**Beyond ISPs: Intermediary Liability for Copyright to Software and Hardware Facilitators**

The liability of technological intermediaries in copyright law has historically centred around Internet Service providers (**ISPs**). However, the rapid developments in software and hardware technologies raises the potential liability of various non-ISP intermediaries, such as those who develop hardware devices such as mod-chips.

**Hardware developers as intermediaries: mod chips**

Many gaming consoles are embedded with a technology called digital rights management (**DRM**). DRM is a form of encodement that controls and restricts who can access copyrighted material and how many copies can be made. This system is designed according to the copyright owner’s authorisation. Mod chips are small hardware devices designed to bypass these DRM systems, allowing users to access copyrighted material they wouldn't normally have access to. The design and capabilities of mod chips essentially strips devices of their DRM systems, which is often utilised by those wishing to infringe copyright and distribute pirated games.

Initially, mod chips were marketed for legitimate purposes, such as allowing users access to non-region-specific games or legally imported titles that weren’t yet available in their country. However, the widespread commercial success of mod chips is arguably due to their ability to bypass copyright protections, raising concerns about their legality under copyright law. According to section 116A of the *Copyright Act 1968* (Cth) (**Copyright Act**), the primary function of a device determines its legality. If its main purpose is to facilitate copyright infringement, it is likely to be classified as an illegal circumvention device.

Despite being illegal in America and most European countries, mod chips remain prima facie legal in Australia. This discrepancy is rooted in the way different jurisdictions define technological protection measures (**TPMs**) and the corresponding classification of mod chips as circumvention devices. A comparison of case law from Australia and Canada offers insight into how different jurisdictions approach this issue.

**Comparative Case Law: Australia vs. Canada**

**Stevens v Kabushiki Kaisha Sony Computer Entertainment (Australia)**

In the Australian case of Stevens v Kabushiki Kaisha Sony Computer Entertainment, Stevens sold and installed mod chips designed to circumvent Sony’s DRM. Sony argued that this violated section 116A of the Copyright Act, which prohibits distributing circumvention devices. The High Court, however, ruled that Sony’s DRM did not qualify as a TPM under the Copyright Act. This ruling was based on the court’s interpretation that DRM’s primary function was to control access to copyrighted material, rather than to prevent copyright infringement. Since the DRM was not considered a TPM, Stevens’s use of mod chips to bypass it did not violate the law. The court’s decision highlights the narrow interpretation of what qualifies as a TPM under Australian law.

**Nintendo v Go Cyber Shopping Ltd. (Canada)**

In the Canadian case Nintendo v Go Cyber Shopping Ltd., the court reached a different conclusion. Nintendo sued a company that sold mod chips allowing users to play pirated games on Nintendo consoles. The Canadian court ruled that Nintendo’s DRM did qualify as a TPM, and therefore, the sale of mod chips constituted a violation of Canadian copyright laws. The key difference between the Canadian and Australian rulings lies in how each jurisdiction interprets the concept of a TPM.

**Narrow definition of a TPM**

In Australia, the narrow definition of a TPM, which focuses on whether the primary purpose of the measure is to prevent copyright infringement, leads to more permissive outcomes regarding mod chips. In Canada, the broader interpretation of a TPM, which includes access control mechanisms like DRM, results in a stricter legal stance against the sale and use of mod chips.

**Future directions**

Following the Australia–United States Free Trade Agreement (**AUSFTA**), which introduces a broader definition of TPMs through its reference to "effective technological measures" (**ETMs**) in Article 17.4.7, there has been pressure to expand the definition of TPM in Australia. However, the narrow standard that emphasises preventing infringement remains in force. In 2015, the Attorney General rejected recommendations to amend the *Copyright Amendment (Online Infringement) Bill* to outlaw mod chips that bypass region coding. Instead, the Bill only outlawed mod chips whose sole purpose is to overcome anti-piracy technology. This legislative decision highlights Australia's continued divergence from other countries' stricter approaches, reaffirming its focus on the primary intent of these devices when considering intermediary liability.