



The Standing Committee on Infrastructure and Communications has invited the Australian Digital Alliance / Australian Libraries Copyright Committee to make a supplementary written submission to the **IT Pricing Inquiry**, addressing certain issues relating to geoblocking and evidence provided by the Attorney-General's Department on 13 February 2013. Specifically:

- **Does the ADA (/ALCC) support a general prohibition on all geoblocking mechanisms (whether via TPMs or otherwise)?**
- **Is ADA (/ALCC) aware of any impediment to Australia implementing such a prohibition?**

Summary:

As a matter of general policy, the ADA and ALCC support a general prohibition on all geoblocking mechanisms (whether via TPMs or otherwise), where these mechanisms serve to enforce different prices and associated conditions of use of content by Australian consumers. The extent to which such a prohibition could be enforced under Australian copyright legislation (or other legislation) is another matter.

The ADA/ALCC believe it is unclear whether it is possible to *ban* the use of geoblocking technologies and remain consistent with Australia's international obligations; in particular, under the Australia - United States Free Trade Agreement (AUSFTA).

The ADA/ALCC do suggest however, that it is possible to amend the *Copyright Act 1968* (Cth) to ensure that Australian consumers who remove, disable or otherwise circumvent geoblocking mechanisms are not subject to civil or criminal sanctions under Australian law.

This submission sets out a roadmap for achieving such an amendment. It focuses only on amendments to the Copyright Act and legal treatment of geo-blocking mechanisms (with reference to Australia's obligations under applicable international law). The ADA/ALCC has not offered comment on other policy considerations or issues that may apply.

Overview: geocodes and the Copyright Act

As the Committee would be aware, the Copyright Act protects certain 'technological protection measures', such as software codes or other digital 'locks' that protect copyright content. The Copyright Act prevents people from circumventing, 'hacking' or 'breaking' these technologies.

Australia's copyright laws protect two types of TPM¹:

- "access control technological protection measures" (**Access TPMs**) – technologies ('device, product, technology or component') that control access to content eg a password protected website or device that needs to read a code to permit something to play; and
- "technological protection measures" (**TPMs**)– technologies (including an access TPM) that "prevent, inhibit or restrict the doing of an act comprised in the copyright" (eg, make a copy, electronically transmit or make available online).

In other words, a TPM must prevent, inhibit or restrict a copyright infringement, or prevent access to the copyright content (an access TPM).

The definitions of Access TPM and TPM in the Copyright Act contain the following exclusion:

¹ See definitions in s.10(1) of the *Copyright Act 1968*

*“... but does not include [a TPM] to the extent that it, if the work is a ... film or computer program (including a computer game) controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the [content] acquired outside of Australia”². (**Region Coding Exclusion**)*

The Region Coding Exclusion was introduced following finalization of the Australia-United States Free Trade Agreement (AUSFTA) in response to concerns expressed about the potential for TPMs laws to be used to prevent Australian consumers from getting around DVD region coding on DVDs legitimately purchased overseas³.

As such, geocodes on films, computer games and computer software that function to prevent playback outside of the Australian ‘zone’ will not be considered to be TPMs/Access TPMs, and it is possible for Australian consumers to circumvent them.

Despite this, the ADA/ALCC believe it is possible the Region Coding Exclusion does not extend to other types of geocodes used on ICT products purchased by Australian consumers. For example, it is possible that the following types of geocodes could still be considered to be TPMs or Access TPMs under Australian copyright laws:

- on books, music and other content (ie, the exception only applies to films, computer games and computer software)
- on downloaded content where the downloader is in Australia (ie, the legislative exception only applies to content “acquired outside of Australia”)
- that only block access to content from outside a geographic region but do not themselves “prevent playback” as required by the exception
- that have a dual purpose (ie, it is unclear what the legal treatment would be of a geocode which both prevented access to an Australian consumer and ‘prevented, inhibited or restricted’ a copyright infringement in the same content).

Can the Copyright Act be amended to protect consumers circumventing ‘geocodes’?

Yes. If the Committee is of the view that copyright laws should not be able to be used to prevent Australians from purchasing legitimate content from overseas then the section 10(1) *Copyright Act 1968* (Cth) definitions of ‘TPM’ and Access TPM’ can be amended to ensure all forms of geocodes are excluded.

The Region Coding Exclusion currently reads:

“[A TPM] to the extent that it, if the work is a...film or computer program (including a computer game) controls geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the [content] acquired outside of Australia”.

The ADA/ALCC submits that at least **4 amendments** would be required to the Region Coding Exclusion in order to ensure that Australian consumers would not be subject to civil and/or criminal sanctions for removing or bypassing geoblocking mechanisms.

1. Expand ‘film or computer program (including a computer game)’ to include all works

Delete ‘if the work or other subject-matter is a cinematograph film or computer program (including a computer game)’.

Deleting this part of the definition extends the exception to all subject matters covered by copyright.

Geocodes attached to literary works, including e-books, as well as artistic works (including artistic works which are part of films or games), musical and dramatic works and sound recordings would then be included under the exception.⁴

² *Copyright Act 1968* s.10(1) definition of “access control technological protection measure” paragraph c) and definition of “technological protection measure” paragraph b)iii).

³ See for example Joint Standing Committee on Treaties consideration of the Australian United States Free Trade Agreement.

⁴ Compliance with international treaty obligations: Article 17.4.10(b) of the Australia-US Free Trade Agreement prevents the retransmission of TV via the internet. It is unlikely a consumer watching, for example, a catch-up TV site based in the US would be considered to be ‘re-

2. Amend the phrase 'prevent playback'

A number of geocodes block access to content from outside a geographic region but do not themselves "prevent playback" of the content. It also does not take into account dual use technologies. The Region Coding Exclusion would need to be amended to address this shortcoming.

There are a number of ways in which this could be achieved, including:

- Removing the phrase 'to the extent that it' from the definition – in its current form, the exclusion does not take into account dual use technologies;

And then:

- Simply removing the phrase "by preventing the playback in Australia of a non-infringing copy ..." so that the exclusion would apply to all technologies that '*control geographic market segmentation*'; or
- Adding additional words such as those underlined here: '*controls geographic market segmentation by preventing the purchase or playback (including viewing through streaming) of content from overseas.*'⁵
- The intention of the exception could be made explicit by including language to the effect: '*controls geographic market segmentation for the purpose of enforcing differences in price or other conditions*'; or
- Adding a legislative note, to explain the intention For example:
'Note: The exception, for the purposes of copyright law, is intended to apply in circumstances where geographic market segmentation is designed to enforce differences in the price of content, or other conditions associated with access to that content by Australian consumers.'

Geographic segmentation applied for other purposes (for example, a court ordering material not be made available in Victoria to avoid prejudicing a Victorian trial) could still be regulated under other laws.

3. Amend the phrase 'acquired outside of Australia'

Consumers downloading content in Australia may not fall under the exclusion 'acquired outside of Australia'. This phrase could be deleted, and a general phrase inserted:

'content made available by, with the permission of, or on behalf of, the owner or the exclusive licensee of the copyright in a work or other subject-matter.'

This language is taken from the section 10 definition of '*access control technological protection measure*' (1(a)(i)).

4. Amend the phrase 'non-infringing copy of [the content]'

The inclusion of the phrase 'non-infringing copy' may be difficult to interpret for the purposes of a geocode exception where the geocode is attached to content that is the subject of parallel importation restrictions under Australian copyright law.

transmitting': they are not sending the content on to anyone else. Retransmission is not defined in AUSFTA (partly defined in Australian copyright law).

⁵ While the less specific amendment is preferred, the second option may preserve our obligations under AUSFTA (in the event it's argued that a general exception is incompatible with our treaty obligations). Under AUSFTA, Australia is obliged to protect access controls. A response to this would be that Australia's TPM regime protects access controls, but excludes certain playback controls. The second proposed amendment may resolve that perceived risk of incompatibility.

Incorporating the above amendments, a sample exclusion to the definitions of TPM and Access TPM, to protect consumers circumventing geoblocks, could read as follows:

'[A TPM] attached to works or other subject-matter that controls geographic market segmentation by preventing the purchase or playback (including viewing through streaming) of content made available by, with the permission of, or on behalf of, the owner or the exclusive licensee of the [copyright](#) in a [work](#) or other subject-matter'.

Licences which serve to prevent the circumvention of geocodes

Circumventing some geocodes may place consumers in breach of the terms and conditions of use of a service, which stipulate, i.e. that a purchaser 'reside in the United States'. There is legislative precedent for the protection of consumers against override of copyright exceptions via contract.

Section 47H of the Copyright Act provides that where an agreement (or provision of an agreement) excludes or limits a user's ability to copy computer programs for normal use or study (s47B), for back up purposes (s47C), to make interoperable products (s47D), to correct errors (s47E) and for security testing (s47F), that **agreement (or provision of the agreement) has no effect.**

Section 47H:

"An agreement, or a provision of an agreement, that excludes or limits, or has the effect of excluding or limiting, the operation of subsection 47B(3), or section 47C, 47D, 47E or 47F, has no effect.

A similar provision could be included to warrant that agreements which exclude or limit, or have the effect of excluding or limiting consumers from circumventing Access TPMs and TPMs to the extent that they control geographical market segmentation, have no effect.

Other measures to address lack of access to content in Australia – through remedies

There are other ways in which a lack of access to certain content in Australia could be addressed through amendment to the Copyright Act.

A lack of access to legitimate content could be included as a factor in determining remedies for infringements of Copyright. In circumstances where an Australian consumer is found to have infringed copyright, in unlawfully downloading, circumventing or otherwise accessing certain content not available in Australia (but available elsewhere), judges could be directed to consider this in determining an award of damages, or granting of an injunction.

Including lack of access as a factor in remedies (and not a block on remedies), ensures courts could also take into account any arguments justifying the unavailability of that content: film distributors, for example, opting to delay release dates in Australia to coincide with school holidays.