



**Presentation to House of Representatives
Standing Committee for Legal and Constitutional Affairs
Inquiry into TPM Exceptions**

**Tuesday 8 November 2005
Text of Verbal Submission by Carolyn Hough**

Our Position in a Nutshell

The games industry supports the introduction of the IP provision of the AUS/US FTA and seeks to have them adopted in full without any exceptions.

Games consoles plug into televisions and the format of the console and the CD-ROMs are set to comply with international television standards. The need to meet this standard is beyond the control of the Australian games industry. Handheld game devices have no region coding. The introduction of HDTV over the next few issues will see this issue disappear.

The primary purpose of games TPMs is to counter piracy issues. The Allen Consulting Group has confirmed that piracy costs the games industry \$100m in lost sales each year and the jobs of 200 Australians. TPMs also allow the games industry to comply with classification law set by the Office of Film and Literature Classification and 3rd party licensing requirements.

While there may be a few individuals who legitimately buy a game overseas (in a non-PAL country) and can not play it back in Australia, the number of persons affected is small, compared to the \$100million piracy problem.

Given the rapid pace of technological change, it is appropriate to introduce the IP provisions of the FTA without any exceptions now, and to review this matter again in four years time.

Overview of presentation

Today's presentation is designed to dispelling 7 'myths' or misconceptions about TPMs and the games industry deriving from media reports and/or public submissions to the Committee's review

- Myth 1 – That there is only one type of TPM used by games industry.
- Myth 2 – That there is only one type of 'region code'.
- Myth 3 – The games industry uses 'region coding' to divide markets.
- Myth 4 – The games industry uses 'region coding' to price discriminate.
- Myth 5 – TPMs cause significant harm to non-infringing uses.
- Myth 6 – There would be no impact on the industry if TPMs could be circumvented.
- Myth 7 – That the Australian games industry can control TPMs.

1. **Myth 1 – There is only one type of TPM**

- The games industry uses a variety of TPMs, all of which are required to be protected by FTA.
- There are two broad types of TPM used across a range of games formats and platforms:
 - (a) Access controls – e.g. authentication systems on networks, password controls, controls that check whether product is legitimate before allowing play, controls that contain password and payment elements to allow users to 'pay per play';
 - (b) Replication controls – e.g. Dynamic Network Authentication System (DNAS) and SecureRom which control physical copying;
- Different TPMs are used for different products/distribution platforms. As a result, it is not possible to identify 'the' TPM used by the games industry.
- The Committee should therefore take great care before recommending any exception to precisely specify the particular TPM that is alleged to cause an adverse effect on non-infringing use (which the games industry does not believe is the case)
- All TPMs are used to control legitimate access to products and to prevent/minimise piracy

2. **Myth 2 – There is only one type of region code**

- There has been much confusion in media reports about this issue, which may have contributed to some of the concern raised in relation to 'region coding' in some submissions
- There are different broad types of 'region coding' used by the games industry and the film industry:
 - a system used by the film industry to protect film content on DVDs (e.g. 'zoning', where Australia is in Zone 4);
 - A type of system used by the games industry on console based games, designed to comply with international television standards.
- An international body (CCA) set television standards (eg NTSC and PAL), which have been adopted by Government's worldwide. In Australia, it was decided to follow the PAL television standard. This is a technical issue not controlled by the games industry
- It is important to understand that console games must be played on consoles which are plugged into televisions. The access code operates to check if the game being placed into the console has been designed to be played on the relevant type of console (eg, if the console is PAL coded, it will check to see if the disc is a PAL disc)

- Other PAL countries include: New Zealand, the UK, Ireland, the majority of Europe and Scandinavia (except France), Indonesia, the Middle East, India and Pakistan, parts of Africa (including South Africa, Zimbabwe and Kenya), parts of Asia (including Singapore, China, Thailand, Hong Kong, Laos and Cambodia) and parts of the Pacific (including East Timor and Papua New Guinea)¹.
- Consoles designed for sale in a particular country are designed to match the television standard of that country.
- It is important to understand two key points:
 - (i) All PAL games can be played on all PAL consoles. In other words, there is no 'zoning' in the sense of geographic markets – all PAL discs can play on all PAL consoles irrespective of whether they were bought in Australia, New Zealand, Europe, Asia or the Middle East; and
 - (ii) the television standard codes only used on console games that need to plug into televisions i.e. handheld devices do not have any form of 'region coding'.
- It is therefore incorrect to think that the games industry uses 'region coding' in order to divide the world into regions. The only technical division is for console games, and in accordance with internationally adopted television standards

3. Myth 3 – That the games industry uses region coding to divide markets

- This is not correct. The only 'division' that may occur is based on technical TV standards and only for console games
- However, technical standard codes do present useful added benefits as they assist:
 - (a) Compliance with classification and labelling laws (e.g. Australia has specific labelling requirements and unlike other countries, there is no 'R' rating for games in Australia. Designing discs for specific 'regions' assists in compliance with these consumer protection standards);
 - (b) Compliance with music licensing and trade mark licences (e.g. a NTSC-J disc that is designed for the Japanese market will have specific licensed material for the Japanese market, such as a Japanese language soundtrack and characters designed to appeal to Japanese consumers. Coding to comply with the Japanese television standard also assists games publishers to comply with territory specific music licences contained in the game);
 - (c) development of country specific product (e.g. games translated into a particular language); and
 - (d) managing consumer preference (e.g. in Australian rugby union games, the customer preference is that the Wallabies win, in New Zealand games, the preference is for the All Blacks win. (Note – both Australia and New Zealand are PAL countries so there is nothing to prevent importation and play of a New Zealand in Australia).

¹ A list of countries and their television standard is available at 'World Television Guide' www.kropla.com/tv.htm

4. **Myth 4 – region coding is used by the games industry to price discriminate**

- IEAA members do not price discriminate between countries
- In any event, it is not practically possible to use region coding to price discriminate for console games within PAL countries as all PAL discs can be imported from any PAL country and played on Australian consoles.
- As region coding is not used on non-console games, it also not possible to use technical means to price discriminate for other games formats.
- There is no market evidence that price discrimination by games owners is occurring. As parallel importation is permitted in Australia, one would expect any significant differences in price to be exploited by commercial retailers sourcing product from overseas markets (as happened with music CDs after the removal of parallel importation restrictions for sound recordings) – The IEAA has seen no evidence that this has been the case

5. **Myth 5 – TPMs cause harm to non-infringing uses**

- For handheld, online, networked or wireless games TPMs only operate to ensure play is licensed or with a lawful product i.e. there can be no threat to non-infringing uses as the TPM only stops *infringing* uses
- For console games, the primary purpose of the TPM is to prevent piracy, as the first series of 'questions and answers' asked by the TPM are to assess whether the disc is a legitimate one.
- In relation to the television standard coding, there are two possible scenarios for the TPM check used by a PAL console:
 - the 'question and answer' establishes that the disc is coded for a PAL console - all PAL products can be played so there cannot be any threat to non-infringing uses in this circumstance
 - the 'question and answer' establishes that the disc is coded for a NTSC console – there is some potential threat to non-infringing use as the NTSC disc will not play on the PAL console as it does not 'work' with the PAL television standard.
- The US Copyright Office looked at this situation and found that any harm to non-infringing use was very small; at the level of 'inconvenience' rather than harm, and that the problem was '*de minimis*'. This was the case in the United States even in the situation where the majority of major external markets for the US are PAL territories
- Lets look at the reality in Australia:
 - Australian Bureau of Statistics Outbound International Tourism statistics² for 2003 (the most recent data IEAA has been able to source) show that the top 5 destinations for outbound international leisure tourism – representing approximately 57% of all international leisure tourism - were:

² Source: ABS Overseas Arrivals and Departures Collection, 2003

Number	Destination	Television Territory
1	New Zealand	PAL
2	United Kingdom	PAL
3	Other Europe	PAL
4	Other Oceania	Majority PAL
5	United States	NTSC

- The top 2 destinations (New Zealand and the United Kingdom) represented approximately 30% off all outbound international travel (for all purposes) for Australians.
- So what is the potential class of consumers affected by NTSC coded console games?
- The main source of NTSC games products is the United States.
- ABS data shows that in 2003 there were 166 600 leisure travellers from Australia to the United States.
- A recent study commissioned by the IEAA called GamePlay Australia (November 2005) suggests that 76% of Australian households have a gaming device, and that 40% of those households have purchased a computer game in 2005.
- Simplistically applying those results to the class of Australians who travel to the United States for leisure, you could expect to see the following:

Total no of Australian tourists to US 2003:	166 000
76% of number of US bound tourists:	126 160
40% of game playing US bound tourists:	50 464
- It seems we are comparing the possible inconvenience of a maximum 50 000 potential purchasers of US computer games, with the possibility of removing all TPM protections from an industry with a \$100 million annual piracy problem.
- This class could be further reduced by assuming that some of the tourists purchasing games would not buy console games, and many tourists would not shop for games while they were on holidays.
- Although this is an extremely simplistic analysis, it does show that we are talking about a very small class of consumers that are potentially impacted by television standard coding on console based games.

- In addition, these consumers are not denied access to products – they are perfectly entitled to buy the local version of the product, or a product released in another PAL territory
- The evidence in Australia show that the findings of the US Copyright Office are credible – there is no credibly demonstrated widespread threat to non infringing uses from the existence of television standard coding on console games, and any harm must be placed at the level of consumer inconvenience, rather than an impact on non-infringing uses under the Copyright Act.

6. **Myth 6 – Allowing consumers to circumvent TPMs would have no impact on the games industry**

- This is not correct. All TPMs used by the games industry have the primary purpose of preventing or minimising piracy, and preventing unauthorised access to content. Allowing the circumvention of TPMs would remove the industry's best practical tool to protect and enforce its copyright rights.
- For *non-console* games TPMs are the only way to protect those products, particularly for online products. e.g. there is no way to make a 'pay per play' offering available to consumers without the protection of a TPM. Allowing an exception that applied to the TPMs used in non-console games would only promote *infringing* uses of games, and remove the ability of games owners to protect their works in digital formats.
- For *console* games:
 - (a) the vast majority of games are purchased in Australia or other PAL countries and therefore there is no need for any consumer to have access to a TPM for 'legitimate' purposes (i.e., allowing an overseas game to be played). The only possible use of a circumvention device in these circumstances is to commit piracy, or to enable play of a pirated game;
 - (b) for NTSC games, evidence from IEAA members suggests that the main use of mod chips is piracy, not to enable legitimate games to be purchased e.g. evidence of calls to Help Desks. It is worth noting that in the Stevens v Sony decision, Mr Stevens was found guilty of piracy matters.
 - (c) In any event, NTSC games are not designed to operate on PAL consoles;
 - (d) Any exception that allowed the circumvention of a console TPM would necessarily circumvent the copy control and parental controls present on games consoles as well as the television standard coding; and
 - (e) there is no practical way to limit the use of a circumvention device to the small class of game playing consumers who have travelled to a NTSC country and to limit their use only for modifying the technical standard coding.
- The practical effect of any exception would be to allow circumvention devices to be widely used, leading to loss of control of content in digital formats, leading to a huge increase in piracy in Australia.

- This would destroy the effectiveness of legal remedies for TPMs and the ability of games owners to take action against the circumvention of TPMs, which is contrary to the requirements of the FTA (Article 17.4.7(f)).

7. Myth 7 – The Australian games industry can control TPMs

- There seems to be a misconception that the Australian games industry could simply design its TPMs to allow people to play 'out of region' games. As set out above, this is not correct as the 'region' element of TPMs used in console games systems is designed to comply with international television standards
- In addition, in relation to other forms of TPMs, the Australian games industry complies with the technological requirements of the international games industry (i.e., games developers in Australia will use TPMs used on games worldwide)
- It also needs to be understood that as fast as the industry can design TPMs, there are people around the world who see the TPM as a challenge, and try to crack it. The 'cracking' of TPMs used by copyright owners has become almost a 'sport' for some computer users.
- It would be unrealistic to say that games owners should just design different types of TPMs – as quickly as TPMs are designed they are vulnerable to crackers. This is why it is so essential that the legal rights of copyright owners in relation to their TPMs are protected in accordance with the FTA.

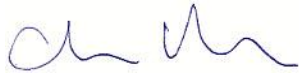
Conclusion

In summary:

1. The games industry primarily uses TPMs to protect its copyright rights and to present choices to consumers in how they play games (eg new console models include the ability for parents to 'lock' children out of games with particular ratings eg MA15+)
2. In the specific case of console games, TPMs also includes television standard codes to ensure that games will work when they are plugged into televisions. This is to comply with international standards and is outside of the control of the Australian games industry.
3. Non-console games do not contain any elements of 'region coding' – the only purpose of non-console TPMs is to control legitimate access and prevent piracy
4. There is no evidence that the television standard coding used in games consoles provides any real threat to non-infringing uses – the class of Australian consumers potentially affected is extremely small, and those consumers have other alternatives by which they can access games products in Australia or internationally.
5. The Free Trade Agreement provisions provide assistance for the industry in protecting its TPMs. The IEAA does not believe there is any evidence to show that these provisions cause an adverse impact on non-infringing uses. In contrast, TPMs are the only practical way games owners can protect their works in digital formats.

6. The IEAA asks the Committee not to recommend any exception to the TPM provisions used by games copyright owners. An exception would remove the effective protection for TPMs and as such would not be permitted by the FTA.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Chris Hanlon', with a stylized flourish at the end.

Chris Hanlon

Chief Executive Officer

Attachments: TPM & Piracy Fact Sheet