



Submission to

Ministry of Business, Innovation and Employment

Subject

**Implementation of the Trans-Pacific Partnership
Intellectual Property Chapter**

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1. Introduction

The Interactive Games and Entertainment Association (**IGEA**) welcomes the opportunity to respond to the Targeted Consultation Document (**TCD**) regarding the implementation of the Trans-Pacific Partnership (**TPP**) Intellectual Property Chapter.

IGEA has reviewed the TCD that presents legislative amendments required for New Zealand to ratify the TPP. In our submission, we have specifically focused on part 4 of the TCD, regarding technological protection measures.

By way of background, we have also attached a document at **Appendix A** that summarises the views of the video game industry with regards to technological protection measures. This document forms an important basis of our submission.

2. Executive Summary

By way of executive summary, IGEA is of the view that the proposed TCD exceptions in relation to TPMs, for situations where copyright is not infringed, should not extend to video games or video game consoles and hardware.

3. About IGEA

IGEA is the industry association representing the business and public policy interests of Australian and New Zealand companies in the interactive games industry. IGEA's members publish, market, develop and/or distribute interactive games and entertainment content and related hardware.

4. Submission: Technological protection measures

It is understood that the TCD recommends certain exceptions with regards to TPMs, whereby the existence of specific situations or circumstances will result in copyright not being infringed. IGEA would like to respond to a number of the suggested exceptions, insofar as they apply to video games and video game consoles and hardware.

a. Exception: To allow access to computer programmes that are embodied in a machine or device and restrict the use of goods (other than the work) or services in relation to the machine or device.

IGEA does not believe that this exception should extend to video game consoles, including traditional home consoles, handheld devices and other pieces of video game hardware.

Piracy continues to be an incredibly detrimental issue for the video games industry. As outlined in **Appendix A**, vendors detected more than 144 million connections by peers participating in the unauthorised file-sharing of titles on through ISPs in more than 200 locales in 2010. To combat such rampant piracy, video game companies have invested heavily in technological protection measures that not only serve to deter piracy, but also provide tangible value to legitimate paying consumers.

By permitting access to computer programmes as described in the above exception, the promulgation and distribution of pirated video game titles would be vastly encouraged. While the TCD does highlight examples wherein the exception attempts to serve legitimate purposes, the application of the exception in and of itself would effectively result in access controls for game consoles being permitted to be “hacked” (regardless of the intentions or purposes behind the action). This would enable any form of content, particularly pirated or unauthorised versions of games, being able to be played on a game console. This problem is especially harmful if the “hacker” in question then goes on to distribute the method by which the console was hacked. In fact, this issue already exists in the video games industry, whereby various circumvention devices or “mod chips” designed to bypass TPM measures are developed and widely distributed. The demand for such devices, including those that enable circumvention of access and copy controls, continues to be high. A major reason for this includes the increasingly high levels of online piracy. Implementing the above exception would only further exacerbate this issue.

Importantly, even for countries that have agreed to the TPP, including the United States, the “jail-breaking” of video game consoles has been rejected as a suggested exception to circumventing TPM protections. In these countries, game copiers and mod chips as discussed above are illegal. At least in the case of the United States, this decision was made because the exception was not believed to enable sufficient non-infringing uses. IGEA believes that similar reasoning can be applied to the above exception at issue in the TCD. Accordingly, to reiterate the point, IGEA does not believe that this exception should extend to video game consoles or hardware.

b. Exception: To enable circumvention of a TPM that to the extent that it controls geographic market segmentation by preventing the playback of legitimate physical copies of a film, sound recording, or computer game in New Zealand.

The TCD specifically refers to viewing or using legitimate versions of “computer games”, where regional zone protection is included, as an example wherein the exception would apply to enable circumvention of a TPM. IGEA does not support this exception, insofar as it applies to computer games.

The purpose behind the proposed exception seems to be to enable New Zealand consumers to bypass geographic market segmentation measures implemented for video game titles, where these consumers have purchased a legitimate physical copy. However, market segmentation in the video games industry is not as pervasive as it once was, and in fact, it continues to slowly decline.

A large factor behind this shift is the vast growth of the digital or online video game market. An increasing amount of consumers are beginning to solely or predominantly purchase digital versions of computer games. In fact, in 2014, almost 80% of consumer spend on access to video game software was purchased digitally. Because of the comparative ease in distributing titles digitally, uniform global release dates for games are commonplace and are arguably becoming the norm. In fact, it is frequently the case that, due to time zones, New Zealand consumers receive game software and hardware prior to any other geographical market in the world.

Accordingly, IGEA is of the opinion that there is little reason for implementing such an exception with regards to computer games, particularly because enabling circumvention of a TPM or “Digital rights management” (**DRM**) system (even if for the reason of avoiding geographic market segmentation) would unfortunately hinder technological systems that prevent games from being played on unauthorised devices. This would only further exacerbate the aforementioned issue of piracy in the video game industry.

5. Conclusion

In conclusion, IGEA does not support the proposed TPM exceptions for situations where copyright is not infringed, insofar as they apply to video games and video game consoles and hardware.

APPENDIX A – GAME INDUSTRY VIEWS ON TECHNOLOGICAL PROTECTION MEASURES

GAME INDUSTRY VIEWS ON TECHNOLOGICAL PROTECTION MEASURES

Severity of Online Game Piracy

The game industry is increasingly harmed by online piracy. In 2010, the Entertainment Software Association (ESA) undertook a study to measure the scope of online piracy through popular P2P networks. Results were compiled across major P2P protocols and involved activity on approximately 230 leading member titles. During 2010, ESA vendors detected more than 144 million connections by peers participating in the unauthorised filesharing of selected ESA member titles on through ISPs in more than 200 countries and territories globally. As staggering as this figure is, it under-represents the true magnitude of online game piracy, as it accounts only for downloads of a limited number of available titles over a selection of P2P platforms. Unaccounted for are the vast number of downloads that occur from non-P2P platforms, such as “cyberlockers” or “one-click” hosting sites.

Industry Anti-Piracy Efforts

The industry invests in technologies that prevent unauthorised copying of games, or the use of unauthorised copies. Each of the major game consoles implement technologies that prevent those consoles from playing unauthorised copies of games. These “technological protection measures” (TPMs) not only serve to deter piracy, they also help to implement value-added features that consumers appreciate and increasingly demand.

TPMs not only protect copyrighted works from unauthorised exploitation, but also enable the entertainment software industry to utilise new and innovative business models to meet consumer demands. Through the use of non-intrusive TPMs game makers can protect their investment into innovation, while simultaneously adding real value for consumers. For example, TPMs facilitate increased portability by permitting consumers to install and authenticate a single game on multiple computers. TPMs also permit companies to differentiate products to offer a greater range of options and flexibility to consumers, such as the ability to “try before you buy,” and allow consumers to implement parental controls.

Demand for Circumvention Devices

Because of the demand for pirated copies, there is no shortage of people and organisations dedicated to developing “circumvention devices” - software and hardware applications to unscramble, decrypt, bypass or deactivate TPMs without the authority of the copyright holder. Hackers devote extraordinary resources to the development of “mod chips,” which can be installed into game consoles to bypass the TPM that prevents the playback of unauthorised copies of games and “game copiers,” which are used to make and play unauthorized copies of games. Some of these devices enable the circumvention of both access and copy controls – for example, the “R4” enables both the copying of Nintendo DS games and their subsequent playback.

These circumvention devices require considerable investment to design, manufacture, distribute and make available for sale. But the rewards for black-market entrepreneurs are great, as these devices can sell for as much as \$50 to \$100 each. Increases in online piracy have driven up demand for circumvention devices. This provides lucrative business opportunities for those who import, sell, and install these devices – some of whom may never be involved in the actual reproduction or distribution of infringing copies.

International Best Practices

The advent of digital technologies and growth of the Internet have made the protection of TPMs as important as copyright protection itself. In an era in which piracy requires little more than the click of a mouse, providing adequate protection for copyright necessitates protection for TPMs. Both the World Intellectual Property Organization’s (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty (WPPT) reflect an international consensus on this point, and require member countries to provide protection for TPMs. As a result, game copiers and mod chips are illegal in the U.S. and in approximately 80 other countries, including all those which have properly implemented obligations under the WCT and WPPT.

New Zealand

Although New Zealand has yet to join the WIPO Treaties, it has implemented some measures for the protection of TPMs. Unfortunately, gaps in the current provisions render them largely ineffective for the games industry.

Because the definition of “technological protection measure” in Section 226 of the Copyright Act expressly denies protection for any “process, treatment, mechanism, device, or system to the extent that, in the normal course of operation, it only controls access to a work for non-infringing purposes,” the statute is of little utility for game developers and publishers who wish to utilise TPMs to combat piracy through the use of access controls.

While it is true that mod chips enable users to play legally purchased games coded for other regions, these devices are overwhelmingly used for the purposes of facilitating the use of illegally downloaded copies of games on consoles. Notwithstanding this fact, manufacturers and vendors of mod chips are able to skirt New Zealand’s TPM provisions by simply making the dubious claim that their product is not intended for infringing uses.

Enforcement

The industry makes use of civil enforcement provisions in addition to working cooperatively with law enforcement to bring to justice the most egregious criminal violators. In the U.S., the industry has had good success in conducting enforcement actions against distributors and sellers of circumvention devices. Following critical legal reforms, Hong Kong initiated its first actions against purveyors of circumvention technologies in the spring of 2008, followed by a series of significant actions in November, 2009. 2009 also saw first-of-their-kind enforcement actions brought in Singapore and Paraguay against mod chip distributors and sellers. In 2010, Canada tabled a bill which will bring the nation in line with international best practices.

As each circumvention device functions as a gateway to multiple infringements, adoption and enforcement of effective anti-circumvention laws are a critical factor in pre-empting the download and/or sale of infringing copies of games. We know from experience that implementation of an effective TPM regime can result in measurable improvements to the gaming industry. In Australia, for instance, entertainment software sales grew by an astounding 27% between 2006, the year Australia implemented a comprehensive TPM regime, and 2007. During that same period, New Zealand experienced only an 11% growth in sales.