

AUSDA

House of Representatives Standing Committee on Legal and Constitutional Affairs

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Inquiry into technological protection measures (TPMs) exceptions

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Question on notice: Is a DVD player a circumvention device?

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In order for a device to be considered a "circumvention device" for the purposes of the Copyright Act 1968 (Act) it:

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- must be a device (including a computer program);
- must have only a limited commercially significant purpose or use (or no purpose or use)
- other than the circumvention, or facilitating the circumvention of a TPM

This means that the first question that needs to be resolved is whether the region coding used by film copyright owners on DVDs and also implemented in DVD players is a "technological protection measure". (ie, if the region coding is not a TPM, then any device that circumvents region coding will not be a circumvention device as defined in the Act)

Is region coding a TPM?

There are two ways a court could look at the region coding used by film copyright owners:

- as one element (Region Playback Control) of the Content Scrambling System (ie, enquiring whether the entire CSS system is a TPM, which includes an element of region coding); or
- treating Region Playback Control (RPC) as a standalone technology (ie, asking whether RPC is itself a TPM)

We believe that in both these examples a court would find that CSS as a system and RPC individually would be a TPM.

CSS as a system

The Act currently requires a TPM to have the purpose of preventing or inhibiting an infringement of copyright. As CSS directly prevents an infringing copy of a film from being made, the CSS system would be a TPM under the Act. This will also be the case when the FTA obligations are implemented, as the CSS system protects the copyright granted to film copyright owners.

RPC as a standalone technology

It is unclear whether RPC would be protected as a TPM in its own right under the current Act, as it does not directly prevent an infringing copy of a film from being made (see the Stevens v Sony decision). However, as RPC inhibits the infringement of another right given to film copyright owners (ie, the right to prevent parallel importation of their films), RPC may be considered to be a TPM under the Act.

However, RPC will be required to be protected as a TPM in its own right under Australia's FTA obligations, as RPC will be covered by the FTA definition of an "effective technological protection measure" (ie, it is a technology, device or component that controls access to a copyright work or other subject-matter)

Is a DVD player a circumvention device?

No. We do not believe that a DVD player itself is a circumvention device, as it is not a device that has no, or only a limited, commercially significant purpose other than circumvention, or facilitating the circumvention, of the TPMs used by film copyright owners.

In other words, DVD players have a lawful commercially significant purpose of playing DVD discs that have been zoned for the region in which the owner of the DVD player resides. As a result, they cannot be considered to be circumvention devices under the Act.

This result was contemplated by the Digital Agenda Act, which was not intended to apply to general purpose electronics devices.

This *does not mean* that it is lawful to modify a DVD player to circumvent or ignore RPC coding, to operate as a multi-zoned DVD player. These activities and devices would be prohibited under the Act and by the FTA for the reasons set out below.

Is a mod chip a circumvention device?

A device (such a mod chip or software program) that is inserted into a DVD player or operates to circumvent, switch off or ignore the RPC programmed onto a DVD player or DVD disc *would* be a circumvention device.

That is because the device would be designed solely for the purpose of circumventing the TPMs used by film copyright owners, and would have no other commercially significant purpose or use.

These devices would continue to be unlawful under the FTA, which prohibits devices that:

- are promoted, advertised or marketed for the purposes of circumventing a TPM;
- have only a limited commercially significant purpose or use other than to circumvent a TPM; or
- are primarily designed or produced for the purposes of enabling or facilitating the circumvention of a TPM.