



Australian Government

Department of Communications and the Arts

# Remaking of the Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969

Consultation paper

September 2017

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# 1. Background

## Sunsetting of legislative instruments

Most legislative instruments are automatically repealed (or “sunsetting”) a fixed period of time after being registered. The sunsetting process is intended to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed.<sup>1</sup>

The Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969 are due to sunset on 1 April 2018.

## Sunsetting copyright legislative instruments

The Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969 are made under the *Copyright Act 1968* (the Copyright Act).

The Copyright Regulations 1969 prescribe a range of matters that the Copyright Act requires or permits to be prescribed, or that are necessary or convenient to be prescribed, for carrying out or giving effect to the Copyright Act.<sup>2</sup> This includes matters relating to copyright in original works and other subject-matter, remedies for infringement of copyright, and the copying and communication of copyright material by educational and other institutions.

The Copyright Tribunal (the Tribunal) is a specialist body that principally arbitrates disputes between copyright collecting societies and their licensees. The Copyright Tribunal (Procedure) Regulations 1969 include general provisions related to the operation of the Tribunal such as provisions relating to the content and form of applications and references to the Tribunal, the filing with the Tribunal of documents, the form and service of summons and the recording and notification of Tribunal orders.

The Copyright Act continues to rely on the Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969 to function effectively and efficiently.

Consequently, the Australian Government has decided that the Copyright Regulations 1969 and the Copyright Tribunal (Procedure) Regulations 1969 should be remade. The Copyright Regulations 2017 Exposure Draft (Copyright Regulations Exposure Draft) sets out the proposed new, remade, version of these regulations.

In addition, due to the complexity in the regulation making power for new exceptions that allow users to circumvent technological protection measures (TPMs) which restrict access to, or sharing, of copyright material, these will be updated by the Copyright Legislation Amendment (Technological Protection Measures) Regulations 2017 Exposure Draft (TPM Regulations Exposure Draft). As a result, these new exceptions will be updated but remain in the existing Copyright Regulations 1969 until these are formally sunsetted on 1 April 2018.

Due to the complexity in the regulation making power for new exceptions that allow users to circumvent technological protection measures (TPMs) which restrict access to, or sharing, of copyright material, these will be updated by the Copyright Legislation Amendment (Technological Protection Measures) Regulations 2017 (TPM Regulations 2017) but remain in the existing Copyright Regulations 1969 until these are formally sunsetted on 1 April 2018.

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<sup>1</sup> *Legislation Act 2003* (Cth) sections 48F and 49.

<sup>2</sup> *Copyright Act 1968* (Cth) section 249.

The TPM Regulations also incorporates changes consequential to the passage of the *Copyright Amendment (Disability Access and Other Measures) Act 2017*.

## Consultation process

### Your views are sought on the Exposure Draft by 6 October 2017.

This consultation process is intended to draw stakeholder views on whether the Copyright Regulations Exposure Draft and the TPM Regulations Exposure Draft (Exposure Drafts) are fit for purpose, including whether they may be further simplified or modernised. The Department is not seeking views on whether substantial, policy changes should be made to the provisions in the Exposure Drafts.

This consultation paper sets out some specific matters in relation to which stakeholder views are sought. However, the Department would welcome submissions on how any aspect of the Exposure Drafts may be simplified or more general comments in relation to whether the Exposure Drafts are fit for purpose.

## 2. General questions

### Publication

The Copyright Regulations Exposure Draft includes a number of provisions which require certain items (such as notices) to be published. The Copyright Regulations 1969, for the most part, require such items to be published in the Commonwealth of Australia Gazette. The Department is interested in stakeholder views on whether the regulations should permit, or require, publication in some other form.

Question 1: How should the Copyright Regulations 2017 require items (such as notices and inquiries) to be published? In particular, how should the Copyright Regulations 2017 require the following to be published?

- (a) A notice for the purposes of section 7 (Notice of intended publication of unpublished work kept in public library—paragraphs 52(1)(b) and (2)(b) of the Act).
- (b) A notice for the purposes of section 9 (Notice of intended making of record of musical work).
- (c) Inquiries for the purposes of section 11 (Inquiries relating to previous records of musical works—section 61 of the Act).
- (d) A notice for the purposes of section 121 (Information on use of copyright material for services of the Crown—subsection 183(4) of the Act).
- (e) Notice for the purposes of section 63 Advertising of applications and references).

## 3. Specific questions on parts of the regulations

### Part 2—Copyright in original works

Section 52 of the Copyright Act sets out circumstances where an unpublished work which is kept in libraries or archives and has been incorporated into a new work may be published (as part of that new work). Proposed new section 7 in the Copyright Regulations Exposure Draft prescribes the notice of intended publication of an unpublished work which must be given prior to the publication of a new work (which incorporates an unpublished work). Among other things, proposed new section 7 provides

that a relevant notice is to be published at least 2 months, but not more than 3 months, before the publication (or subsequent publication) of the new work.

Question 2: Is the Copyright Regulations Exposure Draft subsection 7(2) requirement that a relevant notice be published at least 2 months, but not more than 3 months, before the publication (or subsequent publication) of a new work sufficient? Should the requirement merely be that a relevant notice be published at least 2 months before the publication of a new work (with no upper limit on how far ahead of the publication a relevant notice may be published)?

## Part 6—Limitation on remedies available against carriage service providers

The Copyright Act limits the remedies that are available against a **carriage service provider** for infringements of copyright that occur in the course of the carriage service provider engaging in certain **online activities**.<sup>3</sup> A carriage service provider must satisfy the relevant **conditions**, specified in the Copyright Act, to take advantage of this scheme.

Although the Department is undertaking further, targeted, consultation on whether the scheme should be extended to cover a broader range of service providers, the Copyright Regulations Exposure Draft has been prepared to reflect the current scheme (which only applies to carriage service providers). For the purposes of this consultation on the Copyright Regulations Exposure Draft, stakeholders should, therefore, prepare their submissions with reference to the current scheme.

### Relevant online activities

The limitations on remedies apply to four categories of online activities.<sup>4</sup> The four categories of online activities are:

- **Category A Activity** where the carriage service provider acts as a conduit for internet activities through the provision of facilities or services for transmitting, routing or providing connections for copyright material or through the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections.
- **Category B Activity** where the carriage service provider caches copyright material through an automatic process.
- **Category C Activity** where the carriage service provider stores copyright material on their systems or networks at the direction of a user.
- **Category D Activity** where the carriage service provider refers users to an online location using online information location tools or technology.

### Conditions

A carriage service provider must comply with certain conditions to qualify for the limitations on remedies in relation to each of the categories of activities.<sup>5</sup> Two of these conditions relate to industry codes.

One of these conditions, **condition 2 of item 1** of the table in subsection 116AH(1), applies to all of the categories of online activities. This condition is that a carriage service provider must accommodate and not interfere with **standard technical measures** used to protect and identify copyright material in accordance with a relevant industry code (as defined in section 116AB), if such an industry code is in force. If such an industry code is not in force, this condition does not apply.

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<sup>3</sup> Part V, Division 2AA.

<sup>4</sup> The categories of online activities are set out in Part V, Division 2AA, Subdivision B of the Copyright Act.

<sup>5</sup> Part V, Division 2AA, Subdivision D.

Another of the conditions which relates to industry codes is **condition 2 of item 3** of the table in subsection 116AH(1). This condition only applies to **Category B** activities. The condition is that if a relevant industry code is in force, the carriage service provider must comply with the relevant provisions of that code relating to updating the **cached** copyright material and **not interfering with technology** used at the originating site to obtain information about the use of the copyright material.

### Definition of Industry Code

Section 116AB of the Copyright Act provides that, for the purposes of Division 2AA of Part V of the Copyright Act (the division that sets out the limitation on remedies available against carriage service providers), industry code means:

- (a) an industry code that:
  - (i) meets any prescribed requirements, and
  - (ii) is registered under Part 6 of the *Telecommunications Act 1997*; or
- (b) an industry code developed in accordance with the regulations.

#### Paragraph (a)—registered under the *Telecommunications Act 1997* and meets prescribed requirements

To fall under paragraph (a) of the definition of industry code, an industry code must be registered under Part 6 of the *Telecommunications Act 1997* (Tel Act) and also meet any prescribed requirements.

#### Registered under Part 6 of the *Telecommunications Act 1997*

The simplified outline of Part 6 of the Tel Act notes that bodies and associations that represent sections of the telecommunications industry, the telemarketing industry or the fax marketing industry may develop industry codes under the part. It is likely, therefore, that only an industry code which is registered by such bodies and associations would fall under paragraph (a) of the definition of industry code.

#### Meets any prescribed requirements

Proposed new section 18 sets out prescribed requirements for an industry code to which condition 2 of item 1 of the table in subsection 116AH(1) applies (standard technical measures). These reflect the prescribed requirements included in the Copyright Regulations 1969 for an industry code that relates to this condition.

Question 3: are the prescribed requirements set out in proposed new section 18 appropriate?

The Copyright Regulations 1969 do not currently set out prescribed requirements for an industry code relevant to condition 2 of item 3 of the table in subsection 116AH(1) (cached copyright material and originating site technology). The Department would welcome suggestions on the requirements the proposed new regulations should prescribe, if any, for industry codes relevant to condition 2 of item 3 of the table in subsection 116AH(1).

Question 4: what requirements should the regulations prescribe for an industry code that enlivens condition 2 of item 3 of the table in subsection 116AH(1) of the Copyright Act?

#### Paragraph (b)—developed in accordance with the regulations

The Copyright Regulations 1969 do not however stipulate a procedure that must be followed to develop an industry code for the purposes of the definition of an industry code as set out in the Copyright Act section 116AB at paragraph (b). Currently, therefore, it is not possible for an industry code that falls under paragraph (b) of the definition to come into existence. If the regulations were to stipulate such a procedure it is possible that (depending on the procedure) industry could be more inclined to develop a relevant industry code.

The Copyright Regulations 2017 present an opportunity to provide the procedure that must be followed to develop an industry code for the purposes of paragraph (b) of the definition of industry code in section 116AB of the Copyright Act. The Department would welcome suggestions on the mechanism the new regulations should prescribe for the development of an industry code for this purpose.

Question 5: what procedure should the Copyright Regulations 2017 prescribe for the development of an industry code for the purposes of paragraph (b) of the definition of industry code (section 116AB of the Copyright Act)?

## Part 7—Technological protection measures

Technological protection measures (TPMs) are technical locks copyright owners use to stop their material being accessed or copied. In broad terms, the Copyright Act defines TPM to mean an access control TPM or a device, product, technology or component that prevents, inhibits or restricts the doing of an act comprised in the copyright in a work or other subject-matter. An access control TPM is a TPM that controls access to a copyrighted work (for instance, by requiring the application of information or a process before access is granted).<sup>6</sup>

The Copyright Act includes civil actions and criminal offence provisions in relation to the:

- manufacture of and importation and dealings in devices and services designed to circumvent **any TPM**, and
- circumvention of **access control TPMs**.

The Copyright Act does not include any civil actions or criminal offence provisions in relation to the **circumvention** of TPMs which are not access control TPMs.

### Liability for circumventing an access control TPM

Subsection **116AN(1)** of the Copyright Act provides that a relevant copyright owner, or exclusive licensee, may bring a **civil action** against a person if the person does an act that results in the circumvention of an access control TPM that is protecting the owner/licensee's work or other subject matter. Similarly, subsection **132APC(1)** of the Copyright Act provides that a person commits an **offence** if the person engages in conduct that results in the circumvention of an access control TPM with the intention of obtaining a commercial advantage or profit.

### Exceptions and Defences to liability for circumventing an access control TPM

The Copyright Act includes a number of exceptions and defences to liability for circumventing an access control TPM. One of these exceptions, and one of the defences, may apply where a person circumvents an access control TPM to do an act prescribed by the regulations. Specifically, the Copyright Act provides that:

- The civil action set out in subsection 116AN(1) does not apply if the relevant person circumvents the access control TPM so that they can do an act that is prescribed by the regulations, and the act will not infringe copyright (see subsection **116AN(9)**).
- The offence set out in subsection 132APC(1) does not apply to a person if the relevant person circumvents the access control TPM so that they can do an act prescribed by the regulations and the act will not infringe copyright (see subsection **132APC(9)**).

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<sup>6</sup> See section 10 of the Copyright Act for the full definition of “technological protection measure” and “access control technological protection measure”.



Schedule 10A of the Copyright Regulations 1969 currently prescribes a number of acts for the purposes of subsections 116AN(9) and 132APC(9), including the:

- reproduction of computer programs to make interoperable products;
- reproduction and communication of copyright material by educational and other institutions assisting people with disabilities, and
- gaining of access to copyright material protected by a TPM that interferes with or damages a product in which it is installed where circumvention is necessary to prevent damage to or repair the product.

#### *Amendment of current prescribed acts*

A number of these currently prescribed acts need to be updated as a consequence of changes made to the Copyright Act by the *Copyright Amendment (Disability Access and Other Measures) Act 2017* (DAOM Act). Section 40 of the Copyright Regulations Exposure Draft includes updated versions of these existing prescribed acts, which refer to updated provisions.

#### *New prescribed acts*

Subsections 249(2)–(5) of the Copyright Act set out the circumstances under which regulations may be made prescribing the doing of an act for the purposes of subsections 116AN(9) and 132APC(9). Among other things, these provisions stipulate that the Minister may only recommend that “the doing of an act” be prescribed if a submission has been made requesting that the doing of the act be prescribed.

In 2015 the Department finalised a consideration of submissions requesting that certain new acts be prescribed in the regulations, or that the existing schedule of prescribed acts be varied or revoked. This report, the *Review of Technological Protection Measure exceptions made under the Copyright Act 1968—Recommendations made in response to submissions*, included as an [Attachment](#) to this paper, recommended that a number of new prescribed acts be added to the Copyright Regulations. Some of the proposed exceptions would be impacted by changes made by the DAOM Act. The report details where these changes would be made.

These recommended new prescribed acts have now been included in the Copyright Regulations Exposure Draft (in section 40). Technically, the regulations making power does not provide the ability for the Government to revoke an exception, except in the circumstances defined in s249(8) of the Copyright Act. To address this technicality, the TPM exceptions will continue to exist in standalone regulations until they automatically cease on 1 April 2018. From this date forward the TPM exceptions will be inserted into the new Copyright Regulations 2017. The TPM Regulations 2017 also incorporates changes to the list of existing ‘prescribed acts’ under the Copyright Regulations 1969 relating to the DAOM Act 2017.

The Department would welcome comments on the updated existing prescribed acts in the TPM Regulations Exposure Draft or the new prescribed acts which are included in section 40 of the Copyright Regulations Exposure Draft.

Question 6: Do you have any comments on the prescribed acts included in section 40 of the Copyright Regulations Exposure Draft or in the TPM Regulations Exposure Draft?

## Part 8—Infringement notices and forfeiture of infringing articles and devices

Part 8 sets out an infringement notice scheme for the purposes of sections 133B and 248SA of the Copyright Act. The scheme enables a person who is alleged to have committed an offence of strict liability against Division 5 of Part V, or Subdivision A or B of Division 3 of Part XIA, of the Copyright Act to pay a penalty (specified in an infringement notice) and, in some cases, also forfeit to the

Commonwealth infringing copies or devices used in making relevant infringing copies as part of the alleged commission of the offence (which are in the person's possession at the time the relevant infringement notice is issued) as an alternative to prosecution. The Regulations relating to the infringement notice scheme have been redrafted to help ensure that Part 8 of the Copyright Regulations Exposure Draft reflects the default model for infringement notice provisions, including using terminology consistent with this model.<sup>7</sup>

The Department is interested in stakeholder views on the continued utility of this scheme.

Question 7: Is the infringement notice scheme that is set out in Part 8 still necessary?

## Part 11—Tribunal procedure

Part 11 of the Copyright Regulations Exposure Draft is intended to replace the Copyright Tribunal (Procedure) Regulations 1969. Part 11, Division 2 of the Copyright Regulations Exposure Draft includes general provisions related to the operation of the Copyright Tribunal. The Department would welcome stakeholder comments on any aspect of this part, including the specific issues mentioned in the below questions.

The Copyright Act requires proceedings before the Copyright Tribunal to be conducted with as little formality as the requirements of the Copyright Act, and a proper consideration of the matters before the Tribunal, permit.<sup>8</sup>

The Copyright Act also allows the President of the Copyright Tribunal to give directions as to the arrangement of the business of the Tribunal.<sup>9</sup> To facilitate the Tribunal conducting proceedings with less formality, the Copyright Regulations Exposure Draft does not include a number of provisions present in the Copyright Tribunal (Procedure) Regulations 1969. These provisions were removed as being either unnecessary, or a matter that could be addressed by the President of the Copyright Tribunal.

The Department is interested in any stakeholder views on how Part 11, Division 2 of the Copyright Regulations Exposure Draft can be further amended to better facilitate informal proceedings in the Copyright Tribunal.

Question 8: How can the Copyright Regulations Exposure Draft be amended to better facilitate informal proceedings in the Copyright Tribunal?

Question 9: Is the newspaper publication requirement in sub-section 63(1) too burdensome (in terms of cost, or otherwise)? Should some other form of publication be required?

## Applications and referrals under the educational statutory licence

The Copyright Act provides educational institutions with a statutory licence to copy or communicate certain copyright material for educational purposes (if the body administering the educational institution agrees to pay equitable remuneration to a collecting society).

New subsection 113P(4) to be inserted by the DAOM Act provides the Copyright Tribunal with a broad power to determine questions relating to the educational statutory licence, upon application by either party to the licence.

<sup>7</sup> *Regulatory Powers (Standard Provisions) Act 2014* part 5.

<sup>8</sup> Section 164.

<sup>9</sup> Section 147.

New section 113S to be inserted by the DAOM Act sets out the procedure by which a collecting society can enter the premises of an educational institution for the purpose of reviewing compliance with a relevant remuneration notice and any other relevant terms and conditions.

New subsection 113S(4) to be inserted by the DAOM Act provides the Copyright Tribunal with jurisdiction to consider particular questions in relation to the entry onto premises.

New subsection 153A(4) contains a table which sets out the actions the Copyright Tribunal must take in relation to particular applications and referrals which relate to licensed copying and communicating. Item 1 of this table provides that the Tribunal must have regard to any matters prescribed by the regulations when considering an application under new subsection 113P(4) or new subsection 113S(4) of the Copyright Act.

The Department is interested in stakeholder views on the matters that should be prescribed for these purposes.

Question 10: Which matters (if any) should sections 70 and 72 prescribe for the purposes of item 1 of the table in new section 153A to be inserted by the DAOM Act (as matters to which the Copyright Tribunal must have regard in determining the relevant question), so far as it relates to an application under new subsections 113P(4) and 113S(4) to be inserted by the DAOM Act?

Question 11: Are the matters for the Copyright Tribunal to have regard to in 71(2) appropriate?

## Part 13—Extension or restriction on operation of Act

Section 186 of the Copyright Act permits the regulations to declare certain organisations to be international organisations to which the Copyright Act applies. The current Copyright Regulations contain a list of international organisations in Schedule 10 that has not been updated since 2010. The Act and explanatory materials for amendments to Schedule 10 do not set out the criteria for countries being added to the schedule. Section 122 of the Copyright Regulations Exposure Draft adopts the approach of similar countries, like the United Kingdom and New Zealand, of extending protection to the United Nations, the Specialised Agencies of the United Nations and the Organisation of American States. The Department would welcome stakeholder views on the revision of this list.

Question 12: Is the list in proposed new section 122 appropriate?

## Part 16—Transitional Matters

Part 16 of the Copyright Regulations Exposure Draft sets out some proposed transitional provisions.

Question 13: Are all of the transitional provisions set out in Part 16 of the Copyright Regulations Exposure Draft still necessary? Are any additional transitional provisions needed?

## Attachment A



**Australian Government**

**Department of Communications and the Arts**

### Review of Technological Protection Measure exceptions made under the *Copyright Act 1968*

Recommendations made in response to submissions

August 2017

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## Overview

This report sets out the Department of Communications and the Arts' consideration of applications seeking the revocation or variation of prescribed acts to the prohibition against circumvention of technological protection measures (TPMs) under the *Copyright Act 1968* (the Act). It also extends to consideration of submissions made for the addition of certain, new prescribed acts as being activities allowing for the lawful circumvention of an access control TPM.

These applications were initially outlined in submissions made in response to the Department's Review of Technological Protection Measure exceptions made under the *Copyright Act 1968* (TPM Review) undertaken in 2012. Throughout the TPM Review the term 'exception' was adopted in lieu of 'prescribed act', being a less technical term more likely to be generally understood by the broader public.

In 2015 the Department finalised a consideration of submissions made to the TPM Review i but policy reform was delayed due to the need for the Act to be amended to allow Australia to accede to the Marrakesh Treaty to Facilitate Access to Published Works and Persons who are Blind, Visually Impaired or Otherwise Print Disabled (Marrakesh Treaty).

As many of the proposed prescribed acts have been impacted by changes made by the *Disability Access and Other Measures Act 2017* (DAOM Act), this report makes references to where requests to revoke, vary or add prescribed acts / exceptions in the original 2012 submissions will be either revoked or amended in the Act and, where applicable, this report refers to the updated versions of the provisions.

## What is a Technological Protection Measure?

Technological protection measures (TPMs) are technical locks copyright owners use to stop their material being accessed or copied such as passwords, encryption software and access codes. Access control TPMs prevent a person from being able to read, listen to or watch material. Copy control TPMs allow a person to read, listen or watch material but prevent a person from making a copy of the material. Both civil remedies and criminal penalties are available where a person circumvents a TPM.

A TPM is only protected by the scheme where it is used:

- by, or with the permission of, the owner or exclusive licensee of the copyright
- on material which is protected by copyright (i.e. TPMs on public domain material are not protected)
- in connection with the copyright owner's exclusive rights (i.e. to reproduce, communicate etc.), and
- to control access to the work (e.g. by requiring a password or some other process for access).

The scheme specifically excludes TPMs that control geographic market segmentation. This means that consumers can bypass region coding measures to play overseas purchased DVDs or computer programs on Australian devices.

It also excludes TPMs which restrict the use of after-market goods or services. This includes restricting the supply of spare parts or repair or maintenance services by third parties. For example, a computer printer manufacturer cannot use the TPM scheme to stop generic cartridges being used in its printers. A garage door manufacturer could not use the TPM scheme to prevent the use of competitors' remote control garage door openers. TPMs used by the providers of computer systems to restrict services being provided by competing computer system maintenance providers would also not be protected.

## Exceptions and defences to liability for circumventing an access control TPM

### Are there any circumstances where someone wouldn't be liable after circumventing an access control TPM under the scheme?

Two types of exceptions to access control TPM liability apply under the scheme:

**Specific exceptions in subsections 116AN (2)-(8) and 132 APC (2)-(8) of the Act** (which are not subject to review and were not considered as part of this process):

- 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.

The inclusion of additional prescribed acts in Schedule 10A of the Copyright Regulations 1969 (Copyright Regulations) were considered in the TPM Review in 2012. These included:

- 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.

Sub-section 249(4) of the Act allows an additional prescribed act to be created when a submission for a prescribed act is made, and the Minister makes a decision to grant an exception. The review process was intended to inform the Minister in making a decision relating to a prescribed act. Existing additional prescribed acts can also be revoked or varied through this process.

### Amendment of current prescribed acts

A number of these currently prescribed acts outlined in Schedule 10A of the Copyright Regulations will be updated on 22 December 2017 as a consequence of changes made to the Act by the DAOM Act 2017<sup>10</sup>. These complementary amendments to the Copyright Regulations via the proposed Copyright Regulations 2017 will both modernise them as well as reduce barriers to access to copyright material, including for people with a disability.

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<sup>10</sup> 22 December 2017 being the commencement date for provisions repealed or amended under Schedule 1 of the DAOM Act.

In addition, the Copyright Regulations and Copyright Tribunal (Procedure) Regulations 1969 (Copyright Tribunal Regulations) are also required to be remade as these regulations are due to sunset on 1 April 2018.<sup>11</sup>

### The TPM Review

Sub-sections 249(2)–(9) of the Act allows for regulations to be made prescribing the doing of an act to which a TPM exception will apply. Sub-section 249(4) of the Act sets out the factors that the Minister must consider in deciding whether to recommend that a new regulation be made. These are:

- (a) a submission has been made to prescribe the doing of the act by the person
- (b) the doing of the act will not infringe the copyright in a work or other subject-matter
- (c) the doing of the act is in relation to a particular class of works or other subject-matter
- (d) an actual or likely adverse impact on the doing of the act has been credibly demonstrated, and
- (e) the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act would not be impaired if the doing of the act by the person were prescribed.

Sub-section 249(8) of the Act sets out the factors that the Minister must consider in deciding whether to vary or revoke a regulation. These are:

- (a) a submission has been made to vary or revoke the regulation
- (b) an actual or likely adverse impact on the doing of the act by the person that is the subject of the regulation can no longer be credibly demonstrated, and
- (c) the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act would be impaired if the regulation were not varied or revoked.

As part of its TPM Review, the Department sought submissions on existing or new TPM prescribed acts (referred to throughout the review as ‘exceptions’ rather than ‘prescribed acts’). There were two rounds of submissions.

#### First round of submissions

The Department received 16 first round submissions. The following broad categories of new exceptions were proposed in the context of the Act as it stood in 2012, prior to the recent amendments arising out of the DAOM Act:

[An exception for the circumvention of TPMs that corresponds with the fair dealing provisions in the Act](#) (Australian Libraries Copyright Committee, Copyright Advisory Group, Copyright in Cultural Institutions, Universities Australia, Pirate Party Australia)

[An exception for the circumvention of TPMs that allows libraries, archives, cultural institutions and people with a disability to circumvent a TPM for the purpose of undertaking an activity under the flexible dealing provision in section 200AB of the Act](#) (Australian Libraries Copyright Committee, Universities Australia, Copyright Advisory Group, Copyright in Cultural Institutions)

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<sup>11</sup> Most legislative instruments are automatically repealed (or “sunsetting”) a fixed period of time after being registered. The sunsetting process is intended to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed (*Legislation Act 2003* (Cth) sections 48F and 49).



[An exception for the circumvention of TPMs that allows activities under Part VA of the Act](#) (Copyright Advisory Group and Universities Australia)

[An exception for the circumvention of TPMs that allows the additional preservation copying activities permitted by sections 51B, 110BA and 112AA of the Act](#) (Copyright in Cultural Institutions)

[An exception for the circumvention of TPMs that allows the use of the statutory licence in Part VII Division 2 statutory licence of the Act, in particular section 183](#) (Copyright in Cultural Institutions)  
Exception that allows activities under sections 48A and 104A

An exception for the circumvention of TPMs that allows a parliamentary library to undertake activities under sections 48A and 104A of the Act (Department of Parliamentary Services) [Exception for persons with, and institutions assisting persons with, an intellectual disability](#)

[An exception for the circumvention of TPMs for those with an intellectual disability and for institutions assisting those with an intellectual disability](#) (NSW Young Lawyers)

[An exception for the circumvention of TPMs to allow the making of backup copies of legitimate material](#) (Pirate Party Australia)

[An exception for the circumvention of TPMs to allow unrestricted format shifting](#) (Pirate Party Australia)

[An exception for the circumvention of TPMs to allow the use of a computer program where a TPM is used to enforce an unfair term of a contract under the Australian Consumer Law](#) (Robert X)

[An exception for the circumvention of TPMs with regards to cinematograph films and computer programs that have TPMs for the purpose of geographic market segmentation](#) (Robert X)

[Varying existing exception 3.1 relating to assistance to persons with a print disability](#) (NSW Young Lawyers)

## Second round of submissions

The Department received eight second round submissions, providing comments on first round submissions.

## Scope of the review

The TPM Review was solely focused on amendments to the Copyright Regulations. Proposals to amend the Act were outside the scope of the review.

The Department has considered the existing TPM exceptions in the Copyright Regulations that are affected by changes made to the Act by the DAOM Act. In the Department's view, varying the existing TPM exceptions to refer to new corresponding provisions does not substantially affect the scope of existing TPM exceptions and the varied exceptions continue to meet the criteria in s249(4)(b) to (e).

The exceptions in Schedule 10A of the Copyright Regulations will be revoked on 1 April 2018 as part of the sunset of the Copyright Regulations. The Department recommended that the exceptions in Schedule 10A (so far as they remain relevant) be located in a new item 20Z of the updated Copyright Regulations, alongside other provisions relating to TPMs.

## Summary of proposed new exceptions

The Department concluded its review of submissions to the TPM Review in 2015. The proposed new exceptions are based on these recommendations with minor modifications to ensure that the proposed changes align with recent amendments to the Act arising out of the DAOM Act.

It was recommended that the following activities be prescribed activities under s 116AN and 132APC (9) (c) allowing for the circumvention of an access control measure without infringing copyright:

- for use of copyright material by a student enrolled in a course of study in an educational institution solely for the purpose of and in circumstances set out in sections 40, 41, 41A, 103A, 103AA or 103C of the Act provided that the use was solely for the purposes of a student complying with the requirements of the course of instruction
- for use of copyright material by a person who carries out research for an educational institution solely for the purpose of and in circumstances set out in sections 40, 41, 41A, 103A, 103AA or 103C of the Act provided that the use was solely for the purposes of a person carrying out his or her research duties for an educational institution
- for use of copyright material for educational purposes by or on behalf of a body administering an educational institution, acting under section 200AB of the Act
- use of copyright material by or on behalf of a person with a disability under Division 2, Part IVA of the Act
- use by libraries, archives and Key Cultural Institutions (as prescribed in the Copyright Regulations), under Division 3 of Part IVA of the Act,
- use in relation to access by or for persons with a disability (under Division 2 of Part IVA of the Act)
- for use of copyright material for educational purposes undertaken under the statutory licence under Division 4 of Part IVA of the Act

## Who made submissions?

The Department received submissions from:

- Advanced Access Content System Licensing Administrator (AACS)
- Australian Broadcasting Corporation (ABC)
- Australian Copyright Council (ACC)
- Australian Federation Against Copyright Theft (AFACT) and Australian Home Entertainment Distributors Association (AHEDA)
- Australian Libraries Copyright Committee (ALCC)
- Australian Publishers Association (APA)
- Business Software Alliance (BSA)
- Choice
- Copyright Advisory Group (CAG)
- Copyright in Cultural Institutions (CICI)
- Department of Parliamentary Services
- DVD Copy Control Association (CCA)
- Ericsson
- Free TV Australia
- Interactive Games and Entertainment Association (IGEA)
- New South Wales Young Lawyers
- Pirate Party Australia
- Robert X
- Special Broadcasting Service (SBS)
- Universities Australia (UA), and

- VicCamilleri.

### Analysis of new exceptions sought

The following analysis is of the submissions made to the TPM Review in 2012. These submissions were made in the context of the Act as it stood in 2012, prior to the recent amendments arising out of the DAOM Act. As such, some of the provisions referred to in this analysis will be repealed or updated when the DAOM Act commences in December 2017. Herein, each exception is set out and analysed separately.

## Exception corresponding with fair dealing provisions

An exception for the circumvention of TPMs that corresponds with the fair dealing provisions in the Act

### Summary of first round submissions

CAG and UA submitted that almost all commercial films released on DVD and Blu-ray disc are protected by a TPM called Content Scrambling System (CSS), which is designed to protect the copyright in films by ensuring that only players equipped with the requisite digital keys can unlock the content on the DVD. Stakeholders also submitted that audio-visual material produced in the last five years is generally unavailable on VHS and as a result there is an arbitrary discrepancy in activities permitted by the fair dealing exception due to the presence of a TPM on the updated media for viewing film and television.

ALCC submitted that the use of CSS on DVDs, adversely impact users preventing them from undertaking a fair dealing under sections 103A, 103B and 103C of the Act.

CAG and UA submitted that the use of TPMs prevent students from undertaking a fair dealing under sections 40, 41, 41A, 103A, 103AA or 103C of the Act.

CICI submitted that the use of TPMs prevent cultural institutions from undertaking a fair dealing under sections 40, 41, 41A, 42, 103A, 103AA, 103B, 103C of the Act. UA submitted that the use of TPMs prevent academics and research staff from undertaking a fair dealing under sections 40, 41, 41A, 103A, 103AA or 103C of the Act.

CAG and UA also submitted that similar problems arose in relation to encrypted streams and ebooks.

### Summary of second round submissions

AACSLA submitted that no further exceptions should be granted with respect to circumvention of technology protecting audio-visual works on optical media and that authorising circumvention of encryption-based technologies like CCS risks having authorised circumvention becoming a pathway to broad-based circumvention for uses far beyond those that have been authorised.

The Australian Copyright Council submitted that if an exception to the prohibition on circumvention of access control TPMs were to apply to the fair dealing, the circumvention exception would be subject to interpretation and would require a risk management approach.

AFACT and AHEDA submitted that the limitations proposed are not sufficient and do not outweigh the serious risk in circumstances where digital copies of films without TPMs exposes the content to viral reproduction and distribution. AFACT and AHEDA also submitted that such an exception is unnecessary because alternative means (other than circumventing the TPM) are already available to permit the intended use.

AFACT and AHEDA also submitted that a fair dealing exception would provide a disincentive for further response and development of technological solutions to address reasonable consumer needs, such as accessing legitimately acquired copies on multiple devices.

## Analysis

### *Will the doing of the act infringe the copyright in a work or other subject-matter?*

The proposed uses would be the fair dealing exceptions: sections 40, 41, 41A, 42, 103A, 103AA, 103B, and 103C of the Act.

*Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to all works and subject matter other than works. However the use is limited by the class of users to whom the exception applies.

*Has an actual or likely adverse impact on the doing of the act been credibly demonstrated?*

CAG and UA provided examples whereby student coursework and assessment involves an increasing requirement to compile and present audio-visual material in addition to traditional written based work. CAG cited the Melbourne Declaration on Educational Goals for Young Australians and UA cited the National Digital Economy Strategy to demonstrate that the role of education institutions is to employ technology in learning and to ensure that students are able to experience intensive and immersive online interactions, including development of skills in the use of digital media and that TPMs prevent educational institutions from performing that role.

CAG provided practical examples of how students are prevented from copying DVD material. CAG also submitted that similar problems arise in relation to Blu-ray discs, encrypted streams and ebooks.

AFACT and AHEDA submitted that an exception is unnecessary because alternative means (other than circumventing the TPM) are already available to permit the intended use, without providing detail on these alternative means.

The Department assessed that most audio and audio-visual content is now delivered either by broadcast, DVD/Blu-ray, digital download or encrypted stream. The majority of this content is protected by an access control TPM in some form. The Department also assessed that most ebooks are also protected by an access control TPM in some form.

The Department was not able to identify other realistic means of students gaining access to audio-visual or ebook content. An option would be for a student to copy broadcast content for use in assessment. This would depend on a student having a recording device that does not of itself place limitations on what the student can do with the recorded material. However, this option would limit a student to incorporating material that is broadcast within the project's timeframe. The Department was not aware of other services that provide TPM-free access to audio or audio-visual clips for students to incorporate into their projects or assignments. This is in contrast to some services which are available to educators. The Department did not consider that restricting students to only utilise broadcast audio or audio-visual material was a realistic alternative.

The Department was provided with evidence about how TPMs prevent a student from extracting material from ebooks. The Department considered that where an ebook is the only legitimate source of information for a student, then there may be restriction on the ability of a student to extract a diagram or illustration.

The ALCC/ADA submitted that TPMs on commercially available DVDs curtail the ability of a non-student film-maker to create new work through commentary, parody or reporting. The Department noted that audio-visual material is incorporated regularly in news reporting and questions the extent to which TPMs prevent commentary, parody and satire. In the absence of evidence of a lack of alternatives to reproducing content from DVDs the Department assessed that TPMs are unlikely to have an adverse impact on the non-infringing use of DVDs by film makers in the circumstances raised by the ALCC and ADA.

In summary, the Department considered that sufficient evidence was provided for the following uses:

- for use of copyright material by a student enrolled in a course of study in an educational institution solely for the purpose of and in circumstances set out in sections 40, 41, 41A, 103A,

- 103AA or 103C of the Act provided that the use was solely for the purposes of a student complying with the requirements of the course of instruction
- for use of copyright material by a person who carries out research for an educational institution solely for the purpose of and in circumstances set out in sections 40, 41, 41A, 103A, 103AA or 103C of the Act provided that the use was solely for the purposes of a person carrying out his or her research duties for an educational institution.

*Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

AFACT and AHEDA submitted that a fair dealing exception would provide a disincentive for further response and development of technological solutions to address reasonable consumer needs, such as accessing legitimately acquired copies on multiple devices. In the Department's view, the ability of a student to access content on multiple devices did not relate to and was separate from the use of a clip of a film in a school project. The Department also considered that allowing a student to extract parts of a film to incorporate into a project is unlikely to provide an incentive for further copyright infringement, because the exception would encourage the use of legitimate, paid content. The Department was not aware of legitimate alternatives to infringing content offered by content owners for use by students. Rather than increasing use of infringing content, providing an exception may reduce student exposure to infringing content. Finally, the Department considered that an exception limited to the education based activities of students enrolled in a course of study in an educational institution or to academics and research staff employed by an educational institution would reduce any potential impairment of the adequacy and effectiveness of legal protections and remedies.

## Conclusion

New paragraphs should be added to section 40 of the proposed Copyright Regulations 2017:

- for use of copyright material by a student enrolled in a course of study in an educational institution solely for the purpose of and in circumstances set out in sections 40, 41, 41A, 103A, 103AA or 103C of the Act provided that the use was solely for the purposes of a student complying with the requirements of the course of instruction
- for use of copyright material by a person who carries out research for an educational institution solely for the purpose of and in circumstances set out in sections 40, 41, 41A, 103A, 103AA or 103C of the Act provided that the use was solely for the purposes of a person carrying out his or her research duties for an educational institution.

## Exception corresponding with section 200AB

**An exception for the circumvention of TPMs that allows libraries, archives, cultural institutions and people with a disability to circumvent a TPM for the purpose of undertaking an activity under the flexible dealing provision in section 200AB of the Act (dealt with separately as paragraphs a) to c) below).**

### a) Use by body administering library or archives

#### *Summary of first round submissions*

ALCC/ADA submitted that the use of TPMs on legacy digital material, eBooks, music CDs, DVDs and physical and electronic textbooks accompanied by online supplements prevent libraries and archives from undertaking uses made for the purposes of maintaining or operating the library or archives under section 200AB of the Act.

The ALCC/ADA submitted that they currently use section 200AB of the Act to undertake format shifting activities that may not fall into the specific exceptions for preservation activities. An example provided was the creation of back-up copies of works contained in a computer program. ALCC/ADA also submitted that the broader scope of section 200AB of the Act provides greater capacity to make uses of works in pace with technological developments as opposed to the existing specific exceptions for preservation and administrative purposes found in the Copyright Regulations.

#### *Summary of second round submissions*

AACSLA submitted that no further exceptions should be granted for circumvention of TPMs protecting audio-visual works on optical media. AACSLA submitted that authorising circumvention of TPMs may impair the adequacy of legal protection or the effectiveness of legal remedies and provide scope for circumvention of TPMs for uses beyond those authorised.

The ACC submitted that if an exception to the prohibition on circumvention of access control TPMs were to apply to section 200AB of the Act, the exception would be subject to interpretation and would require a risk management approach.

AFACT and AHEDA submitted that the proposed exceptions are not sufficiently defined and do not mitigate the serious risk of widespread infringement for digital copies of films where the TPM has been circumvented. AFACT and AHEDA also submitted that such an exception is unnecessary because alternative means (other than circumventing the TPM) are already available to permit the intended use.

The APA submitted that insufficient evidence of an adverse impact has been provided and that in relation to the access to textbook supplements, the problem may be caused by a lack of resources for libraries and archives. The APA further submitted that the submissions do not discuss the licensing practices of publishers that routinely license multiple access to online material.

## *Analysis*

### *Will the doing of the act infringe the copyright in a work or other subject-matter?*

Section 200AB of the Act allows uses where the:

- circumstances of the use amount to a special case
- use does not conflict with a normal exploitation of the work or other subject-matter
- use does not unreasonably prejudice the legitimate interests of the owner of the copyright
- use is done by or on behalf of the body administering a library or archives
- use is done for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives), and

- use is not made partly for the purpose of the body obtaining a commercial advantage or profit.

*Is the proposed act in relation to a particular class of works or other subject-matter*

The proposed uses apply to all works and subject matter other than works. However the use is limited by both the class of users (a body administering a library or archives) and the purpose of the use (a special case done for the purpose of maintaining or operating the library or archives).

Has an actual or likely adverse impact on the doing of the act been credibly demonstrated?

The ALCC and ADA provided limited examples of the kinds of activities which they would seek to undertake under section 200AB of the Act which are prevented by access control TPMs.

In relation to the submission that TPMs prevent cultural institutions and libraries from being able to reproduce, reverse engineer and format shift material to ensure interoperability, to perform security testing and error correction, the ALCC/ADA submission did not provide sufficient information to indicate how the current TPM exceptions in subsections 116AN (4)—(6) of the Act do not provide scope to undertake these activities.

The Department noted further that in relation to these perceived adverse impacts, existing TPM exceptions in the Act may apply:

- subsection 116AN (2) Permission
- subsection 116AN(3) Interoperability
- subsection 116AN(4) Encryption research
- subsection 116AN(5) Computer security testing
- subsection 116AN(7)(c) Performance of a statutory function, power or duty by or on behalf of the Commonwealth, a State or a Territory, or an authority of one of those bodies.

Moreover, subsection 116AN (7) (c) of the Act is likely to apply to many cultural institutions with a statutory function.

For example, section 6 of the *National Library Act 1960* requires the Library:

- (a) to maintain and develop a national collection of library material, including a comprehensive collection of library material relating to Australia and the Australian people;
- (b) to make library material in the national collection available to such persons and institutions, and in such manner and subject to such conditions, as the Council determines with a view to the most advantageous use of that collection in the national interest.

The Department noted that the exception in subsection 116AN (7) (c) does not apply to all cultural institutions and libraries as many cultural institutions and libraries do not have a statutory function (for example institutions within the jurisdiction of local councils).

While libraries and archives can use these existing exceptions to address many of the issues raised in the ALCC/ADA submission, in relation to audio-visual collection management, the Department accepted that TPMs may prevent some legacy CDs and DVDs from being consolidated into digital repositories. Section 200AB of the Act would allow such format shifting, where the:

- a) circumstances of the format shifting amount to a special case
- b) format shifting does not conflict with a normal exploitation of the work or other subject-matter



- c) format shifting does not unreasonably prejudice the legitimate interests of the owner of the copyright
- d) format shifting is done by or on behalf of the body administering a library or archives
- e) format shifting is done for the purpose of maintaining or operating the library or archives (including operating the library or archives to provide services of a kind usually provided by a library or archives), and
- f) format shifting is not made partly for the purpose of the body obtaining a commercial advantage or profit.

Accordingly, the Department believed confining the proposed exception to audio and audio-visual material would be appropriate.

*Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

The Department considered that an exception to undertake format shifting of audio-visual material for preservation purposes under section 200AB of the Act would not impair the adequacy of legal protections and the effectiveness of legal remedies. The Department made this consideration particularly because a use under section 200AB of the Act can only be done in a special case, in a situation where it does not conflict with a normal exploitation of the work or other subject-matter, and does not unreasonably prejudice the legitimate interests of the owner of the copyright.

### *Conclusion*

The Department initially recommended that a new paragraph should be added to Schedule 10A of the Copyright Regulations for format shifting of audio-visual material for preservation purposes by a library or archive acting under section 200AB of the Act.

In light of amendments to section 200AB relating to libraries, archives and key cultural institutions, the Department recommended instead that a new exception be created for:

use by libraries, archives and Key Cultural Institutions (as prescribed in the Copyright Regulations), under Division 3 of Part IVA of the Act.

### **b) Use by body administering educational institution**

#### *Summary of first round submissions*

CAG and UA submitted that TPMs prevent educational institutions from undertaking uses of literary, dramatic and artistic works, sound recordings and films made for the purposes of giving educational instruction.

CAG further submitted that TPMs prevent access to DVDs and Blu-ray discs, ebooks, websites and encrypted digital streams.

CAG provided specific examples of adverse impacts that had been experienced by schools and TAFEs. These examples relate to:

- a) creating compilations of excerpts from films
- b) playing DVDs or excerpts of DVDs using modern devices
- c) including excerpts of films in content accessed online by distance learning students, and
- d) making translations of protected ebooks.

### *Summary of second round submissions*

AACSLA submitted that no further exceptions should be granted for circumvention of TPMs protecting audio-visual works on optical media. AACSLA submitted that authorising circumvention of TPMs may impair the adequacy of legal protection or the effectiveness of legal remedies and provide scope for circumvention of TPMs for uses beyond those authorised.

The ACC submitted that if an exception to the prohibition on circumvention of access control TPMs were to apply to section 200AB of the Act, the exception would be subject to interpretation and would require a risk management approach.

AFACT and AHEDA submitted that the proposed exceptions are not sufficiently defined and do not mitigate the serious risk of widespread infringement for digital copies of films where the TPM has been circumvented. AFACT and AHEDA also submitted that such an exception is unnecessary because alternative means (other than circumventing the TPM) are already available to permit the intended use.

### *Analysis*

#### *Will the doing of the act infringe the copyright in a work or other subject-matter?*

Section 200AB of the Act allows for uses where:

- a) the circumstances of the use amounts to a special case
- b) the use does not conflict with a normal exploitation of the work or other subject-matter
- c) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright
- d) is made by or on behalf of a body administering an educational institution
- e) is made for the purpose of giving educational instruction, and
- f) the use is not made partly for the purpose of the body obtaining a commercial advantage or profit.

#### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to all works and subject matter other than works. However the use is limited by both the class of users (a body administering an educational institution) and the purpose of the use (a special case done for the purpose of giving educational instruction).

#### *Has an actual or likely adverse impact on the doing of the act been credibly demonstrated?*

The Department considered that access control TPMs are routinely applied to audio-visual material, including digital downloads and encrypted streaming of material, as well as ebooks. The Department noted that audio and audio-visual content is now delivered either by broadcast, DVD/Blu-ray, digital download or encrypted stream. The majority of this content is protected by an access control TPM in some form.

The Department noted that the Part VA statutory licence provides educational institutions with means to access broadcast material. Section 200AB of the Act does not apply if another part of the Act would make a particular use non-infringing. Outside section 200AB of the Act, the Department was unaware of other options under the Act for educational institutions seeking to undertake acts under an exception in relation to audio and audio-visual content (other than broadcast content under Part VA).

The Department was provided with some evidence about how TPMs prevent a teacher from extracting material from ebooks. The Department considered that where an ebook is the only legitimate source of information for a student, then there is a restriction on the ability of a student to extract an illustration or artistic work. However, in the absence of evidence of a lack of alternatives to reproducing content from an ebook the Department assessed that TPMs are unlikely to have an adverse impact on the non-infringing use of ebooks.

*Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

The Department considered that an exception to undertake uses of audio-visual material by or on behalf of a body administering an educational institution made for the purpose of giving educational instruction under section 200AB of the Act would not impair the adequacy and effectiveness of legal protections and remedies. The Department made this consideration particularly because a use under section 200AB can only be done in a special case, in a situation where it does not conflict with a normal exploitation of the work or other subject-matter, and does not unreasonably prejudice the legitimate interests of the owner of the copyright.

### *Conclusion*

A new paragraph should be added to section 40 of the proposed Copyright Regulations 2017 for use of audio-visual material for educational purposes by or on behalf of a body administering an educational institution, acting under section 200AB of the Act.

### *c) Use by or for person with a disability*

#### *Summary of first round submissions*

CAG and UA submitted that the use of TPMs prevent educational institutions from obtaining accessible format copies of subject matter for a person with a disability.

CAG submitted that schools and TAFEs want to use section 200AB of the Act to produce captioned or subtitled versions of films for hearing impaired students. CAG submitted that the inability to circumvent TPMs on audio-visual content has prevented schools from providing accessible audio-visual material to hearing impaired students. Instead, students are provided with written transcripts or separate subtitles which are to be read simultaneously with watching the visual aspects of the film. CAG also noted the statutory obligations on schools and TAFEs to provide accessible formats to students with a disability.

UA submitted that universities want to use section 200AB of the Act to enable text-to-speech functionality on ebooks for students with a print disability in circumstances where no audio-book version of the work is commercially available.

#### *Summary of second round submissions*

AACSLA submitted that no further exceptions should be granted for circumvention of TPMs protecting audio-visual works on optical media. AACSLA submitted that authorising circumvention of TPMs may impair the adequacy of legal protection or the effectiveness of legal remedies and provide scope for circumvention of TPMs for uses beyond those authorised.

The ACC submitted that if an exception to the prohibition on circumvention of access control TPMs were to apply to section 200AB of the Act, the exception would be subject to interpretation and would require a risk management approach.

AFACT and AHEDA submitted that the proposed exceptions are not sufficiently defined and do not mitigate the serious risk of widespread infringement for digital copies of films where the TPM has been circumvented. AFACT and AHEDA also submitted that such an exception is unnecessary because alternative means (other than circumventing the TPM) are already available to permit the intended use.

The APA submitted that publishers have taken significant steps to ensure that persons with a print disability have better access to copyright material and that a TPM exception to allow use under section 200AB of the Act would negatively impact emerging digital markets.

### *Analysis*

Will the doing of the act infringe the copyright in a work or other subject-matter?

Section 200AB of the Act allows for uses where:

- a) the circumstances of the use amount to a special case
- b) the use does not conflict with a normal exploitation of the work or other subject-matter
- c) the use does not unreasonably prejudice the legitimate interests of the owner of the copyright
- d) is made by a person with a disability that causes difficulty in reading, viewing or hearing the work or other subject-matter in a particular form, or someone else
- e) is made for the purpose of the person obtaining a reproduction or copy of the work or other subject-matter in another form, or with a feature, that reduces that difficulty, and
- f) the use is not made partly for the purpose of the body obtaining a commercial advantage or profit.

### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to all works and subject matter other than works. However the use is limited by the purpose of the use (a special case done for the purpose of making accessible copies by or for a person with a print disability).

### *Has an actual or likely adverse impact on the doing of the act been credibly demonstrated?*

The Department accepted evidence from UA and CAG that TPMs on audio-visual material prevents the creation of accessible formats. Likewise the Department accepted that in relation to electronic books and other electronic documents, TPMs often prevent the making of accessible formats.

The Department considered that where an accessible format of a work or other subject matter is not commercially available, then a person with a disability or another person should be able to create an accessible work, even where it is protected by an access control TPM. Although submissions mainly focussed on the ability of educational institutions to circumvent TPMs, the Department understood that technological changes have meant that increasingly, people with a disability can make accessible format copies themselves. The Department considered that the use of such technology has the capacity to increase access to content for people with disabilities, and deemed it inappropriate that this access is limited by TPMs.

### *Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

The Department considered that an exception to undertake uses of copyright material by or on behalf of a person with a disability would not impair the adequacy and effectiveness of legal protections and remedies. The Department reached this consideration particularly because the exception can only be done in a special case where it does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the owner of the copyright.

### *Conclusion*

A new paragraph should be added to Schedule 10A of the Copyright Regulations for use of copyright material by or on behalf of a person with a disability under section 200AB of the Act. In light of amendments to section 200AB relating to access by or for a person with a disability, the Department recommended instead that a new exception be created for:

- use in relation to access by or for persons with a disability (under Division 2 of Part IVA of the Act)

## Exception allowing activities under Part VA

### **An exception for the circumvention of TPMs that allows activities under Part VA of the Act.**

#### Summary of first round submissions

CAG submitted that an exception to circumvent TPMs should correspond with the Part VA statutory licence, which allows schools and TAFEs to copy the content of free-to-air broadcasts from online sources. CAG noted that schools and TAFEs pay for copying broadcasts under the Part VA statutory licence, but are prevented from copying broadcast content from online sources protected by a TPM.

CAG further submitted that where underlying broadcast content (i.e. a cinematographic film) is made available online it is subject to encryption, restricting access to the website and preventing the content from being downloaded. CAG argued that depending on the technology used, this encryption operates as a TPM, preventing educational institutions from copying the broadcast content from the website and using it in ways permitted under Part VA.

CAG submitted that off-air 'online' copying is a concern for regional educational institutions because they face greater risk of technical disruptions in receiving broadcasts, interfering with their ability to reliably schedule off-air recordings. As an alternative, these institutions rely on copying broadcasts content from online sources.

UA noted that when exceptions were last considered by the Government in 2006, the Part VA statutory licence did not expressly permit educational institutions to copy and communicate the content of a broadcast that has been made available online by the broadcaster at or after the time of the broadcast. UA noted this activity now comes within the scope of the Part VA licence.

#### Summary of second round submissions

No specific comments were made on this proposal in the second round of submissions.

#### Analysis

##### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

Part VA of the Act provides a statutory licence for copying and communication of broadcasts and broadcast content by educational and other institutions.

##### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to free to air broadcast content from online sources.

##### *Has an actual or likely adverse impact on the doing of the act by the person been credibly demonstrated?*

CAG and UA submitted that the use of TPMs on catch-up television websites prevents copying of broadcast content under the Part VA statutory licence. CAG noted this is a particular concern for regional educational institutions.

The extension of the Part VA statutory licence to 'broadcast content' was a response to the emerging practice of broadcasters making the content of their broadcast material available online, either simultaneously or at a later time. The extension of Part VA facilitated the use by educational and other institutions of free-to-air broadcast material from online sources made available by broadcasters in the same way that Part VA previously permitted copying and communication of free-to-air broadcasts while ensuring that copyright owners are appropriately compensated for the use of their material.

The Department accepted the evidence of CAG and UA, that TPMs impact the ability of institutions to copy and communicate broadcast content under the Part VA statutory licence. The Department also

accepted that for regional institutions, online broadcast content may be the only feasible method of obtaining content under the Part VA licence.

The Department considered that an actual or likely adverse impact has been credibly demonstrated in relation to Part VA.

Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?

Copying and communication under the Part VA statutory licence can only be undertaken by educational institutions or institutions assisting a person with an intellectual disability. The Department considered that the limited class of users who can take advantage of the statutory licence and the remunerated nature of the statutory licence would militate against any reduction in the legal protection or effectiveness of legal remedies against the circumvention of the TPM.

### Conclusion

It was recommended that a new paragraph should be added to Schedule 10A of the Copyright Regulations for use of broadcast content under the Part VA statutory licence.

In light of amendments to Parts VA relating to the educational statutory licences, the Department recommends instead that a new exception be created in section 40 of the proposed Copyright Regulations 2017 for:

- use of copyright material for educational purposes undertaken under the statutory licence under Division 4 of Part IVA of the Act.

## Exception allowing certain additional preservation copying activities

### **An exception for the circumvention of TPMs that allows the additional preservation copying activities permitted by sections 51B, 110BA and 112AA of the Act.**

#### Summary of first round submissions

CICI submitted that TPMs adversely impact Key Cultural Institutions by preventing them from undertaking preservation copying activities that they are permitted to undertake under sections 51B, 110BA and 112AA of the Act. A Key Cultural Institution is a body administering a library or archives that:

- (i) has, under the law of the Commonwealth or a State or Territory, the function of developing and maintaining the collection (sections 51B(1)(a)(i); 110BA(1)(a)(i) and 112AA(1)(a)(i)); or
- (ii) is prescribed by the regulations under sections 51B(1)(a)(ii); 110BA(1)(a)(ii) and 112AA(1)(a)(ii).

Three bodies have been prescribed for the purposes of sections 51B(1)(a)(ii); 110BA(1)(a)(ii) and 112AA(1)(a)(ii): the Australian Broadcasting Corporation, the Australian National University Archives Program and the Special Broadcasting Service Corporation.

CICI submitted that cultural institutions encounter works protected by TPMs including password protection, time access controls and encryption measures allowing access only by authorised persons, DVDs and CDs protected by CSS and Digital Cinema Packages encrypted in digital files.

CICI submitted that TPMs may interfere with software emulation which is required to make digital media (including games, ebooks and convergent media) accessible for preservation purposes. CICI advised that some cultural institutions are restricting their collections to material not protected by TPMs which impacts on their functions as Key Cultural Institutions to maintain a collection of culturally significant material. This includes preserving the material in the collection.

Sections 51B, 110BA and 112AA of the Act provide exceptions to allow Key Cultural Institutions to undertake preservation copying of material of historical or cultural significance in their collections. CICI asserted that if TPMs interfere with the ability of Key Cultural Institutions to preserve the material in their collection, then TPMs have an adverse impact on Key Cultural Institutions.

#### Summary of second round submissions

No specific comments on this exception.

#### Analysis

##### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

Sections 51B, 110BA and 112AA of the Act provide exceptions to allow Key Cultural Institutions to undertake preservation copying of material of historical or cultural significance works, films and sound recordings, and published editions in their collections.

##### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to works, published editions, films and sound recordings. However the use is limited by the user (key cultural institutions) and the purpose of the use (preservation copying).

##### *Has an actual or likely adverse impact on the doing of the act by the person been credibly demonstrated?*

As noted above, under sections 51B, 110BA and 112AA of the Act a Key Cultural Institution is a body administering a library or archive that:

- has, under a law of the Commonwealth or a State or Territory, the function of developing and maintain the collection; or

- is prescribed by the regulations for the purposes of this subparagraph.

A key feature of the TPM scheme as outlined in Division 2A of Part V of the Act, is the series of statutory exceptions found in subsections 116AN (2)–(8) of the Act. The relevant exception in this instance is subsection 116AN (7)(c), which provides an exception from liability to anything lawfully done for the purpose of ‘performing a statutory function, power or duty’.

Each of the bodies sponsoring the submission has a statutory function, power and/or duty that would come within section 116AN (7) of the Act for the maintenance and preservation of their respective collections:

- Subsection 6(1)(a) of the *National Film and Sound Archive Act 2008* confers functions on the NFSA, to ‘develop, preserve, maintain, promote and provide access to a national collection of programs and related material’.
- Section 23 of the *Film Act 2001 (Vic)* sets out the functions of the Australian Centre for the Moving Image ‘to establish, maintain, conserve, develop, promote and exhibit, whether in Victoria or elsewhere, the collection of moving images’.
- Section 7 of the *National Gallery Act 1975* sets out the functions of the NGA ‘to develop and maintain a national collection’.

A function of a Key Cultural Institution is to maintain a collection of material of cultural or historic significance. This includes preserving the material in the collection. Sections 51B, 110BA and 112AA of the Act provide exceptions to allow Key Cultural Institutions to undertake preservation copying. While the evidence provided in the CICI submission is insufficient against this criterion, the Department assumed that if TPMs interfere with the ability of Key Cultural Institutions to preserve the material in their collection the TPMs clearly have an adverse impact on those institutions.

Key Cultural Institutions that come within the definition of the Act in subsections 51B(1)(a)(i), 110BA(1)(a)(i) and 112AA(1)(a)(i) (‘paragraph (i) institutions’) already have an exception in subsection 116AN(7) of the Act which allows them to perform their preservation activities in furtherance of their functions. However, bodies prescribed under sections 51B(1)(a)(ii), 110BA(1)(a)(ii), and 112AA(1)(a)(ii) are not able to avail themselves of the exception in section 116AN(7).

For this reason, the Department concluded that an exception should be made for Key Cultural Institutions that have been prescribed in the regulations as Key Cultural Institutions under subsections 51B(1)(a)(ii), 110BA(1)(a)(ii), and 112AA(1)(a)(ii) (‘paragraph (ii) institutions’) of the Act.

*Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

The proposed exception only applies to a limited and easily defined class of institutions, paragraph (ii) institutions—those having been prescribed as Key Cultural Institutions in the Copyright Regulations 1969. A further limiting factor on the scope of an exception is the nature of the works and other subject-matter, i.e.—they must be of ‘historical or cultural significance to Australia’. This would reduce the scope of an exception to a few significant items in a Key Cultural Institutions’ collection. Where material is copied for preservation purposes, there is potential for the Key Cultural Institution to implement measures to reduce the risk of wider distribution or digital leakage.



## Conclusion

The Department considered that the limited number of institutions affected by sections 51B, 110BA and 112AA of the Act, together with the requirement that the reproduction and copying be for (a) preservation purposes and (b) of historically or culturally significant items, significantly narrows the scope of an exception to the prohibition against circumvention of a TPM.

It was recommended that a new exception should be added to Schedule 10A of the Copyright Regulations for Key Cultural Institutions.

In light of amendments to sections 51B, 110BA and 112AA relating to key cultural institutions, the Department recommends instead that a new exception be created in section 40 of the proposed Copyright Regulations 2017 for:

- use by libraries and archives under Division 3 of Part IVA of the Act.<sup>12</sup>

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<sup>12</sup> This proposed new exception extends to Key Cultural Institutions by virtue of them being defined as an archive under sections 10(1) and (4) of the Copyright Act.

## Exception that allows use of Part VII Division 2 statutory licence

### **An exception for the circumvention of TPMs that allows the use of the statutory licence in Part VII Division 2 of the Act, and in particular section 183.**

#### Summary of first round submissions

CICI represents ACMI, NFSA and the NGA.

CICI sought TPM exceptions in relation to a wide range of activities permitted by statutory licences, exceptions and fair dealing provisions in the Act.

CICI proposed that cultural institutions which are the Crown or are authorised by the Crown to use copyright material 'for the services of the Crown' should have access to a corresponding TPM circumvention exception. CICI stated that a new TPM exception 'would provide clarity for the relevant cultural institutions to lawfully circumvent TPMs to facilitate the use of the statutory licence in Part VII Division 2 of the Act, and in particular section 183'.

CICI asserted that in the absence of such an exception, cultural institutions are adversely impacted by not being able to rely on the statutory licences.

#### Summary of second round submissions

The ACC noted that while the section 183 statutory licence is limited to use for 'the services of the Crown' it is a very broad licence and may be difficult to construe as applying to a particular class of work. The ACC noted that a number of government activities are already specifically permitted under subsection 116AN (7) of the Act.

AFACT and AHEDA noted that CICI failed to limit their request to particular classes of works and provided no evidence on the impact TPMs have on the ability to carry out the acts in question.

#### Analysis

##### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

Section 183 provides a broad statutory licence for the use of copyright material by the Commonwealth or a State. A condition of the Government use statutory licence is that necessary steps are taken in relation to determining equitable remuneration for acts done under the licence. Equitable remuneration must be paid either through participation in an agreement with a declared collecting society or directly through notification to the copyright owner.

CICI sought an exception for circumstances where cultural institutions that are part of the Crown or authorised by the Crown are doing acts comprised in copyright for the services of the Crown. This limitation on their proposed exception brings it wholly within the provisions of section 183.

##### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to works and subject matter other than works. However the use is limited by the user (the Commonwealth or a State) and the purpose of the use (for the services of the Commonwealth or a State).

##### **Has the use of the TPM had an adverse impact on the non-infringing use by the person or body seeking the exception, or is it likely that it will have such an impact?**

CICI asserted that cultural institutions are adversely impacted by not being able to rely on the existing statutory licence. CICI asserted that the problems posed by some TPMs are so severe that some cultural institutions are following policies which restrict the development of collections based on whether or not TPMs apply to items.

CICI anticipates that the impact of TPMs on cultural institutions' collections will increase over time, as will the need for cultural institutions to circumvent TPMs to maintain ongoing access to items originally collected in legacy formats.

CICI maintained that without corresponding TPM exceptions, the copyright exceptions and licences in the Act do not offer the intended public benefits.

However, subsection 116AN (7) (c) of the Act provides an exception that permits circumvention for the purposes of performing a statutory function, power or duty. For the reasons outlined above in considering the other CICI proposal (Key Cultural Institutions), each of the agencies sponsoring the submission has a statutory function, power and/or duty that may come within subsection 116AN(7)(c) of the Act. Through reluctance or lack of awareness, the CICI organisations may not have been making use of the existing exception and therefore have perceived an adverse impact. If the CICI members had made use of the existing exceptions available to them, no adverse impact may be demonstrated. The Department considered that an actual or likely adverse impact has not been credibly demonstrated under subsection 249(4) (d) of the Act.

Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?

The Department did not address this criterion, given that no adverse impact was demonstrated.

### Conclusion

That no exception be made.

## Exception that allows activities under sections 48A and 104A

### **An exception for the circumvention of TPMs that allows a parliamentary library to undertake activities under sections 48A and 104A of the Act.**

#### Summary of first round submissions

Department of Parliamentary Services (DPS) proposed a new TPM exception that corresponds to the exceptions found in sections 48A (works) and 104A (subject-matter other than works) of the Act.

The Parliamentary Library's collection available in digital form has increased from 15% to 33% from July 2006 to July 2012 and the demand by parliamentarians for access to digital information has grown, thereby increasing the potential impact of TPMs.

DPS submitted that TPMs prevented it from archiving certain PDF documents into ParInfo Search.

#### Summary of second round submissions

No specific comments were made on this proposal in the second round of submissions.

#### Analysis

##### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

Sections 48A (works) and 104A (subject-matter other than works) of the Act provide broad exceptions for use of copyright material for the purpose of assisting a Member of Parliament.

##### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed uses apply to works and subject matter other than works. However the use is limited by the user (the Commonwealth or a State) and the purpose of the use (for the services of the Commonwealth or a State).

##### *Has an actual or likely adverse impact on the doing of the act by the person been credibly demonstrated?*

The DPS submission noted that the Parliamentary Library has encountered TPMs that have prevented the Library from archiving PDF documents into the ParInfo Search service. DPS submitted that providing access to information resources through the selection and archiving of material for the library and media databases in ParInfo Search is one of its key services.

The DPS submission sought a TPM exception that would apply to:

*'any circumvention of an access control TPM that is undertaken for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member, by an authorised officer of a library, being a library the principal purpose of which is to provide library services for members of that Parliament.'*

Subsection 116AN (7) of the Act provides an exception that permits circumvention of TPMs for the purposes of performing a statutory function, power or duty. Division 3 of Part 4 of the *Parliamentary Service Act 1999*, specifically section 38B, sets out the statutory functions of the Parliamentary Librarian:

- (1) *The functions of the Parliamentary Librarian are:*
  - (a) *to provide high quality information, analysis and advice to Senators and Members of the House of Representatives in support of their parliamentary and representational roles, and*
  - (b) *to undertake such other responsibilities within the joint Department, consistent with the function set out in paragraph (a), as are conferred in writing on the Parliamentary Librarian by the Secretary of the joint Department with the approval of the Presiding Officers.*
- (2) *The Parliamentary Librarian must perform the function mentioned in paragraph (1)(a):*
  - (a) *in a timely, impartial and confidential manner, and*
  - (b) *maintaining the highest standards of scholarship and integrity, and*
  - (c) *on the basis of equality of access for all Senators, Members of the House of Representatives, parliamentary committees and staff acting on behalf of Senators, Members or parliamentary committees, and*
  - (d) *having regard to the independence of Parliament from the Executive Government of the Commonwealth.*

The purpose for which copies can be made under sections 44A and 104A of the Act is relevant to section 38B of the *Parliamentary Services Act 1999*. The copy must be made 'for the sole purpose of assisting a person who is a member of a Parliament in the performance of the person's duties as such a member'. The Department concluded that the Parliamentary Librarian has a statutory function to provide information, or copies of copyright material, in the Parliamentary Library's collection, to members of parliament. This would be a statutory function for the purposes of subsection 116AN (7) of the Act.

*Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?*

The Department did not address this criterion, given that the Department's view was that the proposed exception is already provided for in subsection 116AN (7) of the Act.

## Conclusion

The Department considered that the DPS submission has credibly demonstrated an actual or likely adverse impact under subsection 249(4)(d) of the Act. However, having regard to the statutory functions of the Parliamentary Library under section 38B of the *Parliamentary Services Act*, the Department was of the view that the exception sought in the DPS submission was already provided for in subsection 116AN(7) of the Act.

The Department recommended that no exception be made.

## Exception for persons with, and institutions assisting persons with, an intellectual disability

### **An exception for the circumvention of TPMs for those with an intellectual disability and for institutions assisting those with an intellectual disability.**

#### Summary of first round submissions

NSW Young Lawyers proposed a new exception to allow institutions assisting persons with an intellectual disability to circumvent TPMs for the purpose of making copies under the statutory licence in Part VB of the Act.

The proposal for an exception to circumvent TPMs for a person with a disability has been considered above. In that consideration, the Department recommended that a new paragraph should be added to Schedule 10A of the Copyright Regulations for use of audio-visual material and ebooks by or on behalf of a person with a disability acting under section 200AB of the Act.

#### Summary of second round submissions

No specific comments were made on this proposal in the second round of submissions.

#### Analysis

##### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

Part VB, Division 4 of the Act provides a statutory licence for institutions assisting persons with an intellectual disability. Section 135ZR of the Act provides that copying of a published edition is not an infringement of copyright. Section 135ZS of the Act provides that copying and communication of eligible items is not an infringement of copyright.

No specific exception applies to allow copying and communication for institutions assisting persons with an intellectual disability. However, section 200AB of the Act allows for copying by and on behalf of persons with a disability more generally.

##### *Is the proposed act in relation to a particular class of works or other subject-matter?*

Part VB, Division 4 of the Act relates to published works and subject matter other than works. However the use is limited by the user (institutions assisting people with an intellectual disability) and the purpose of the use (for the assistance of people with an intellectual disability).

Section 200AB (4) of the Act applies to all works and subject matter other than works. However the use is limited by the purpose of the use (a special case done for the purpose of making accessible copies by or for a person with a print disability).

##### *Has an actual or likely adverse impact on the doing of the act by the person been credibly demonstrated?*

The submission asserted that there is a likely adverse impact on institutions assisting persons with an intellectual disability because there are corresponding exceptions for the statutory licences for institutions assisting persons with a print disability (Item 3) and educational institutions (Item 2). The submission drew much of its reasoning from a 2006 review by the House Standing Committee on Legal and Constitutional Affairs titled Review of Technological Protection Measures Exceptions. The Department accepted that similar adverse impacts would apply in relation to exceptions to allow use by a person with an intellectual disability.

The Department noted an asymmetry between the three Part VB statutory licenses contained in the Act (for educational institutions, for institutions assisting persons with a print disability and for institutions assisting persons with an intellectual disability) and Schedule 10A of the Copyright Regulations. The statutory licences for educational institutions and institutions assisting persons with a print disability

already have corresponding exceptions in Schedule 10A of the Copyright Regulations 1969 to allow for circumvention of TPMs:

Item 2 for educational institutions under Division 2A of Part VB of the Act, and

Item 3 for assistance to persons with a print disability under Division 3 of Part VB of the Act.

*Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

Copying and communication under the statutory licence in Division 4 of Part VB of the Act can only be undertaken by institutions assisting a person with an intellectual disability. While the definition of 'institutions assisting persons with an intellectual disability' includes educational institutions, a term defined broadly in section 10 of the Act, the statutory licence is not available generally to all copyright users.

The Department considered that the limited class of users who can take advantage of the statutory licence would mitigate any reduction in the legal protection or effectiveness of legal remedies against the circumvention of the TPM. Further, the Department noted similar exceptions already exist for educational institutions and for assistance to persons with a print disability.

### Conclusion

The Department noted that this exception has not been sought by a relevant user. However, the Department considered that the failure to extend the original Part VB TPM exception to Division 4 of Part VB of the Act was an oversight, and that it would be appropriate to provide an exception.

It was recommended that a new exception should be added to Schedule 10A of the Copyright Regulations for institutions assisting persons with an intellectual disability. This new exception would complement existing exceptions in Schedule 10A of the Regulations, for the other statutory licences in Part VB of the Act:

- The reproduction or communication by, or on the premises of, an educational institution of copyright material of a kind, and in the circumstances, mentioned in Division 2A of Part VB of the Act (Item 2)
- The reproduction or communication by an institution assisting persons with a print disability for provision of assistance to those persons of copyright material of a kind, and in the circumstances, mentioned in Division 3 of Part VB of the Act (Item 3).

In light of amendments to Part VB relating to organisations that assist people with a disability, the Department recommends instead that a new exception be created for:

- use in relation to access by or for persons with a disability (under Division 2 of Part IVA of the Act).

## Exception to allow the making of backup copies of legitimate material

### **An exception for the circumvention of TPMs to allow the making of backup copies of legitimate material.**

#### Summary of first round submissions

The Pirate Party Australia sought an exception to permit the circumvention of TPMs to allow the making of back-up copies of legitimate copyright material (such as CDs or DVDs) in a form chosen by the owner of the material. The Pirate Party Australia submission noted that the extent to which TPMs restrict access and copying of data does not adequately balance the rights of the consumer with the rights of copyright holders. The Pirate Party stated in its submission that there is no evidence to indicate an additional exception to TPM measures would have an adverse effect on the rights holder, as copyright infringement is rampant.

The Pirate Party was also concerned that consumers are unsure of the legality of making backup copies of material which they have legitimately acquired.

#### Summary of second round submissions

The Australian Federation Against Copyright Theft (AFACT) strongly opposed the submission by the Pirate Party on the grounds that the Pirate Party's reasoning behind the creation of such an exception is based on copyright infringement already being 'rampant' and will not, therefore, have an adverse effect on the rights holder. AFACT contested this claim citing academic works which argue that sales of film and television content have been harmed due to illegal file sharing.

AFACT submitted that, in the alternative, digital markets are addressing concerns about the ability of consumers to have access to a new copy if a copy of a work is destroyed or unusable, arguing that, for example, a file that is downloaded through iTunes can be downloaded again. If a copy for backups was introduced it would defeat the licensing conditions applied by legitimate providers of content.

The Business Software Alliance (BSA) submitted that an exception would facilitate TPM circumvention for purposes of software copyright infringement disguised as an act done for the purpose of making a backup copy. The BSA argued that this would undermine the incentives of content creators. BSA noted that a TPM exception is not necessary and that computer software developers and distributors regularly provide for and facilitate their licenced users making backup copies of their licensed software programs.

BSA submitted that such an exception would be contrary to section 47C ("Back-up copy of computer programs") of the Act and that the proposed exception 'fails' the requirements of subsection 249(4) of the Act (under "Regulations").

The Interactive Games and Entertainment Association Ltd (IGEA) recommended the Department reject the proposed exception for making backup copies. IGEA argued the exception does not relate to an act that is not infringing, the exception refers to copyright material generally and not a particular class of works, the exception is not backed by credible demonstrations of any likely adverse impacts relating to the inability to make backup copies and that the exception would impair the adequacy of the protection of access control TPMs and the effectiveness of the remedies for their circumvention.

#### Analysis

##### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

Section 101 of the Act deems an act done by a person that is not the owner of copyright and without the licence of the copyright owner, in Australia or authorises the doing in Australia of any act comprised in the copyright to be an infringing act. Copying a CD or DVD would be an infringing activity in the absence of an exception or statutory licence.



Section 47C of the Act permits the making of a backup copy of a computer program. However, that exception does not apply (subsection 47C (4)) if:

*‘the owner of the copyright in the computer program has so designed the program that copies of it cannot be made without modifying the program’.*

This exception may rule out TPM protected computer programs. In any case, the proposal did not identify how the proposed activity would be a non-infringing activity.

*Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed use would apply to all works and subject matter other than works, by any user but where the use is for the purposes of backing up legitimate material.

*Has an actual or likely adverse impact on the doing of the act by the person been credibly demonstrated?*

The submission did not provide any evidence of adverse impact.

*Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

The submission did not provide any evidence that the exception would not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of TPMs.

## Conclusion

The proposal, as presented in the submission, may permit uncontrolled circumvention of TPMs and subsequent reproduction of works, performances and phonograms that could not be monitored in any meaningful way by the copyright owner and may reduce the adequacy of protection and the effectiveness of remedies. If a proposed use is an infringement under the Act, for which no exception or statutory licence applies to make the use non-infringing, then an exception to the TPMs regime could not be granted through the review. The Department recommended that no exception be made.

## An exception for the circumvention of TPMs to allow unrestricted format shifting

### Summary of first round submission

Pirate Party Australia requested an exception be made to allow consumers to circumvent TPMs where it would otherwise prevent them from using copyrighted content on any device of their choosing.

### Summary of second round submissions

AFACT opposes the proposed exception. AFACT submitted that introducing a format-shifting exception would encourage the circumvention of TPMs and allow copies to be reproduced or made available online thereby undermining the opportunity of owners to receive financial returns. AFACT suggested the introduction of such an exception could be contrary to obligations under the AUSFTA. BSA objected to the exception on the grounds that, if made, it would remove the protections relied upon by copyright owners to help protect their software applications from copyright infringement.

### Analysis

#### *Will the doing of the act by the person infringe the copyright in a work or other subject-matter?*

The Act allows format shifting in the following cases:

- section 43C—Reproducing works in books, newspapers and periodical publications in different form for private use
- section 47J—Reproduction of photograph in different format for private use
- section 109A—Copying sound recordings for private and domestic use
- section 110AA—Copying cinematograph film in different format for private use

Currently, the Act does not allow unrestricted format shifting.

#### *Is the proposed act in relation to a particular class of works or other subject-matter?*

The proposed use would apply to all works and subject matter other than works, by any user but where the use is for the purposes of format shifting.

#### *Has an actual or likely adverse impact on the doing of the act by the person been credibly demonstrated?*

The submission presented no evidence to address this criterion.

While the proposal asserted:

*‘the rigid legal protection for TPMs means that while consumers have the right to duplicate or transcode the material and the technological means to do so, there is no legal protection for their right to circumvent TPMs for this purpose’.*

The format shifting exceptions listed above do not allow unfettered duplication or transcoding of copyright material. Furthermore, the proposal did not set out specific non-infringing uses to which the TPM exception would apply.

#### *Would the adequacy of the protection and the effectiveness of the remedies provided by Subdivision A of Division 2A of Part V and Subdivision E of Division 5 of Part V of the Act be impaired if the doing of the act by the person were prescribed?*

The scope of the proposed exception is uncertain as the proposal did not limit sufficiently the exception to a class of users, a class of copyright material or a class of rights. Such a broad exception applying across the four ‘format shifting’ exceptions may significantly reduce and impair a copyright owner’s capacity to control access to their works or other subject matter through TPMs.

## Conclusion

The proposal, as presented in the submission may permit uncontrolled circumvention of TPMs and subsequent reproduction of works, performances and phonograms that could not be monitored in any meaningful way by the copyright owner and may reduce the adequacy of protection and the effectiveness of remedies. The submission provided insufficient evidence upon which to make a decision to grant an exception.

The Department recommended that no exception be made.

## An exception for the circumvention of TPMs to allow the use of a computer program where a TPM is used to enforce an unfair term of a contract under the Australian Consumer Law

### Summary of the submission

Robert X submitted that an Australian who purchases software from an overseas online supplier is unlikely to have effective recourse against the supplier for a breach of Australian law, such as the Australian Consumer Law (ACL) under the *Competition and Consumer Act 2010*.

Mr X asserted that software suppliers apply TPMs on software, which allows the suppliers to control consumers' use of the software, including requiring an internet connection, or agreement to be bound by licence agreements. Mr X cites Valve, which runs the Steam software service, as an example of this.

### Summary of submissions

The BSA submitted that the range of remedies provided under the ACL is sufficient to adequately and fairly remedy a breach of the ACL. The ACL and its interpretation are not sufficiently certain upon which to base an exception to the prohibition against circumvention of TPMs.

### Analysis

Will the doing of the act by the person infringe the copyright in a work or other subject-matter?

Section 36 of the Act deems an act done by a person that is not the owner of copyright and without the licence of the copyright owner, does in Australia or authorises the doing in Australia of any act comprised in the copyright, to be an infringing act.

Section 31 of the Act outlines the exclusive rights in literary works. These rights are to:

- reproduce the work in a material form
- publish the work
- perform the work in public
- communicate the work to the public, and
- make an adaptation of the work.

The submission noted that ordinarily, using a computer program for the purposes for which it was made is not an exercise of these rights. The Department agreed with Mr X that using a computer program should not of itself infringe copyright as it is not an act comprised in copyright in a literary work.

The submission refers to the exception in section 47B of the Act that allows for reproduction for normal use or study of computer programs.

Subsection 47B (1) of the Act applies for the purpose of normal use and if the reproduction is 'incidentally and automatically' made. This exception provides that there will be no infringement in the copyright of a computer program where a reproduction is made in the course of running a copy of the program for the purposes for which the program is designed, and the copy is done by, or on behalf of, the owner or licensee of the copy. The term 'incidentally and automatically' implies that the reproduction occurs without human volition other than through the ordinary use of the computer program.

Similarly, subsection 47B (3) of the Act applies for the purpose of 'studying the ideas behind the program and the way in which it functions' and if the reproduction is 'incidentally and automatically' made and the copy is done by, or on behalf of, the owner or licensee of the copy.

The Department assessed that a TPM that enforces unfair contract terms is unlikely to be an access control TPM for the purposes of the Act as it is not used in connection with the exercise of the copyright.

The Department did not consider the remaining criteria.

### Conclusion

The submission noted that ordinarily, using a computer program for the purposes for which it was made is not an exercise of the copyright owner's rights. That this act is not within the copyright owner's rights in literary works as defined in section 31 of the Act, and that consequentially a specific exception is unavailable under the Act, lead the Department to conclude that an exception to the prohibition against circumvention of TPMs for this purpose should not be granted.

The Department recommended that no exception be made.

## Exception relating to certain geographic market segmentation TPMs

**An exception for the circumvention of TPMs regards to cinematograph films and computer programs that have TPMs for the purposes of geographic market segmentation.**

### Summary of the submission

Choice submitted that measures are used by business to limit Australians' access to websites to buy or access genuine and legitimate products and services online. Choice proposed an exception from the prohibition against circumventing TPMs for the purpose of working around IP address lockouts.

Similarly, Robert X proposed an exception to the prohibition against circumvention of TPMs for watching a cinematograph film, or alternatively, circumventing the region locking system on films.

### Summary of submissions

AFACT and AHEDA submitted that this proposal should be rejected. They submitted that the TPM scheme already addresses the matter of geographic market segmentation by virtue of its definition in section 10 of the Act.

BSA similarly submitted that the proposed exception is already adequately provided for in the Act in the definition of a TPM. They claimed that there was no evidence provided that the existing statutory definition of a TPM is inadequate to permit circumvention of a TPM for the reasons stated by Robert X.

### Analysis

Geographic market segmentation in the form of technology that prevent playback in Australia, is excluded from the definition of an access control TPM, and an exception is unnecessary.

Paragraph (c) excludes from the definition of access control TPM a 'device, product, technology or component' that is used in connection with the film or computer program to the extent that it controls 'geographic market segmentation by preventing the playback in Australia of a non-infringing copy of the work or other subject-matter acquired outside Australia'.

Geoblocking spans a wide variety of technologies, some of which may and some of which may not, be captured by the TPM regime in the Copyright Act. With regard to the submission from Choice, the proposal to provide an exception to the prohibition against circumventing TPMs for the purpose of gaining access to products and services made available to foreign jurisdictions at local prices was outside the ambit of the review. The submission from Choice did not outline the nature of the copyright material that is protected by a TPM. The Department was not convinced an 'IP address lockout' is a computer program protected as a literary work for the purposes of the Act. Further, offering goods or services for sale or licence is not necessarily an exercise of copyright.

However, consistent with the Government's response to recommendation 5.2 (geoblocking) of the Productivity Commission's Intellectual Property Arrangements report, the Government will consider whether new TPM exceptions should be created to prescribe particular uses of copyright material prevented by geoblocking if there are future submissions on the issue.

### Conclusion

The Department recommended that no exception be made.

## Analysis of requests to vary current exceptions

### Varying existing exception 3.1 relating to assistance to persons with a print disability

#### *Summary of the submission*

The New South Wales Young Lawyers submission sought to vary Item 3 by replacing the word 'institution' with 'authorised entity'. The intention of this submission was unclear but appeared to be seeking to amend the Act to allow additional classes of people to assist people with a print disability under Part VB of the Act.

The Department considered that subsection 200AB (4) of the Act already provides for assistance by organisations and individuals other than institutions. Exceptions to allow TPM circumvention under subsection 200AB (4) of the Act were already addressed in the paper.

#### *Conclusion*

The Department recommended that Item 3 not be varied as proposed by this submission.

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