" costs the software industry around \$545 million a year (US\$409 million).
- 3.6 A major Cost of Counterfeiting Study conducted by the Allen Consulting Group in 2003 on behalf of the Australian Toy Association (ATA), the Business Software Association of Australia (BSAA) and the Interactive Entertainment Association of Australia (IEAA), found counterfeiting cost the software industry \$446 million in lost sales (very similar to the latest IDC estimate); \$142.5 million in lost profits to software vendors (adjusted for price effects and sales margins), and \$11.9 million in lost profits for retailers (adjusted for price effects and sales margins).⁶
- 3.7 A worldwide study conducted by IDC released in April 2003, estimated that a 10 per cent reduction in software piracy in Australia by 2006 could increase the value of the local IT sector to nearly \$35 billion, boost local industry revenues by \$5 billion, create 7,000 new jobs, and generate another \$728 million in tax revenues.⁷
- 3.8 Piracy is therefore one of the major challenges facing the software industry. A key element of the software industry's efforts to prevent piracy is the use of TPMs including product activation codes and other access control technologies to ensure that each working copy of the software is licensed and paid for. If the software industry is to have any success in using TPMs to reduce piracy, the law must provide strong and effective measures against the circumvention of TPMs.

4 Approach to the Inquiry and US Experience

- 4.1 As the Committee has noted in its information paper, the task of the Committee is to report on what additional exceptions, if any, should apply to the prohibition on circumvention of access controls. Australia is required by the Australia/US Free Trade Agreement (AUSFTA) to introduce a comprehensive prohibition on the act of circumvention of access controls by 1 January 2007.
- 4.2 We note that the provisions of the AUSFTA in relation to technological protection measures are largely based on the US Digital Millennium Copyright Act. Furthermore, the task now facing the Committee is the same task which was entrusted to the US Copyright Office when it undertook the first triennial rulemaking under the Digital

⁴ International Planning & Research (IPR) 8th annual benchmark survey on behalf of Business Software Alliance and Software & Information Industry Association, 2002.

⁵ CARMA International survey of 13,600 computer users in association with the Australian Graphic Design Association (AGDA), Printing Industry Association (PIA) and CAD User magazine, 1998.

⁶ Allen Consulting Group "Cost of Counterfeiting" study conducted on behalf of the Australian Toy Association, the Business Software Association of Australia and the Interactive Entertainment Association of Australia released November 2003.

⁷ International Data Corporate (IDC) global research study released April 2003.

Millennium Copyright Act. For this reason, BSAA urges the Committee to examine closely the approach and conclusions of the US Copyright Office in carrying out its task in this inquiry.

- 4.3 BSAA commends to the Committee the excellent summary of the experience and conclusions of the US Copyright Office contained in the submission to the inquiry dated 6 October 2005 by the International Intellectual Property Alliance (IIPA).⁸
- 4.4 In particular, the BSAA wishes to highlight the following points which emerge from the US experience:
- (a) Proponents of an exception carry a very high evidentiary burden to establish that the prohibition has a substantial adverse effect on non-infringing uses of copyright works. Mere inconvenience or isolated harm is not sufficient and the adverse impact must be a result of the prohibition rather than other factors.
 - (b) The US Copyright Office has found that TPMs actually encourage and facilitate non-infringing use of copyright material. For example, in its 2000 recommendation, the US Copyright Office concluded that "the advent of access control protections has increased the availability of databases and compilations."
- 4.5 BSAA also wishes to emphasise that under the AUSFTA the Committee must ensure that any exceptions which it proposes do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of TPMs. As a general proposition, BSAA believes that this requirement dictates that any exception must be narrowly crafted. Any exception has the tendency to impair the effectiveness of the prohibition against circumvention of TPMs because those seeking to circumvent TPMs for illicit purposes will always attempt to take advantage of any loophole in the law. The broader the exception the more likely it is that an infringer will be able to take advantage of the exception. Furthermore, TPMs cannot distinguish between infringing and non-infringing uses and so creating an exception creates an opportunity for infringing use.

5 Specific Activities to be Examined by the Committee

- 5.1 BSAA is not aware of any facts or evidence which suggest that exceptions are needed in relation to the prohibition on circumvention of access controls. The terms of reference of the inquiry lists specific activities which the Committee may examine. BSAA's comments will be restricted to two of those, namely the activities of open source software developers and activities conducted in relation to regional coding.
- 5.2 With regard to the first of these BSAA draws the Committee's attention to article 17.4.7(e)(i) of the AUSFTA. This provision authorises Australia to enact a permanent exception in relation to non-infringing reverse engineering activities with regard to a lawfully obtained copy of a computer program for the purpose of achieving interoperability. BSAA believes that enacting an exception in accordance with this

⁸ BSAA's affiliated organisation the Business Software Alliance is a member of IIPA.

provision will adequately protect the legitimate interests of open source software developers. Therefore, no further exception is needed in the context of this inquiry.

- 5.3 With regard to region coding, this is an issue which does not directly affect the business software industry. However, it does affect the broader software industry and in particular the computer games industry. BSAA would therefore like to offer a few observations in relation to region coding.
- 5.4 The use of circumvention devices or “mod chips” to enable the use of pirated games is a serious problem for the computer games industry. Experience shows that mod chips are overwhelmingly used to play pirated games rather than to play legitimate games bought overseas.
- 5.5 It is the same TPM which protects region coding and protects against use of pirated games. Therefore, allowing an exception for circumvention of region coding would necessarily allow circumvention for the purpose of playing pirated games, thereby substantially undermining the effectiveness of TPMs to protect against copyright infringement.
- 5.6 The danger of introducing an exception for region coding outweighs the minor inconvenience which may be caused to Australian consumers who wish to play games bought in other regions. This is no different to the inconvenience which consumers throughout the world have lived with for many years due to the use of different formats in different countries eg PAL vs NTSC format for VCRs.
- 5.7 The BSAA notes that the US Copyright Office has extensively examined the issue of region coding of DVDs and computer games. The US Copyright Office rejected proposals to allow circumvention of region coding and noted that region coding serves a legitimate purpose as an access control and encourages the distribution and availability of digital audio visual works. The US Copyright Office also concluded that the prohibition on circumvention of region coding had only a de minimis adverse impact on non-infringing use. BSAA believes that similar conclusions should be reached by the Committee in relation to the position in Australia.

BSAA looks forward to participating further in the inquiry.

October 2005

Tremble, Kate (REPS)

From: Towner, Joanne (REPS)
Sent: Friday, 21 October 2005 1:22 PM
To: Committee, LACA (REPS)
Subject: FW: Review of technological protection measures - Submission by BSAA

Kate

For processing pls.

Joanne

-----Original Message-----

From: Gonsalves, Maurice [mailto:Maurice.Gonsalves@mallesons.com]
Sent: Friday, 21 October 2005 12:34 PM
To: Committee, LACA (REPS)
Cc: Towner, Joanne (REPS)
Subject: RE: Review of technological protection measures - Submission by BSAA

Mallesons Stephen Jaques
www.mallesons.com

Confidential communication

Dear Ms Towner

I now attach a submission by the Business Software Association of Australia (BSAA) to the Committee's Inquiry into Technological Protection Measures.

BSAA appreciates the opportunity to participate in the Inquiry.

Please contact me in relation to any issues regarding the submission or the Inquiry.

Kind regards

Maurice Gonsalves
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maurice.gonsalves@mallesons.com

From: Tremble, Kate (REPS) [mailto:Kate.Tremble.Reps@aph.gov.au] **On Behalf Of** Committee, LACA (REPS)
Sent: Tuesday, 4 October 2005 10:39 AM
To: Gonsalves, Maurice
Cc: Towner, Joanne (REPS)
Subject: Review of technological protection measures - extension to submit

Dear Mr Gonsalves.

Your request for an extension to lodge a submission to the TPM Inquiry has been granted. You may have until Friday 21 October 2005.

21/10/2005

Yours sincerely

Kate Tremble
LACA Secretariat

-----Original Message-----

From: Gonsalves, Maurice [mailto:Maurice.Gonsalves@mallesons.com]
Sent: Friday, 30 September 2005 5:09 PM
To: Committee, LACA (REPS)
Cc: Towner, Joanne (REPS)
Subject: RE: Review of technological protection measures
Importance: High

Mallesons Stephen Jaques
www.mallesons.com

Confidential communication

Dear Ms Tremble
Thank you very much for considering our request. If it is any help I can reassure you our submission will be short and to the point.
Yours sincerely

Maurice Gonsalves
Partner
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From: Tremble, Kate (REPS) [mailto:Kate.Tremble.Reps@aph.gov.au] **On Behalf Of**
Committee, LACA (REPS)
Sent: Friday, 30 September 2005 11:16 AM
To: Gonsalves, Maurice
Cc: Towner, Joanne (REPS)
Subject: RE: Review of technological protection measures

Dear Mr Gonsalves

Thank you for your interest in the TPM inquiry.

We may be able to meet your request for a 2 week extension, but as we are working on a very tight timeframe, I will have to seek the advice of the Inquiry Officer who is currently on leave. As Monday is a public holiday here in Canberra, we will respond on Tuesday.

Yours sincerely,

Kate Tremble