

NEW AUSTRALIAN COPYRIGHT LAWS

TECHNOLOGICAL PROTECTION MEASURES LIABILITY SCHEME

The amendments strengthen Australia's TPM laws and provide new exceptions to liability.

What is a TPM?

Technological protection measures (TPMs) are technical locks copyright owners use to stop their material being copied or accessed (eg passwords, encryption software and access codes). The new laws introduce an offence for circumventing an access control TPM and new exceptions to liability.

Which TPMs are covered by the new scheme?

The new scheme introduces civil remedies and criminal penalties where a person circumvents an access control TPM. There is no liability for the circumvention of TPMs which do not come within the definition of an access control TPM.

To come within the definition of an access control TPM, the TPM must be:

- used by, or with the permission of, the owner or exclusive licensee of the copyright
- used on material in which copyright subsists (i.e. TPMs on public domain material are not protected)
- used in connection with the exercise of the copyright owner's exclusive rights (i.e. to reproduce, communicate etc.), and
- used in the normal course of its operation to control access to the work (e.g. by requiring the application of information or a process before access is granted).

Only TPMs which control access to the work will come within this definition. For example, passwords that prevent access to electronic documents or encryption that prevents unauthorised access to streamed music or video.

An access control TPM specifically excludes TPMs which control geographic market segmentation. This means that consumers will be able to circumvent the region coding TPMs on legitimate DVDs purchased overseas. It also allows for the continued availability of region-free DVD players.

It also excludes TPMs which restrict the use of after-market goods or services. This means that makers of products are not able to restrict the use of generic after-market goods and services through the application of TPMs to their product.

What penalties will apply?

If a copyright owner takes civil action, similar remedies apply as for copyright infringement actions.

For criminal actions, the maximum penalty for circumvention of an access control TPM is 60 (\$6,600) penalty units.

New exceptions to liability under the TPM scheme

The specific exceptions to TPM liability in the Act include:

- where there is permission of the copyright owner
- interoperability between computer programs
- encryption research
- computer security testing
- online privacy
- law enforcement and national security, and
- acquisitions by libraries and other related institutions.

However, not all exceptions apply to all categories of liability. It is important to refer to the Act for the application of each of the exceptions to the different categories of liability.

There is also a mechanism for the creation of additional exceptions to civil and criminal liability for the circumvention of access control TPMs (see sub-ss 116AN(9) and 132 APC(9)).

Exceptions in the Copyright Regulations

Additional exceptions to TPM liability in the *Copyright Regulations 1969* include:

- reproduction of computer programs to make interoperable products
- the reproduction and communication of copyright material by educational and other institutions assisting people with disabilities
- the reproduction and communication of copyright material by libraries, archives and cultural institutions for certain purposes
- the inclusion of sound recordings in broadcasts and the reproduction of sound recordings for broadcasting purposes
- access where a TPM is not operating normally and a replacement TPM is not reasonably available, and
- access where a TPM damages a product, or where circumvention is necessary to repair a product.

An additional exception can be created when a submission for an exception is made which is then subject to a review process, and the Attorney-General makes a decision to grant an exception. There is also a mechanism for the revocation or variation of additional exceptions. Exceptions created under this process are found in the Regulations. For information on this process contact the Copyright Law Branch, Attorney-General's Department at copyrightlawbranch@ag.gov.au.

This fact sheet provides general information only and is not a substitute for professional legal advice.



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