INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®

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The International Intellectual Property Alliance (IIPA) appreciates this opportunity to comment on the Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 ("Exposure Draft").

IIPA is a coalition of seven trade associations representing the U.S. copyright-based industries – including the business and entertainment software, audio-visual, sound recording, music publishing and book publishing industries – in bilateral and multilateral efforts to improve international protection of copyright works. Both directly and through our member associations, IIPA has a long history of involvement in the development of copyright law and enforcement policy in Australia.

I. Definitional Provisions on Access Controls

IIPA's main concern about the Exposure Draft lies with its definitional provisions, particularly clauses 1 and 4. These fall well short of bringing Australia into compliance with its obligations under the Australia-US Free Trade Agreement (AUSFTA). Taken together with the proposed statutory notes and with other explanatory comments made in connection with release of the Exposure Draft, these provisions could actually weaken the protections now accorded to access control technologies under current law, and could undermine the entire regime of protection for effective technological measures that is fundamental to the IPR chapter of the AUSFTA.

Article 17.4.7.b of the AUSFTA defines an effective technological measure (ETMs) to include "any technology, device or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter" (emphasis added). Articles 17.4.7.a.i and ii require AUSFTA parties to prohibit circumvention of ETMs and trafficking in tools aimed at achieving such circumvention. While a number of exceptions to these prohibitions are authorized under Articles 17.4.7.e and f, none of these take the form of a categorical exclusion of a genus of access control technologies from all protections against circumvention acts and trafficking in circumvention tools.

Australia's copyright law currently covers only a technological protection measure that is "designed, in the ordinary course of its operation, to prevent or inhibit the infringement of copyright in a work or other subject-matter" in one of two specified ways. Copyright Act 1968, section 10(1). The requirement to show a design to "prevent or inhibit" copyright infringement has already been one of the main subjects of protracted litigation, which concluded that at least one technology commonly used to control access to copyright material and to prevent the playing of infringing copies of videogames was not

protected. See Stevens v. Kabushiki Kaisha Sony Computer Entertainment, [2005] HCA 58. It seems apparent that the "prevent or inhibit" barrier to protection of access control technologies, both on its face and in the way it has been applied by Australian courts, is inconsistent with the AUSFTA obligation to provide protection for all technologies that "control access to a protected work."

Indeed, this seems to have been the view of the Attorney General's Department on October 27, 2005, when its submission to the inquiry carried out by the Legal and Constitutional Affairs committee (LACA) stated that FTA definition "differs from and is effectively broader than the definition of TPM in the Copyright Act." See Submission 52, at para. 24. The AGD also noted that "the AUSFTA requires Australia to introduce liability for the act of circumventing an ETM that controls access to copyright material." Id., para. 26. However, in testimony before the LACA Committee five weeks later, a senior counsel within the AGD insisted that "the analysis cannot be confined to" the provisions cited in the preceding paragraph, and called attention to "the chapeau, or the introductory words to Art. 17.4.7." [1] (5 Dec 2005, LCA 25) In this counsel's view, the chapeau language "suggests that there is to be a relationship between the use of an ETM and the exercise of rights by a copyright holder." Id. Sixteen days later, when the AGD made its third written submission to the LACA committee, this "suggestion" had hardened into a perceived limitation: "the definition of an ETM must be read together with the chapeau to Art. 17.4.7(a) which establishes the limits of the proposed liability scheme." Submission 52.2 at p. 5 (answer to question 7).

Regardless of how the AGD arrived at this conclusion, there is strong reason to doubt that the "chapeau" language in question imposes any such limitation, beyond a requirement that the material to which access is controlled be protected by copyright. Although the AGD's submissions before the LACA committee do not indicate this, this language is taken virtually verbatim from the text of the WIPO Internet treaties. WIPO Copyright Treaty (WCT) Art. 11; WIPO Performances and Phonograms Treaty (WPPT) Art. 18. Australia is committed under AUSFTA Art. 17.1.4 to adhere to these treaties, and nothing in the TPM-related provisions of Art. 17.4.7 could plausibly be read to authorize Australia to reduce its TPMs regime below the levels that comply with these treaties.

Since AGD relies on this language taken from the WCT and WPPT to justify its position, it is instructive to note that none of Australia's major trading partners which have acceded to the WCT and WPPT have found it necessary, in their implementing legislation for these requirements, to categorically exclude from coverage any access control technologies which lack some required "relationship [with] the exercise of rights by a copyright holder." The legal regimes in these jurisdictions either apply to any technology that effectively controls access to a copyright work (see, e.g., 17 USC § 1201(a) (US law); EU Copyright Directive Art. 6.3), or have even broader coverage (Japan Unfair Competition Law, Article 2(5) (definition of "technical restriction means"). It should also be noted that WIPO's authoritative Guide to the Copyright and Related Rights Treaties Administered by WIPO explains that all access control technologies used in connection with copyright works must be protected. See para. CT-11.8, page 216, entitled "The meaning of technological measures 'used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention'":

[1] The chapeau reads, "In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances and phonograms, each Party shall provide that any person who:"

> [T]he Treaty leaves it to authors – and , of course, "authors" also means other owners of copyright – whether or not they apply technological measures, and, if they do, what kind of measures. *The obligation to provide "adequate protection and effective legal remedies" exists, however, as soon as such measures are applied.* (emphasis added)

See also id. at para. CT-11.8, page 217 ("There are two basic forms of restricting (making conditional) acts: first, *restricting access to works*; and second, restricting the carrying out of certain acts in respect of works. *The obligations of Article 11 [of the WCT] cover both of these basic forms.*") (emphasis added).

Upon reviewing these submissions, IIPA was concerned about the AGD's apparent position that, despite the clear and comprehensive definition of the term "effective technological measure" in the AUSFTA, the word "any" in that definition could safely be ignored, and ETMs might be excluded from protection because they lacked some to-be-defined "relationship to copyright." Our concern has increased substantially, however, now that we have learned, with the release of the Exposure Draft, that this relationship would be defined in almost exactly the same terms as it is expressed in current law: an access control technology would not be protected unless it was "designed ... to prevent or inhibit the doing of an act ... that would infringe the copyright by preventing [unauthorized] access to the work or subject matter." Exposure Draft, clause 1.[2] AGD's position has come full circle. It started with an acknowledgement that the coverage of access controls under the current act needed to be broadened to satisfy the FTA, and ultimately arrived at a formulation that is no broader than, and indeed perhaps narrower than, current law.

By deciding to retain the "prevent or inhibit infringement" test as a prerequisite to protection of an access control technology, the Exposure Draft would apparently continue to permit trafficking in tools to circumvention of technological measures, such as those at issue in the Stevens v. Sony case, that function by preventing the use of infringing copies. It would also cast a cloud over the legal status of many commonly used access control measures that have become pervasive features of the marketplace for electronic dissemination of copyright works.

Consider, for example, the following. "Streaming" dissemination is an increasingly familiar means by which copyright works of all kinds – sound recordings, cinematographic works, even computer programs – are accessed by consumers and businesses over digital networks. It is commonplace for access to these streams to be controlled by technological measures – password protection, to use the simplest example – so that subscribers or others with authorization may gain access to the streamed material while others are turned away. Cinematographic works and computer programs are protected under copyright law in Australia, and sound recordings are also recognized as protected subject matter, so these password controls and similar protections fully meet the definition of ETMs in the AUSFTA. Accordingly, circumventing these controls, or trafficking in tools designed or marketed to do so, ought to be outlawed (subject to the applicability of any FTA-consistent exceptions).

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[2] Even if the AGD's analysis were right – and the WIPO Guide and the legislators in the US, the EU and Japan were wrong – that the "chapeau" language constitutes a substantive limitation on the obligation, that language would not justify the reversion to the "prevent or inhibit" language found in the Exposure Draft. Surely it is possible for a copyright owner to use an access control "in connection with the exercise of [its] rights" under copyright, and to use it to "restrict unauthorized acts in respect of [its] works" (e.g., unauthorized access) without having a design to "prevent or inhibit" infringement, as that phrase has been interpreted by Australian courts. The technological measure employed in the Stevens v. Sony case would be an example.

However, under the Exposure Draft, it is far from clear that this would be the outcome. The liability of one who hacks through these controls to gain unauthorized access, or who provides others with the tools for doing so, would turn on whether or not the control was ultimately determined to have been "designed to prevent or inhibit" infringement. Making that determination would necessitate an inquiry (like the one that occupied several years in the Stevens litigation) into whether what the hacker achieves — the ability to enjoy the streamed audio, audio-visual, or computer program material without authorization from the copyright owner – is in fact an infringement of copyright in that work. The answer to that question may turn on many factors, which could include the source of the stream (whether within Australia or off-shore), the technological parameters of the device upon which the hacker receives the stream (e.g., whether or not it makes temporary or permanent copies of a significant portion of the work in the course of receiving the stream), and the factual circumstances in which the hacker enjoys the unauthorized access to the stream (e.g., whether it is an infringement to view a video-on-demand stream without authorization may depend on whether the viewing takes place in a private home or in a commercial establishment).

In sum, a question that ought, under the AUSFTA, to be a simple and clear one – whether obtaining unauthorized access through circumvention of an effective technological measure is illegal if no FTA-compliant exception applies – becomes, under the exposure draft, an exceptionally complicated one. Of course, the issue of liability for trafficking in tools to carry out this unauthorized access is even more complex, since it would turn on whether or not, to the extent that the hacker was engaged in actionable circumvention, the tool was designed, produced, or marketed for such a purpose. It is certainly possible that the outcome of this extended and convoluted inquiry would be the same as it would have been were Australia's law simply to adopt the definition of ETM contained in the FTA; but since other outcomes are also possible, depending on the resolution of a number of specific factual questions, there is no doubt that the formulation proposed in the Exposure Draft will lead to increased uncertainty and will undermine the real goal of TPMs protection, which is to encourage new and diverse forms of dissemination of copyright works.

The foregoing discussion assumes that the formulation in the Exposure Draft essentially maintains the requirement of current law that any access control measure that is found to have been designed to prevent or inhibit infringement will be protected. There is good reason to doubt this, however, and to be concerned that the Exposure Draft would in fact narrow the scope of current law, at least with respect to the prohibitions against trafficking in tools to circumvent access controls.

This concern arises from the statutory notes included in the Exposure Draft in clauses 1 and 4, as well as from statements in the AGD's summary of the Exposure Draft. The former rules out any protection for any technological measures that are "solely designed to control market segmentation." The latter extends this to all TPMs "solely designed for other purposes ... where the TPM does not have a connection with copyright," providing in an apparently non-exhaustive list of such purposes the "market segmentation" purpose, as well as the purpose of "protection against competition in aftermarket goods (eg spare parts)." Although we recognize that these statements apply only to TPMs designed "solely" for the stated purposes, they still raise the specter of permitting an uncontrolled market in tools to circumvent an access control measure that fully meets the definition of ETM in the AUSFTA (because it controls access to a copyright work), and that may even have a role in discouraging copyright infringement, but that is

denied protection because the prevention or inhibition of infringement is not found to have been the purpose for which it was designed.[3]

The statutory note is of particular concern to the extent it would deny protection to any TPM whose purpose is to "control market segmentation," a phrase that is nowhere defined. Almost any technological protection measure could be characterized as having the purpose of "controlling market segmentation." For example, a movie made available during a Video on Demand window will often be accompanied by a technological protection measure to prevent recipients from making a permanent copy, thus "segmenting" the market between those entitled to view the movie in a streaming format now, and those who will be entitled to obtain a permanent copy (whether via download or during a conventional video window) at some point in the future. Certainly someone with the desire and the means to circumvent the TPM used during the VOD window, in order to make a permanent copy, would be able to argue, based on the statutory note to Clause 4 of the Exposure Draft, that all she circumvented was a TPM aimed at "controlling market segmentation"; and the party providing that means (even on a commercial basis) would also claim immunity from liability. Other examples could be given of common business models for digital dissemination of copyright works that depend upon the ability to use technology to "segment" the market temporally, spatially, or between different distribution channels. The Exposure Draft thus threatens to open a significant gap in legal protection of TPMs, making vulnerable any such measure that is used to differentiate between (for example) those currently authorized to access a work in a particular way, and those whose access will be authorized later, in a different medium, or at a different price. The risk of disruption to legitimate markets for copyright materials should be obvious.

IIPA fully understands that, to some extent, these provisions of the Exposure Draft have been motivated by a desire to respond to expressed concerns regarding regional coding of DVDs and perhaps other products. But certainly these provisions sweep far more broadly than would have been necessary to address the situation of, for example, an Australian who acquires an out-of-region DVD abroad and encounters difficulties in playing it on his equipment at home. This broader sweep was clearly intended: the AGD's summary gives region coding as one <u>example</u> of market segmentation, with the obvious implication that there are other examples besides region coding that would also be excluded from protection.

IIPA urges the Australian government to re-examine these proposals in the Exposure Draft, and to consider other ways to address the expressed concerns while still achieving full compliance with the AUSFTA, as well as with the WIPO Internet treaties.

II. <u>Other Concerns with Exposure Draft</u>

(1) AUSFTA Arts. 17.4.7.e.i and ii restrict the applicability of the interoperability and encryption research exceptions to acts of circumvention that involve "lawfully obtained" copies. The corresponding provisions of the Exposure Draft (see proposed secs. 116AK(3), AL(2), AM(2), and 116AK(4), AL(3), AM (3)) omit this prerequisite. This could mean that the circumvention of purloined copies of, for example, unreleased beta versions of computer software could fall within the exception, even though there is no public policy justification for facilitating their interoperability with other programs.

[3] For example, a region coding access control may have the effect of discouraging infringement of the exclusive importation right, to the extent that this is recognized under Australian law for certain works.

(2) AUSFTA Art. 17.4.7.a.ii calls for prohibitions on manufacturing or importing circumvention devices, but proposed sections 116AL(1)(a)(i) and (ii) reach these acts only if it is also proven that the manufacturer or importer intended to provide the device to another person. This requirement for civil liability is inconsistent with the AUSFTA and should not be imposed; considerable damage could be inflicted even if the manufacturer or importer simply uses the device himself or herself to circumvent technological measures. A similar defect is found in the criminal provisions, proposed section 132APB(1)(a)(i) and (ii), and should also be corrected.

(3) Proposed section 116AO(2) does not direct the court, in considering an award of additional damages, to consider the need for deterrence of similar conduct, as does the parallel provision for copyright infringement, current section 115(4)(B)(ia). This discrepancy should be corrected.

(4) The recurrent use of the phrase "circumvention device of the person" (see, e.g. proposed section 116AL(1)(b)) could inappropriately give the impression that a defendant must have a certain possessory or ownership interest in a circumvention device before being exposed to liability for trafficking in it. This is not necessarily the case (e.g., A could be liable for offering to B a circumvention device possessed by C). We understand this phrasing may be an artifact of the need to add to current law what is proposed to be the first prong of the definition in clause 2 (dealing with marketing or promotional activities) but suggest that the drafting be reviewed to dispel potential confusion.

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IIPA appreciates your consideration of its views. Please do not hesitate to contact the undersigned if there are questions about this submission.

Respectfully submitted,

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