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**A Further Submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs - Inquiry into technological protection measures (TPM) exceptions**

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**"An Over Broad Definition of TPM Will Defeat the Ability of Australians to Participate as Global Consumers in a WTO World"**

One thing that has not been supplied as part of this review is a clear understanding of the definition of "technological protection measure". This is critical to the process of working out which acts of circumvention should be tolerated under the amended law.

**Background**

The existing definition of TPM by including the words "prevents or inhibits infringement of copyright" is said to be narrower in effect than a provision that "controls access" without any reference to copyright infringement. At the time of enactment submissions were made by the International Intellectual Property Alliance (IIPA) to the House of Representatives Legal and Constitutional Affairs Committee (this Committee) that the definition of a TPM in the form of an "access control" should not be linked to copyright infringement.<sup>1</sup> It was argued that access controls should be reinforced by anti-circumvention law even if they do not prevent or inhibit infringement of copyright. The "real world" example provided by the IIPA to highlight the point was that of having a lock to prevent

<sup>1</sup> S Metalitz, 7.10.1999, pages 3-5

<http://www.aph.gov.au/house/committee/laca/digitalagenda/submiss.htm>

opening a door to a house (the access control) which contained a book which upon entry I could read without infringing copyright.<sup>2</sup> This view was said to have been endorsed in the *Digital Millennium Copyright Act* (DMCA) in the US. Critics of this approach had argued that such a broad ranging definition of TPM introduced a new form of economic exploitation over information called an "access right". At no point in time did the IIPA submission suggest that an access control should regulate "use" of copyright material that had already been copied. As well, the IIPA argued on the basis that the law reform being undertaken at that time related to the WCT and WPPT – both treaties dealing with copyright and convened by the World Intellectual Property Organisation. The IIPA's preferred definition of an effective TPM is the same as the one offered in art 17.4.7 of AUSFTA and the DMCA.

In the decision of *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCA 58 the High Court of Australia held that regional access coding on Sony PlayStation computer games as implemented by the PlayStation console could not be a TPM as it did not prevent or inhibit the infringement of copyright. The regional coding of games designed in one aspect to segment markets across the world and install differential pricing did not prevent a game being copied or burnt; it simply made it difficult to use or play on the PlayStation console. It also made it difficult to use or play games legitimately purchased in, for example, New York, on the PlayStation console.

In short the High Court held that some things that purport to be TPMs do not satisfy the legal definition because they do not prevent or inhibit copyright infringement. Regional access coding on a computer game CD as read by the boot ROM of the PlayStation console was one such example – it did not prevent or inhibit infringement of copyright. Sony had also made complex arguments based on the reproduction of computer games in the Random

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<sup>2</sup> S Metalitz, Public Hearing 21.10.1999 pages 176-177  
<http://www.aph.gov.au/house/committee/laca/digitalagenda/pubhear.htm>

Access Memory (RAM) of the games console but these were rejected by the High Court primarily on the basis that reproduction in RAM was not sufficiently permanent or substantial enough to amount to copyright infringement.

### **The Effect of AUSFTA on the Sony Decision**

The AUSFTA has already been implemented in part through the *US Free Trade Agreement Implementation Act 2004* (Cth) which came into effect on 1 January 2005. Article 17.4.1 of AUSFTA obliges Australia to enact laws allowing copyright owners the right to prohibit all types of reproduction, in any manner or form, permanent or temporary. The *US Free Trade Agreement Implementation Act 2004* (Cth) amends the definition of 'material form' and 'copy' in section 10 of the Act and creates an exception to infringement where the reproduction is made as part of the technical process of using a non-infringing copy of the copyright material (see ss 43B and 111B). The critical difference being that temporary reproduction of a whole or substantial part of a computer program (game) or film (game) in RAM generated from an infringing copy of the copyright material will be unlawful. This will most likely mean that the arguments made by Sony concerning reproduction in RAM will be upheld in the case of infringing material. The decision in relation to reproduction in RAM would remain intact in relation to non-infringing material namely games purchased overseas and possibly back up copies.

### **Will the Changes Required by AUSFTA mean Regional Access Coding is now a TPM?**

The clear intent of the AUSFTA evidenced in art 17.4.7 is to bring Australian anti-circumvention law into line with that in the US through making actual anti-circumvention of an access control unlawful and moving the definition of TPM from one that "prevents or inhibits infringement of

copyright" to one that "controls access" to protected subject matter.

The critical question concerning the continued relevance of the *Stevens v Sony* reasoning will be whether the amended Australian law will equate "access" with "use". If "controls access" means for example controlling access to copyright subject matter **before** any act of using, reproduction or communication occurs then the *Stevens v Sony* reasoning will remain important, as regional access coding does not "control access" before the relevant act. It does not stop someone being able to access the copyright subject matter for the purpose of using, copying or communicating it. This approach fits well with the argument proposed by the IIPA that access should be decoupled from the activity that goes on after access is achieved; access is merely the lock on the door. It does not concern itself with any activity (e.g. use)<sup>3</sup> that will occur after access has been achieved. However if "controls access" means for example the right to control use or playing of a game on a PlayStation **after** access to copyright subject matter has been achieved then the *Stevens v Sony* reasoning will be of limited application.<sup>4</sup>

The very great fear is that as software inhabits an enormous number of the consumer goods we purchase in

<sup>3</sup> On one view it might be argued that you have not achieved access to a PlayStation game if you cannot play it on the console you have purchased. It is hard to justify such an approach as it ignores the fact that once access is established a consumer can use modified technology to play the game. If they could not achieve access to the game in the first place there would be nothing that could be done to enable use. By trying to draw the legality of the modified technology into the definition of access the proponents of this view are extending the notion of access control (having its origins in copyright law) to a broader right to control use (having significant impact on consumer law).

<sup>4</sup> On this interpretation see, *Sony v Gamemasters* 87 F. Supp. 2d 976 (N.D. Cal. 1999):

"39. Defendant concedes in its opposition papers that "[t]he Game Enhancer makes temporary modifications to the [PlayStation] computer program ... [c]hanging these codes with the Game Enhancer does not alter the underlying software made by SONY." (Def. Opp. at 6). Based upon the declarations before this Court, the Game Enhancer's distinguishing feature appears to be its ability to allow consumers to play import or non-territorial SCEA video games. As discussed above, SCEA specifically designed the PlayStation console to access only those games with data codes that match the geographical location of the game console itself. The Game Enhancer circumvents the mechanism on the PlayStation console that ensures the console operates only when encrypted data is read from an authorized CD-ROM. (Plt's Reply at 7). Thus, at this stage, the Game Enhancer appears to be a device whose primary function is to circumvent "a technological measure (or a protection afforded by a technological measure) that effectively controls access to a system protected by a registered copyright...." 17 U.S.C. § 1201(a)(2)(A). (Emphasis added)"

this day and age there is tremendous scope for embedding TPMs in all kinds of products and thereby radically redefining the parameters of a sale of goods or services. If TPMs as protected by anti-circumvention law can be used to structure the scope/usability of the product through code or technology then what the consumer is buying may not be readily apparent and worse still, may not allow choice of or interoperability with other accessories.<sup>5</sup>

If the definition of a TPM is to move from "prevent or inhibit copyright infringement" to "controls access" meaning "controls use" then we have not only legislated an access right in our copyright law but we have also legislated a far reaching right to control and define consumer use. This would be better placed in our consumer legislation and assessed in that light than articulated and justified as an aspect of copyright law. The AUSFTA in essence acknowledges such a point in art 17.4.7 (d).<sup>6</sup>

As Australia has moved to open up the flow of goods and services across borders in line with free trade principles through the removal on the restrictions on parallel importation of copyright material in certain circumstances it seems odd that the AUSFTA should be interpreted as promoting the reintroduction of such barriers through technology. The barrier that law has taken away AUSFTA is threatening to reintroduce through technological regulation.

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<sup>5</sup> *The Chamberlain Group Inc v Skylink Technologies Inc* 381 F.3d 1178 at 1203, 1204 (Fed Cir. 2004); *Lexmark Int'l, Inc. v Static Control Components, Inc.* 387 F.3d 522; 2004 U.S. App. LEXIS 27422 (6th Cir 2004); B Fitzgerald, "The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?" <http://www.law.qut.edu.au/about/staff/lstaff/fitzgerald.jsp> An earlier and shorter version of this paper appears in (2005) 10 *Media and Arts Law Review* 89

<sup>6</sup> AUSFTA art 17.4.7 (d): Each Party shall provide that a violation of a measure implementing this paragraph is a separate civil or criminal offence and independent of any infringement that might occur under the Party's copyright law.

Constitutional and statutory interpretation principles and international free trade principles suggest that "controls access" should not be given a broad interpretation so as to include use. In this way the fundamental reasoning and logic of *Stevens v Sony* would prevail and Australian consumers would be more secure in understanding what they are buying and allowed a broader choice and interoperability of accessories. Some will still argue that to be able to segment markets across the world through price differentiation is not bad in economics nor in anti-trust or competition law. However once we have removed parallel importation restrictions and recognise that digital content can be distributed cheaply and efficiently across the globe in an instant, arguments taking us back to segmented markets reinforced through technology are not appealing. Arguments suggesting the cost of distribution in Australia are so high that a differential pricing structure is needed to make such distribution efficient are questionable in light of the increasing capacity to distribute online in a cost effective manner.

The lifting of parallel importation restrictions were meant to liberate us from the imperialism that British and US publishers have forced on us for many generations. Why would we entertain the return to such imperialism in a digital environment that allows Australian consumers the possibility of immediate access to a global distribution market for the very first time. Today we can buy direct from New York and have it delivered via the Internet. Why should technology be allowed to stultify this and force us back to a situation where we buy the Australian edition at a marked up price?

Ultimately any TPM that is designed like regional coding to segment markets in digital entertainment products should not be reinforced by anti-circumvention law so as to make Australian consumers second class citizens in a global market. It is almost unthinkable that a copyright treaty and a copyright chapter in an FTA could end up being implemented in domestic law to the effect that the consumer's liberty is restricted by preventing them from

using games lawfully acquired in New York on the games console purchased in Australia. That would be both frightening and outrageous.

Kirby J in *Stevens v Sony* questions whether such an enactment would be constitutional.<sup>7</sup> Parliament would act to legislate these amendments under the intellectual property power s 51 (18) and/or the external affairs power s 51 (29) (implementing the WCT<sup>8</sup>, WPPT and AUSFTA) with other powers such as the trade and commerce power or the corporations power having potential relevance. Any inherent limits found in the intellectual property power (as yet undefined by the High Court)<sup>9</sup> or the guarantee of compensation ("just terms") for acquisition of property under s 51 (31) would be the obvious constitutional limits.<sup>10</sup> Section 51 (31) would have particular relevance where property rights to chattels have already vested and the AUSFTA amendments purport to reduce the value (through functionality) of such chattels to the benefit of the copyright owner.<sup>11</sup>

## **Conclusion: The Limits of TPMS**

The critical issue for Australia (and our enterprise class) is to ensure that the implementation of the AUSFTA obligations does not result in the reinforcing of TPMs that deny Australian consumers their legitimate rights to participate in the global market for digital entertainment products. *Stevens v Sony* highlights for the very first time the need to bring into the balance and reconcile the

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<sup>7</sup> At [216]

<sup>8</sup> E.g. Art 11 WCT: Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

<sup>9</sup> See: *Grain Pool of WA v The Commonwealth* [2000] HCA 14 at ¶n 218 per Kirby J

<sup>10</sup> See further: B Fitzgerald, "The Playstation Mod Chip: A Technological Guarantee of the Digital Consumer's Liberty or Copyright Menace/Circumvention Device?" <http://www.law.qut.edu.au/about/staff/lsstaff/fitzgerald.jsp> An earlier and shorter version of this paper appears in (2005) 10 *Media and Arts Law Review* 89; B Fitzgerald, "Unjust Enrichment As A Principle of Australian Constitutionalism" (1995) available at <http://www.law.qut.edu.au/about/staff/lsstaff/fitzgerald.jsp>

<sup>11</sup> Consider: Kirby J in *Stevens v Sony* at [216]

fundamental rights of consumers with those of copyright owners. The next great battle in this digital copyright war will not necessarily be between pirates and copyright owners but between the digital liberties of the everyday Australian consumer and the increasing reach of copyright owners in the form of multi-national corporations.

My point is that if the definition of technological protection measure is amended to focus on "controls access" and this is equated to "controls use" then the liberties of Australian consumers will be radically altered by this legislation which serves to implement a part of the AUSFTA designated "Intellectual Property". The recent decision in *Stevens v Sony* has guaranteed Australian consumers a fair degree of liberty in the face of imperialistic regional coding restrictions. Will this significant decision reinforcing the liberties of Australian consumers be made redundant by your actions?

To this end it would have been useful for this Committee to explain its understanding of the new definition of TPM to be introduced in the next 12 months as it is integral to the process at hand. If TPM means "controls use" then we have entered a whole new dimension in which the interests of Australian consumers risk being subjugated to the needs of powerful multi-national corporations. In that situation the strongest consideration needs to be given to the exceptions that will apply to ameliorate this impact.

My suggestion is the Parliament should clearly articulate the view that the term "controls access" does not reach so far as to "control use" of consumer products. We need to "unlock" the digital environment through interoperability and choice not suffocate it through an ill defined and unprincipled "grab" for control over the liberty of Australian consumers.

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Brian is a well-known intellectual property and information technology lawyer. He is co-editor of one of Australia's leading texts on E Commerce, Software and the Internet - *Going Digital 2000* - and has published articles on Law and the Internet in Australia, the United States, Europe, Nepal, India, Canada and Japan. His latest (co-authored) books are *Cyberlaw: Cases and Materials on the Internet, Digital Intellectual Property and E Commerce* (2002); *Jurisdiction and the Internet* (2004); *Intellectual Property in Principle* (2004). Over the past four years Brian has delivered seminars on information technology and intellectual property law in Australia, Canada, New Zealand, USA, Nepal, India, Japan, Malaysia, Singapore, Norway and the Netherlands. In October 1999 Brian delivered the Seventh Annual Tenzer Lecture - Software as Discourse: The Power of Intellectual Property in Digital Architecture - at Cardozo Law School in New York. In October 2000 he was invited as a part of the Distinguished Speaker series hosted by the Ontario wide Centre for Innovation Law and Policy to deliver an address on "Digital Property" at the University of Western Ontario Law School in London, Canada. Through the first half of 2001 Brian was a Visiting Professor at Santa Clara University Law School in Silicon Valley in the USA. In January 2003 Brian delivered lectures in India and Nepal and in February 2003 was invited as part of a distinguished panel of three to debate the Theoretical Underpinning of Intellectual Property Law at University of Western Ontario in London, Canada. During 2004 Brian has presented talks in Germany, India and China and was a Visiting Professor in the Oxford University Internet Institute's Summer Doctoral Program in Beijing in July 2004. He is also a Chief Investigator in the newly awarded ARC Centre of Excellence on Creative Industries and Innovation. His current projects include work on digital copyright issues across the areas of Open Content Licensing and the Creative Commons, Free and Open Source Software, Fan Based Production of Computer Games, Licensing of Digital Entertainment and Anti-Circumvention Law. Brian is a Project Leader for Creative Commons in Australia. From 1998-2002 Brian was Head of the School of Law and Justice at Southern Cross University in New South Wales, Australia and in January 2002 was appointed as Head of the School of Law at QUT in Brisbane, Australia.