

**Australian Competition and Consumer Commission**

**Submission to Digital Agenda Review -**

**Circumvention Devices and Services, Technological  
Protection Measures and Rights Management Information  
Issues Paper**

**October 2003**

## Summary

1. The Australian Competition and Consumer Commission (“the Commission”) is pleased to make a submission (“the Submission”) to the Digital Agenda Review (“the Review”).
2. In the submission the Commission addresses the broad public interest issues to be considered in reaching the appropriate balance between the property rights of copyright holders and the interests of consumers which the *Copyright Act* 1968 (“the Act”) seeks to strike. The submission focuses in particular on s 116A of the Act.
3. The Commission does not seek to comment in any detail on the decision of the Full Court in *Kabushiki Kaisha Sony Computer Entertainment & Ors v Stevens* [2003] FCAFC 157 (“the Sony case”)- a decision with which the Commission is confident the Review is well acquainted. The Commission’s motivation behind its involvement in those proceedings and the consequence of the preferred interpretation of s.116A are, however, issues the Commission will address.
4. The Commission submits that the anti-circumvention provisions of the Act do not achieve a reasonable balance between the rights of copyright owners and users.

## **The Effect of the preferred interpretation of s 116A**

1. Following the Full Court's decision in the *Sony* case, it is apparent that the supply and/or installation of a device which has the effect of circumventing both a technological protection measure ("TPM") and regional playback control ("RPC"), in the Sony case the TPM and the RPC being the one and same thing, is a contravention of s 116A of the Act. The Commission supports the use by copyright holders of TPMs. However, the Commission is concerned to ensure that copyright holders are not able to subvert the object of TPM's by including in their operation RPC.

### Commission's view

2. The Commission became involved in the Sony case because the Commission is of the view that TPMs which also have as a function RPC should not, as a matter of policy, be given legislative protection from circumvention.
3. While Sony maintains that PlayStation region coding is related to the television formats NTSC and PAL, the reality is that PlayStation *region* coding, as distinguished from coding, has no utility other than the creation of three mutually exclusive geographic regions for the purposes of distribution. This is evidenced by the fact that both Japan and the United States have as their television format standard NTSC and yet the two countries fall within different regions for the purpose of PlayStation region coding. A single code would inhibit the infringement of the copyright held in relation to PlayStation software and a code should properly be the subject of legislative protection from circumvention. Region codes are not necessary to achieve this end and should not be given the same legislative protection.
4. The Commission is concerned that the main purpose of the RPC, as distinguished from playback control, is to prevent parallel importation of competing software, not to prevent infringement of copyright as alleged by Sony<sup>1</sup>. The Commission's concerns are highlighted with respect to DVD software where there is potential competition between suppliers, RPC is utilised and, following the Sony case, it would be a

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<sup>1</sup> RPC in DVD players can also be chipped to overcome zoning arrangements. The Commission is not aware of any action taken by movie studios or equipment manufacturers to prevent such chipping. However, there is a new form of technology, known as Region Code Enhancement, being applied to some DVD movies which prevents a movie from being played if it detects that the DVD player has been modified.

contravention of the Act to supply or install a device which circumvents the RPC if the RPC also incorporated a TPM.

5. In the Commission's view the maintenance of RPC through recourse to copyright law subverts the intended protection of intellectual property and the promotion of creative endeavour to restrictive trade practices.

### **Commission's comments on Issues Papers**

6. The Commission is concerned that the new provisions of the Act may have inadvertently tilted the copyright balance toward producer interests to the detriment of users and society as a whole. In particular, the provisions relating to TPMs and rights management information may provide rights to copyright holders that go beyond those needed to prevent infringement of copyright. In doing so, the provisions increase the likelihood of anti-competitive conduct with consequent detrimental outcomes for both consumers of the copyright works and society in general.
7. The Commission recognises that piracy of copyright products is a significant issue and leads to under-*production* of copyright products. The Commission supports the right of copyright owners to prevent infringement of their copyright by enforcing those rights. Prohibitions on piracy in copyright laws address this. However, the Commission's view is that the market should then be allowed to *distribute* the product without legal restrictions on trade or competition unless a specific failure in the sphere of distribution can be identified. The Commission has some concerns about the potential for TPMs in some instances to unnecessarily extend copyright protection into the distribution sphere with unintended consequences for competition.

### **Conclusion**

8. The Commission believes that the anti-circumvention provisions in s 116A of the Act do not achieve a reasonable balance between the rights of copyright owners and users. Rather, the effect of the provisions is that the interests of copyright owners in protecting copyright material are preferred over the interests of users in guaranteeing reasonable access to that material.
9. While the Commission supports the right of copyright owners to prevent or inhibit infringement of their copyright, the Commission is concerned that these provisions

will result in consumers suffering a loss of choice and they may pay more for their games.

10. It is unlikely that the effect of these provisions will be limited to PlayStation technology. The interpretation of the definition of TPM to incorporate access coding systems may extend the Act to other digital media systems, such as DVD technology, that are organised on a region coding basis. So, copyright owners may take action on the basis of this interpretation against resellers who have modified DVD players to accept DVDs manufactured for other international regions.
11. Consequently, the Commission is concerned that Australian consumers will be unable to use digital media such as CDs and DVDs legitimately bought overseas or legitimate backup copies, where they are part of systems incorporating region coding.
12. The Commission believes that region coding is detrimental to consumers as it limits consumer choice and, in some cases, access to competitively priced goods.
13. Further, these provisions may also have the consequence of eroding the benefit for consumers achieved by recent legislative changes to ease the restrictions on parallel importation of computer software in Australia.
14. At present it is clear that s 116A of the Act protects from circumvention a device that both protects copyright and regionalises distribution. That result effects an extension of copyright protection which, in the Commission's view, is contrary to the public interest, skewing the balance sought to be achieved by the legislature between the rights of copyright holders and users.
15. An unintended consequence appears to be that the Act, in some instances, allows for an unnecessary restriction on competition to the detriment of Australian consumers who consequently face restricted access to copyright products and may pay more for legitimate copies than they would in a more competitive environment.
16. Therefore, the Commission is of the view that s 116A of the Act should be amended to remove any unintended protection of RPC.