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James Madison Memorial Building
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Re: Copyright Office Docket RM 99-7 -- 64 Fed. Reg. 66139 (November 24, 1999) -- Notice of Inquiry: Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies -- Initial Comments

Dear Mr. Carson:

Sony Computer Entertainment America, Inc. (SCEA)¹ submits this response to your Notice of Inquiry under 17 U.S.C. Sec. 1201 (a) (1) concerning circumvention of copyright owners' access control technologies.

We first comment generally, and then respond to your specific questions.

SCEA employs more than 600 persons in the United States, and has annual revenues in excess of \$1 billion from the marketing (including licensing) of approximately 50 videogame products and services. There are approximately 800 independent videogame publishers or developers licensed by SCEA, who produce approximately 300 games per year for the Sony PlayStation® system. The independent developers employ in excess of 6,000 persons (primarily in the United States) and earn annual revenues of approximately an additional \$2 billion .

¹ SCEA is a Delaware corporation, wholly-owned by Sony Computer Entertainment, Inc., a Japanese corporation.

The PlayStation® console connects to a television monitor and enables users to insert and play a wide variety of PlayStation® game programs stored on CD-ROMs. It was developed over a period of three years with an expenditure of approximately \$500 million. Our PlayStation® 2 line will be launched in the United States this fall, the achievement of an investment several times that required for its predecessor.

At the present time, SCEA's primary concerns related to this inquiry are the copyrighted works created by SCEA or by others under license from SCEA: the computer programming in the Sony PlayStation® console and videogames created to be used with the Sony PlayStation® console, as well as the audiovisual works embraced within the games themselves.

A consumer playing a legitimate copy of a PlayStation® game at home on a PlayStation® console makes a noninfringing use of SCEA copyrighted works. The technological measures that SCEA employs to control access to these works are needed to control the nature and quality of the goods and services made available under our trademarks. That control is essential to protect not only the consumer's interest but also our own reputation and good will as well as the integrity of our trademarks. Indeed, under trademark law the maintenance of our strong trademarks requires that we preserve such control over nature and quality with respect both to products that we produce and products that our licensees produce.

Moreover, adequate and effective access control measures are required to combat counterfeiting and other piratical activities with respect to our products. Such technological measures are an obstacle for the activities of infringers whose unauthorized copies, if playable at all, will not play properly.

Access control measures also enable us to ensure that even legitimately produced videogames are distributed only in the areas for which they are properly licensed. As is true of products in many other industries, a particular version of a PlayStation® videogame may be created for use only in a particular market, in which case its sale in other markets will produce only dissatisfied consumers. An obvious example is a game using one language but diverted for marketing without authorization in a territory where consumers don't speak that language.

We have found access control technologies to be an important means for SCEA to combat unauthorized access to our works, and have succeeded in obtaining injunctive relief against parties who have produced and trafficked in unauthorized devices marketed to circumvent these technologies. See *Sony Computer Entertainment America, Inc. v. Gamemasters et al.*, N.D. Cal., No. C-99-02743(TEH) (11/4/99).

Using our access control technologies to fight against such illegitimate activities enables us more effectively to fulfil our responsibilities to our licensees and to our customers, the consumers. We would strongly object to any weakening of the anti-circumvention provisions of the statute.

In addition, we believe that any weakening of the present statutory provisions would put the United States in violation of its obligations under Article 11 of the WIPO Copyright Treaty and Article 18 of the WIPO Performances and Phonograms Treaty to provide adequate legal protection and effective legal remedies against circumvention of our access control measures.

Answering your specific request for information concerning the three-year period beginning October 28, 2000: we remain concerned that there be adequate and effective support for the integrity of technological measures that protect against unauthorized access to our existing copyrighted works, but we have even greater concern as to protection of access to the greater spectrum of copyrighted products and services that will be available when our PlayStation® 2 line is launched in the United States in the fall of this year.

We believe it is critical to the success of our products in the marketplace -- and their continued availability to consumers -- that the law continue to support the integrity of the technological measures that restrict unauthorized access to them.

In these comments, we have sought to convey to the Office a general notion of our technological measures for controlling access. As you will understand, the specifics are confidential proprietary information. However, as we have done in judicial proceedings we've brought to enforce our rights, we will be pleased to describe relevant portions of that information *in camera* on a confidential basis if the Office makes an appropriate procedure available for that purpose in the manner that certain administrative agencies do.

On another matter connected with the current Rulemaking, we are concerned about the relationship that Section 1201 (g) of Title 17 ("Encryption Research") bears to the scope of the anti-circumvention provisions of Section 1201 (a) (1). We know that the relationship is included in the subject matter of the separate proceeding the Office has underway pursuant to Section 1201 (g) (5). Docket # 990-428-110-911-001, 64 Fed. Reg. 28802, 5/27/99.

Section 1201 (a) (1) (A) by its terms doesn't come into effect until October 28, 2000. So, it hasn't been in effect during the course of the Section 1201 (g) study. That being the case, , we don't believe that the Office is as yet able to report appropriately to Congress on what Section 1201 (g) (5) describes as "the effect [subsection 5] has had on --... (C) [access control measures under Section 1201 (a)]."

The comments to be received by the Office in the course of the current Rulemaking under Section 1201 (a) (1) will be far more current (by about a year) than those received in the Section 1201 (g) proceeding. We therefore strongly urge the Office that the independent judgments that Congress has asked the Office to make in this proceeding not be in any way foreclosed by anything to be reported in the study as to Section 1201 (g) (5) (C).

Indeed, because of the critical relationship between the anticircumvention provisions of Section 1201 (a) (access control measures) and Section 1201(b) (copyright protection measures), we would urge, similarly, that the independent judgments of the Office in this later proceeding not be foreclosed by anything to be reported in the study as to Section 1201 (g) (5) (B) (copyright protection measures under Section 1201 (b)).

Our responses to your specific questions follow. As the Federal Register Notice directs, we have not addressed every one of your questions, but only those for which we believe we can

appropriately provide particular knowledge or information at this stage of the Rulemaking, without speculating to anticipate every issue that may possibly arise during its course. The additional information you request for the period between October 28, 2000 and October 28, 2003 is flagged as "2000-2003" information.

Our responses to the questions follow separately after each question:

A. Technological Measures

1. What technological measures that effectively control access to copyrighted works exist today?

Access to copyrighted PlayStation® games is permitted only through use of the access control coding in the PlayStation® console and the CD-ROM that embodies the videogame. The console permits access to the videogame only when "WIZ" coding in the console detects certain encrypted data in the videogame to verify that the videogame is an authorized, legitimate SCEA product licensed for distribution in the same geographic area as the console.

The "WIZ" coding will not permit access to games that are not so licensed, and those games cannot be played on the console. Similarly, the coding on an authorized legitimate SCEA videogame product will permit the game to be accessed only by the console, ensuring proper processing of digital signals to and from the game software. See the Order in *Gamemasters*, above, at slip opinion pp. 8 (par. 20) and 18-19 (par. 39).

2000-2003: Copyrighted material distributed on DVD discs will be marketed with additional technological measures, including a MagicGate authentication and encryption security system incorporated in a new 8 MB memory card for the Dual Shock 2 Controller. These measures will be relied upon to control access not only to copyrighted material on the DVD discs but also access to copyrighted games to be included in an electronic transaction system to support online distribution and access to other aspects of networked digital entertainment.

2. Do different technological measures have different effects on the ability of users to make noninfringing uses? Can and should the Librarian take account of those different effects in determining whether to exempt any classes of works from the anticircumvention provisions of section 1201? If so, how? In determining what constitutes a class of works?

The essential non-infringing use made of videogames is the playing of the game by consumers in the home. Consumers' ability to make such use is not adversely affected by the technological measures that SCEA uses to control access to its copyrighted works. On the contrary, the measures enable SCEA to provide the consumer with a high level of quality control in protecting the consumer against the deficiencies of counterfeit games and attempted "substitutes" for the PlayStation® console for use in playing the games.

2000-2003: Increasing sophistication of counterfeiters and others employing Internet technologies to interfere with copyright owners' exercise of their rights will make our use of

access control technologies even more important in our effort to maintain a high level of quality for the consumer's use of our products and services.

B. Availability of Works

3. *How has the use of technological measures that effectively control access to copyrighted works affected the availability of such works to persons who are or desire to be lawful users of such works?*

We are not aware that our access control measures have adversely affected the availability of our works to lawful users. Indeed, as indicated previously, these measures have enabled us to maintain the availability of our works to consumers at a high level of quality for these works.

2000-2003: See answers to Questions 1 and 2.

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7. *Are there works or classes of works that are available only electronically and only in formats to which such technological measures have been applied? If so, what are they?*

Yes. Interactive products/services such as PlayStation® videogames, where electronic format is essential to the product or service and technological measures are essential to protect access.

2000-2003: We believe that in this period there will continue to be works available only electronically and only in formats protected by access control measures.

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C. Impact on Criticism, Comment, News Reporting, Teaching, Scholarship, or Research

12. *What impact has the use of technological measures that effectively control access to copyrighted works had on the ability of interested persons to engage in criticism, comment, news reporting, teaching, scholarship, or research?*

Access control measures have had no impact on the ability of interested persons to engage in legitimate such activities concerning videogames produced by SCEA and its competitors.

SCEA products are easily accessible for such purposes. SCEA makes review copies freely available to the full spectrum of media interested in the subject, including technical periodicals for developers and researchers such as *Game Developer*; industry and business periodicals such as *Game Week*; the general media; and the many consumer publications that are devoted specifically to videogames or include the subject in their overall coverage.

2000-2003: The response is the same for this period also.

13. *What impact has the use of technological measures that effectively control access to copyrighted works had on the ability of interested persons to engage in noninfringing uses of such works, including fair use and activities permitted by exemptions prescribed by law?*

See our responses to Questions 2 and 12 above.

We are not aware that our access control measures have in any way restricted noninfringing uses by consumers or other legitimate users.

As indicated above, however, we believe that such measures do restrict the harmful activities of counterfeiters and others intending to make infringing uses.

2000-2003: We believe the same will hold true for this further period.

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D. Effect of Circumvention on the Market for or Value of Copyrighted Works

18. *In what ways can technological measures that effectively control access to copyrighted works be circumvented? How widespread is such circumvention?*

Pirates have devised a MOD chip that circumvents certain of SCEA's access control measures to enable an unauthorized copy of a videogame to be played on the Sony PlayStation® console. The distribution of the MOD chip has facilitated the growth of a substantial black market for counterfeit and other unauthorized copies of SCEA videogames.

Another example of a circumvention device is the "game enhancer" device that SCEA had to sue to have enjoined by the U.S. District Court for the Northern District of California in the *Gamemasters* case, cited above.

2000-2003: We are greatly concerned that technological developments during this period will produce successors to the MOD chip, the "game enhancer" and other devices to circumvent our access control measures. Unless the law protecting against circumvention devices is strong, undiluted with exemptions, SCEA's access control measures will not suffice to prevent widespread unauthorized access to our works and violation of our rights under Title 17, U.S.C.

19. *Has such circumvention (or the likelihood of circumvention) had any impact on the price of copyrighted works? Please explain.*

Yes.

Circumvention means that fewer copies of the legitimate products can be marketed to consumers. In reducing the number of units of the legitimate products that can be marketed, unauthorized access/copying impairs the return of the legitimate producer's investment in developing the product. Absent such circumvention, the higher level of units marketed of the legitimate product permits that return of investment to be achieved at a lower price for the legitimate product to be acquired by the honest user.

Piratical and other unauthorized versions of SCEA products approximate about ten per cent of the entire market.

2000-2003: As indicated above, SCEA is greatly concerned that in the future more sophisticated technologies will facilitate circumvention of our access control measures. The greater risk of such circumvention may well require us to add additional access control measures for our products, which would increase their production cost and require raising the price of the product to the consumer.

20. *Has such circumvention (or the likelihood of circumvention) had any impact on the availability of copyrighted works? In particular formats or in all formats? Please explain.*



None.

2000-2003: See "2000-2003" response to Question 19 above.

21. *Has such circumvention had any other impact on the marketing of copyrighted works? If so, please explain the impact and which works or classes of works have been affected.*

None.

2000-2003: See "2000-2003" response to Question 19 above.

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E. Other Factors and Questions

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25. *Has the use of technological measures that effectively control access to copyrighted works resulted in making copyrighted works more widely available? Please explain.*

Yes.

Effective control against unauthorized access means less exposure to illegal activity after a product has been released. Less exposure of that sort means that there's less risk in placing a new product on the market. Less risk in marketing means a greater incentive to make new copyrighted works available to the consumer for lawful uses.

2000-2003: The same should hold true for this further period as well.

26. *Has the use of technological measures that effectively control access to copyrighted works resulted in facilitating lawful uses of copyrighted works?*

See response to Question 25.

29. *Do you wish to testify at a hearing to be conducted by the Copyright Office in connection with this rulemaking?*

SCEA wishes first to review the comments and reply comments that are to be submitted by others. We will then inform the Copyright Office whether we believe SCEA's participation in the hearings can be of further assistance in the Rulemaking.

Very truly yours,

Riley R. Russell
Vice President, Legal & Business Affairs
Sony Computer Entertainment America, Inc.