INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE®

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VIA E-MAIL: copyrightlawbranchATag.gov.au

Gabrielle Mackey
Principal Legal Officer
Copyright Law Branch
Attorney-General's Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Dear Ms. Mackey:

The International Intellectual Property Alliance ("IIPA") appreciates this opportunity to comment on the Exposure Draft of the Copyright Amendment Regulations (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.

The primary focus of IIPA's comments will be on the compliance of the Exposure Draft with the operative provisions of the Australia-US Free Trade Agreement ("FTA"). We defer to copyright industry organizations within Australia to offer informed opinions on whether the Exposure Draft, if adopted, would constitute sound policy that will advance the objective of promoting the creation and dissemination of works and other materials protected by copyright in Australia.

Art. 17.4.7.a.i of the FTA requires Australia to adopt legal prohibitions against the circumvention of effective technological measures that control access to protected works and other subject matter.[1] Art. 17.4.7.e.viii authorizes Australia to recognize exceptions to these

[1] For simplicity, this submission will refer to "works" to encompass works, performances and phonograms subject to protection under Australia's copyright law.

prohibitions for "non-infringing uses of a work …..in a particular class of works, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding." Article 17.4.7.f provides that such exceptions may be applied "only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures."

At the outset, we are handicapped by being asked to comment on proposed exceptions to a prohibition that has not yet been enacted, or even presented in bill form to the legislature. Candidly, we consider it premature for the government to advance an instrument for the recognition of exceptions under such circumstances, and ask that another opportunity be provided to supplement these comments after the contours of the prohibition have been presented to the legislature in bill form.[2]

The explanatory material provided by the Attorney General's Department (AGD) states, "A number of additional exceptions were identified in the *Review of Technological Protection Measures Exceptions* by the House of Representatives Standing Committee on Legal and Constitutional Affairs. Some of these will be included in the Copyright Regulations." We take it from this that the AGD believes that the review carried out by the LACA Committee was the "legislative or administrative review or proceeding" called for by the FTA as a pre-requisite to the recognition of exception under Article 17.4.7.e.viii, at least as to the subset of LACA recommendations that have been carried forward (in some cases with slight modifications) in the Exposure Draft.

IIPA has already identified "pervasive and rather fundamental defects" in the proceedings of the LACA Committee which, in our view, disqualify it from providing the basis for FTA-compliant exceptions to the prohibition on circumvention of access controls. See IIPA's submission to Attorney-General Philip Ruddock of May 9, 2006 ("May 9 submission") at 8, which we incorporate by reference with this submission. The main defects include:

- The LACA review improperly treated "an adverse impact that is reasonably foreseeable" as synonymous with the "likely adverse impact" which is required under the FTA. See May 9 submission at 3.

- The LACA review does not identify "particular classes of works" for which circumvention of access controls would be permitted under the exception, even though the FTA limits the availability of exceptions under Art. 17.4.7.e.viii to such "particular classes." See May 9 submission at 3-5.

[2] IIPA and the other commenters are nearly as much "in the dark" about the prohibition to which proposed exceptions will apply as was the LACA Committee exactly one year ago, when IIPA made its submission to that body. See *Review of Technological Protection Measures Exceptions* by the House of Representatives Standing Committee on Legal and Constitutional Affairs ("LACA Report") at 1.10 (quoting *Submission 10* of IIPA).

- The LACA review rejected the argument that it should not base a recommendation on a "likely adverse impact" unless that impact was substantial, and postulated that a "credible demonstration of adverse impact" could be found even if the preponderance of the evidence were against such a finding. It also asserted that it would be pertinent to such a credible demonstration that a copyright owner imposed "a financial impost relating to the use of works" (presumably including normal subscription fees), or that someone sought unauthorized access to a work in order to carry on a business, occupation or profession, or to maintain "a quality of life." These conclusions strain the FTA concept of a credible demonstration of likely adverse impact beyond the breaking point. See May 9 submission at 5-7.

- The LACA review did not appear to assess the cumulative impact of its recommendations on the adequacy of legal protection and the effectiveness of legal remedies, as FTA Art. 17.4.7.f requires. See May 9 submission at 7, 9.

- Procedurally, the LACA review provided no meaningful opportunity for stakeholders who may be adversely affected by particular proposed exceptions to provide relevant information, or to argue that the proposals were inconsistent with the FTA standards, even though it seemed to recognize that a "natural justice perspective" would have required this. See May 9 submission at 7-8. Inevitably, the record upon which the AGD relies for the Exposure Draft is, for all practical purposes, bereft of evidence of such inconsistency – not because such evidence does not exist, but because stakeholders had no opportunity to present it at the relevant time. This procedural flaw meant that the LACA Committee was deprived of evidence that was critical to the validity of its determinations, and therefore its conclusions cannot be relied upon to support the recognition of exceptions that would comply with Art. 17.4.7.e.viii.

Until a "legislative or administrative proceeding" that complies with the FTA and with basic tenets of administrative law is carried out, there is no principled basis for any recommendations for exceptions to be recognized under Art. 17.4.7.e.viii of the FTA. For the reasons summarized above, the LACA review was not such an FTA-compliant proceeding; and there is no indication in the Exposure Draft or its accompanying explanatory material that the AGD or any other entity has conducted such a proceeding or has cured the deficiencies of the LACA review. While it may be that the AGD believes that it has filtered out of the LACA recommendations those that would not have been made had the LACA proceeding complied with the FTA, it has not represented that it has done so, and indeed the Exposure Draft carries forward some recommendations that do not appear to satisfy the FTA criteria. For example, some of the exceptions contained in the Exposure Draft depend upon adverse impacts which may be "foreseeable," but which are not "likely" to occur; these exceptions are therefore inconsistent with the standards set forth in the FTA.

Proposed regulation 20Z(f) is flawed in this way. It would recognize an exception when an access control is circumvented in order to allow "reproduction or communication by a library or archives of part or the whole of an article or published work to another library or archives in

the circumstances mentioned in section 50 of the Act." That section of the Copyright Act of 1968 applies only to "a periodical publication or published work held in the collection of a library," a term that for these purposes includes an archive. Sections 50(1), 50(9). If such a work is already held in the collection of a library, it is difficult to conceive of a scenario in which the library would have to circumvent a technological protection measure in order to gain access to it. The discussion of this exception in the LACA Report at 4.132-4.137 is cursory at best, and the submissions which LACA cites fall short of showing "credibly demonstrated likely adverse impacts" of the prohibition on circumvention of access controls; some of the examples they provide do not fall within section 50,[3] while others are not clearly explained. Thus, there is insufficient concrete evidence from which it can be concluded that any adverse impact is "likely" to occur, which is the standard that must be satisfied before an exception may be justified under Art. 17.4.7.e.viii. Since LACA did not apply this standard, it is not surprising that it recommended such an exception; but since the AGD is obligated to apply the correct standard, there is no basis for it to have brought this particular LACA recommendation forward into the Exposure Draft.

We offer the following comments on some of the other specific proposed exceptions in the Exposure Draft:

Proposed Regulation 20Z(a): this proposed exception to permit circumvention to achieve "interoperability of an independently created article" with a computer program is questionable under the FTA. Art. 17.4.7.e.i comprehensively addresses the issue of permissible exceptions to circumvention prohibitions regarding computer programs for the purpose of interoperability. It does not reach what this proposal would cover. The Exposure Draft of the Copyright Amendment (Technological Protection Measures) Bill 2006 ("TPM legislation"), in sections 116AK(3), 116AL(2), 116AM(2), and corresponding criminal provisions, already occupies (and indeed, may already exceed) the full scope of exceptions provided for in the FTA in this sphere. The exceptions to be recognized under Art. 17.4.7.e.viii are intended to focus on areas not already covered by explicit exceptions set out in the FTA.

Furthermore, it is not even clear that the LACA Committee recommended this exception. It described the proposal before it as limited to achieving interoperability between computer programs (LACA Report at 4.22), an activity already comprehensively addressed by Art. 17.4.7.e.i (and by the cited provisions in the TPM legislation). LACA's recommendation in the second point of Recommendation 15 is also limited to interoperability between programs. The LACA report at 4.28 refers obliquely to proposed exceptions "for the purpose of achieving interoperability between software and computer systems or hardware" but never explicitly recommends one, concluding instead that an exception for interoperability of computer programs

[3] See, e.g., *Submission 28* (cited in the LACA Report at 4.135, n.62) in which the National Library of Australia gives the examples of "personal papers of a deceased person" or "personal correspondence of a depositor" as works within a library's collections for which it would be necessary to hack through access controls. But these are very unlikely to be "periodical publications or published works" and thus section 50 is inapplicable to them.

"will … cover" interoperability needs regarding hardware. Thus there is no clear indication of the evidentiary basis upon which the AGD concluded that proposed exception (a) satisfied the FTA criterion of a credible demonstration of likely adverse impact.

Proposed Regulation 20Z(j) also appears far broader than the evidentiary support behind it. Paragraph 4.178 of the LACA Report identifies only a single submission that supports any finding of likely adverse impact if the prohibition applied to circumvention of malfunctioning access controls; and that submission relies almost entirely on the record developed in the rulemaking proceeding in the United States under 17 USC § 1201.[4] But proposed exception (j) is far broader than its counterpart in the United States ("computer programs protected by dongles that prevent access due to malfunction or damage and which are obsolete") in at least the following respects:

- the U.S. exemption applies only to computer programs whereas the proposed Australian exception covers all "copyrighted material;"

- the U.S. exemption applies only to circumventing dongles whereas the proposed Australian exception covers all access controls;

- the U.S. exemption applies only when a computer program cannot be accessed due to a damaged or malfunctioning dongle and therefore does not apply to all damaged or malfunctioning dongles (see Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, Final Rule, 68 Fed. Reg. 62011, 62013 (Oct. 31, 2003) ("Final Rule")) whereas the proposed Australian exception can be read to cover all TPMs that are "not operating normally" regardless of whether the abnormal operation prevents access to a copyrighted work;

- the U.S. exemption applies only when a replacement dongle is obsolete and therefore cannot reasonably be replaced or repaired in the commercial marketplace (see Final Rule at 62013) whereas the proposed Australian exception is applicable whenever "a replacement technological measure is not reasonably available" regardless of whether the existing TPM is reasonably repairable.

Proposed Regulation 20Z(j) also leaves critical terms undefined. It risks opening the door to circumvention whenever a user subjectively concludes that an access control is "not operating normally," even if it is operating in the manner which the copyright owner intended. It is telling that the "not operating normally" criterion does not appear to have been supported by any

[4] *Submission 38* at 25 (cited in the LACA Report at 4.178, n. 82-3). The other two sources cited in the LACA Report at 4.178 refer to scenarios other than a malfunctioning TPM (*Submission 53* at 17 deals with obsolete access controls, while the concern raised in the Fitzgerald testimony cited in n. 84 is accommodated by section 116AK(5) and corresponding provisions of the TPM legislation, providing an exemption to the prohibition for a wide range of government functions).

participant in the LACA proceeding, including the committee itself, so it is entirely unclear whether any credible demonstration of likely adverse impact to support this exception has been made.

Proposed Regulation 20Z(k) addresses a scenario (a TPM that damages another product) which the AGD apparently told the LACA Committee had never manifested itself in Australia. LACA Report at 4.189, n. 91. From all that appears in the LACA Report, it derives from the submission of a single witness who argued that "it is not appropriate for a TPM to apply where its operation will … impact on other applications." *Submission 6* at 2.[5] This falls far short of amounting to a credible demonstration that interference or damage is likely to occur, much less that the ability to make non-infringing uses is likely to be adversely impacted unless circumvention of the offending TPM is allowed. In addition:

- there is no evidence that it is necessary for a consumer to engage in prohibited circumvention of a TPM to gain access to copyrighted material (as contrasted with simply choosing to uninstall the copy of the work, along with the objectionable TPM) in order to prevent or repair damage to a host product or other products;

- there does not appear to have been any consideration of whether other exceptions already cover the activity described to the extent that it is legitimate (e.g., the security testing exemption explicitly authorized by Art. 17.4.7.e.iv already covers circumvention "for the sole purpose of testing, investigating, or correcting the security of a computer, computer system, or computer network");

- even if there were evidence of TPMs that damage host products, there is no evidence that legitimate uses of copyrightable materials are prevented by such TPMs;

- the lack of definitions in the exception makes it susceptible to overly broad interpretations that would allow circumvention based on subjective impressions of when a TPM "interferes with or damages a product" or what repairing or preventing damage to a product means;

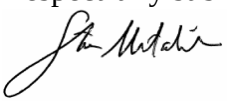
- the criterion of "interfering with a product" is particularly troublesome. There is no apparent basis for even including the concept of "interference" in the proposed exception, since it would not permit circumvention for the purpose of correcting or curing "interference," but only for the purpose of preventing or repairing damage. Unless "interference" is deleted, the door would be open to an argument that, for instance, a

[5] The LACA Report at 4.186 also cites *Submission 14* at 11, which discusses CDs that some editing and transmission equipment can not read. Apparently, LACA thought there was "a broader significance" to this discussion; but the AGD should recognize that proposed exception 20Z(i), which deals with "the broadcasting of a sound recording in the circumstances mentioned in section 109 of the Act," fully addresses the issues raised in this part of Submission 14.

password control "interferes with" the ability of an Internet browser program to access a work online if the correct password is not supplied. This could hardly be the basis for allowing circumvention of the password control to "repair" the "interference," but it is essential that such an interpretation be ruled out.[6]

IIPA appreciates your consideration of our views. If we can provide any further information or respond to any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,



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[6] Moreover, the current formulation of the exception does not limit itself to covering only circumvention that is necessary to prevent damage or further damage under prong (i), although it does so limit itself with regards to repairs under prong (ii). This formulation would potentially encourage users to circumvent access controls based on a mere suspicion, rumor or hunch that a TPM will damage their products. If prong (i) of the exception were limited, as prong (ii) is, to circumstances in which circumvention is *necessary* to enable the prevention of damage or further damage, consumers would not be able to strip access controls and place copyrighted works at risk on such a flimsy basis. Nevertheless, even if such changes were made, the exception would remain inconsistent with the FTA since it is not based upon a credible demonstration of likely adverse impact.