

Submission to the Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968

22/08/2012

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 Fax 02 9577 3377 Email ausconsumer@choice.com.au www.choice.com.au

The Australian Consumers' Association is a not-for-profit company limited by guarantee.

ABN 72 000 281 925 ACN 000 281 925



About CHOICE

CHOICE exists to unlock the power of consumers. Our vision is for Australians to be the most savvy and active consumers in the world.

As a social enterprise we do this by providing clear information, advice and support on consumer goods and services; by taking action with consumers against bad practice wherever it may exist; and by fearlessly speaking out to promote consumers' interests - ensuring the consumer voice is heard clearly, loudly and cogently in corporations and in governments.

To find out more about CHOICE's campaign work visit www.choice.com.au/campaigns and subscribe to CHOICE Campaigns Update at www.choice.com.au/ccu.



Background

CHOICE's recent submission to the House Standing Committee on Infrastructure and Communications Inquiry into IT pricing found large price differentials between the Australian and US markets. After comparing over 200 products CHOICE established that Australian consumers are paying approximately 50% more for IT products. It is the opinion of CHOICE, based on the research and evidence we examined, that the main cause of these price differentials is price discrimination by international copyright holders.

The second recommendation of CHOICE's submission to the inquiry reads:

Recommendation 2: CHOICE recommends that the Federal Government investigate whether technological measures that allow suppliers to discriminate against Australian consumers such as region-coding or the identifying of IP addresses should continue to be allowed.

CHOICE considers these measures to be anti-competitive when they result in significant price differentials for Australian consumers.

CHOICE believes that this recommendation is relevant to the Attorney General's current review of circumvention exceptions of access control Technological Protection Measures (TPMs).

Online TPMs and Circumvention

The growth of the internet and of online retail has led to increased awareness amongst consumers of the price differences between Australian and foreign markets. Websites offering 'direct' or parallel importing to Australia, such as Kogan and the Book Depository, have become popular in recent times.

The internet has therefore made business practices which rely on geographic market segmentation for price discrimination increasingly transparent and anachronistic. However instead of adapting to these new market conditions many companies have sought to sustain market segmentation by attempting to restrict the access of consumers to legitimate and genuine products online.

Amazon¹, Netflix², Hulu³, Steam⁴, and iTunes⁵ are just some of the websites which use measures to identify a consumer's location via their IP address in order to prevent them accessing certain goods and services at certain prices, or at all.

¹ www.amazon.com/

² www.netflix.com/

³ <u>www.hulu.com</u>



However many consumers have worked around these restrictions using circumvention devices and services, such as Virtual Private Networks (VPNs)⁶. CHOICE believes that the use circumvention measures to buy or access genuine products and services online are perfectly legitimate.

CHOICE also believes that it is possible that IP address lockouts could fit the definition of a 'computer program' that controls access to copyrighted works or other subject matter. If this is the case, then IP address lockouts could be considered an 'access control' TPM, exposing individuals using circumvention devices or services to civil or criminal liability.

Currently 'access control' TPMs exclude those which control for the purposes of 'geographic market segmentation' for films and computer programs (including games). This exclusion applies to region coding on DVD and console video games. However, IP address lockouts apply to other products, such as audio products and eBooks. Therefore some IP address lockouts may still be considered 'access control' TPMs, despite the current exclusion of certain TPMs used for geographic market segmentation. The Copyright Regulations, subject to review here, do not provide any clarity on this issue.

CHOICE believes that if a copyright holder knowingly and willingly provides *any* product or service to the market online, then Australian consumers should be allowed to access those products and services at the price they are sold even if this requires the use of circumvention devices or services. Consumers should also be confident that the practices they are engaging in are legal.

However there is a great deal of confusion in the general public and the media as to whether the use of circumvention measures such as VPNs are legal or not. For example, Monash University copyright law expert Dr Rebecca Giblin told the *Sydney Morning Herald* that the use of VPNs and DNS re-routing services to watch restricted material being streamed for free overseas may be legal:

"An argument can be made that you're authorising an infringement by the service provider, at least if they're streaming content to you outside the terms of their own licence. But you're not committing any direct infringement that I can see... It depends on the technicalities of each service, but generally you're not making a copy within the meaning of the copyright law when you're merely streaming video."⁷

However, Dr Kathy Bowrey of the University of NSW told *The Australian* that VPN providers may be breaching the law:

Page | 4

⁴ www.steampowered.com

⁵ www.apple.com/itunes/

⁶ VPNs create a secure network connection via a public network such as the internet. VPNs are often used by governments, companies and universities to allow users to access a private network of remote computers. They can also be used by internet users to hide their location by operating via servers located in other countries.

Moses, A., (2012), 'Gaming the Games: How Net Tools Dodge Network TV Coverage', *The Sydney Morning Herald*, 02/08/2012, http://www.smh.com.au/technology/technology-news/gaming-the-games-how-net-tools-dodge-network-tv-coverage-20120802-23gw8.html



"[t]he person who offers the VPN is possibly liable. It's also a breach of copyright to encourage people to infringe, and provide a means by which they can infringe"⁸

Meanwhile, a spokesperson for then-Attorney General Robert McClelland told *The Australian* last year that VPNs may not breach copyright law, but may breach state or territory law:

"In relation to the use of VPNs by Australians to access services such as Hulu and Netflix, on the limited information provided there does not appear to be an infringement of copyright law in Australia...Whether the Australian users have committed an offence by deceiving these providers about their identity, or eligibility to receive their services, would depend on state or territory criminal law."

Recommendation

The confusion surrounding IP address lockouts means that many consumers may be civilly or criminally liable by circumventing 'access control' TPMs. CHOICE believes that this review is an opportunity to clarify this confusion by explicitly exempting the circumvention of IP address lockouts from liability.

CHOICE believes that such circumvention should be exempt because consumers are merely accessing products and services which are being provided knowingly and willingly by the copyright holder. Consumers are already allowed to circumvent TPMs which control for geographic market segmentation on DVD players and video gaming consoles. CHOICE is recommending an expansion of that principal to IP address lockouts.

_

⁸ Griffith, C., (2011), 'Media Streams Spark Piracy Row Over Copyright', *The Australian*, 21/06/2011, http://www.theaustralian.com.au/australian-it/media-streams-spark-piracy-row-over-copyright/story-e6frgakx-1226078817583

⁹ Ibid.