



AUSTRALIAN  
COPYRIGHT COUNCIL

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**COMMENTS ON EXPOSURE DRAFT OF COPYRIGHT REGULATIONS  
OCTOBER 2017**

## BACKGROUND

The Australian Copyright Council (ACC) welcomes the release of the exposure draft of the *Copyright Regulations 2017* and the *Copyright Legislation Amendment (Technological Protection) Regulations 2017*. The ACC is an independent, non-profit organisation. Founded in 1968, we represent the peak bodies for professional artists and content creators working in Australia's creative industries and Australia's major copyright collecting societies. A full list of our members is attached at Appendix 1.

We note that the existing regulations are due to sunset in April 2018. This mechanism is to ensure that legislative instruments are periodically reviewed and, if they no longer have a continuing purpose, are repealed, as required by the *Legislative Instruments Act 2000*.

In our submission, the exposure draft regulations fall into two broad categories: technical matters, and matters still subject to policy deliberation. It is our position that the safe harbour and technological protection measure regulations fall into the latter category. It is our view that the Government should resist the temptation to rush through amendments to these parts of the regulations simply because of the sunset mechanism. To do so would be contrary to good policy making. In our submission, these regulations should either be remade without amendment or they should be allowed to lapse pending resolution of outstanding policy matters.

In this submission, we address the questions raised in the consultation document, although our focus is on the *Copyright Legislation Amendment (Technological Protection Measure) Regulations 2017*. We note that our focus is on the TPM Regulations under domestic law and not under Chapter 17 of the Australia-United States Free Trade Agreement.

**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- (a) A notice for the purposes of section 7 (Notice of intended publication of unpublished work kept in public library—paragraphs 52(1)(b) and (2)(b) of the Act).**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).**

The ACC is in favour of continuing the publication requirement as a means of ensuring transparency. While we are conscious that publication in the Government Gazette may seem anachronistic, we are reluctant to recommend a different model of publication for copyright matters than that which applies generally. The Copyright Regulations should adopt the standard method of publication.

**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)?**

We are not aware of any reason for requiring that a notice be published not more than three months ahead of publication.

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

While we do not have any objection to the prescribed requirements *per se*, we do not support amending the safe harbour regulations while there are still outstanding policy issues.

**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?**

We refer to and support the submission of Music Rights Australia in this regard.

**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)?**

As stated in our previous submissions on the safe harbour scheme, there should be a mechanism for the Government to intervene where industry is unable to reach consensus on a code of conduct. One option might be the appointment of an independent facilitator to steer the process. However, in our view this should be dealt with as part of the broader discussion on the safe harbour scheme. We refer to and support the submission of Music Rights Australia in this regard.

**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?**

The ACC participated in both rounds of consultation in the TPM Review conducted by the Attorney-General's Department in 2012. It is disappointing to learn that the Department completed its review in 2015 and yet the outcome of the review has only been made public in September 2017.

We do not support the prescribed acts included in s 40 relating to fair dealing, library and archive use and section 200AB for educational institutions. Moreover, we do not believe that the procedures set out in s 249 of the *Copyright Act* for prescribing new TPM exceptions have been met, and therefore query the validity of the TPM Regulations Exposure Draft.

Sub-section 249(5) of the *Copyright Act* provides:

“(5) If a submission has been made to prescribe the doing of an act by a person, the Minister must make a decision whether to recommend the prescription of the doing of the act by the

person as soon as practicable after receiving the submission, but in any case, within 4 years of receiving it.”

Submissions to prescribe new access-control TPM exceptions were made as part of a process conducted by the Attorney-General’s Department in August 2012. We are informed that the Department of Communications and the Arts completed this review some three years later, in 2015, after the transfer of responsibility for administration of the *Copyright Act* from the Attorney-General to the Minister for Communications and the Arts. It is not apparent whether the Minister made a decision at this point. Presumably the Minister made a decision sometime between the Department completing its review in 2015 and the publication of the exposure draft regulations on 12 September 2017.

In our submission, this delay amounts to a failure to make a decision “as soon as practicable” and arguably outside of the four-year time limit prescribed by the Act, and therefore renders the process invalid. At best, the two-year delay in publishing the outcome of the review shows a lack of procedural fairness.

In our submission, the delay materially affects the Minister’s decision as it is based on evidence from 2012. That is a time which predated many of the ways copyright material is distributed and enjoyed today. For example, it was before Spotify, Netflix or Audible were available in Australia. Given the evolution in content delivery and consumption over the last five years, we do not believe that exceptions should be prescribed in 2017 based on evidence from five years ago. This is compounded by amendments to the principal legislation which affect the proposed TPM exceptions. In our submission, the Government is legally required to conduct a new process before the Minister can recommend the creation of any new TPM exceptions.

We address the specific exceptions in detail below.

#### Exceptions corresponding with fair dealing provisions

In our submission, there is a *prima facie* problem in basing an exception to the prohibition on circumvention of access control TPMs on a party’s assertion that their conduct amounts to a fair dealing. That is distinct from a court making a determination that a particular activity is a fair dealing.

#### *Will the doing of the act amount to an infringement?*

Fair dealing operates as a defence to an allegation of infringement. The mere fact that a party asserts that their conduct is fair dealing is not the same as it actually being fair dealing. In our submission, there is a real risk that activities purporting to be fair dealing will amount to infringements of copyright. Indeed, on the basis of current case law it is not clear that research for an educational institution would be covered as a fair dealing for research or study.

#### *Particular class of work or other subject-matter*

The proposed exceptions are limited to students enrolled in a course of study at an educational institution for the sole purpose of their course requirements, and persons carrying out research for an educational institution for the sole purpose of their research duties. That is, they are limited by the user and by the purpose of the use. In our submission, this is not the same as limiting an exception to a particular class of work or subject-matter as required under the *Act*. Therefore, we do not think that this requirement has been met.

*Evidence of actual or likely adverse impact*

It is important to say something about s 116AN of the *Copyright Act*, which is concerned with exceptions to the prohibition against circumvention of access-control TPMs. The examples offered to the Department by way of evidence concern copying of DVDs, Blu-Ray discs, encrypted streams and e-books. In our submission, these all relate to copy-controls and are not relevant to the prescription of an exception pursuant to s 116AN.

With respect, the Department's analysis of these examples fails to distinguish between access-control and copy-control TPMs. Furthermore, the assessment is based on old examples that refer to DVD and Blu-Ray discs. They predate the development of resources for educational institutions through initiatives such as Enhance TV and Reading Australia which are now in common usage.

The process can be contrasted with the rule-making process conducted by the US Copyright Office whereby evidence is tested.

In the ACC's experience of training and providing advice to people in the education sector, there are many work-arounds and resources available that do not involve circumventing access-control TPMs. We do not accept that sufficient evidence has been established.<sup>1</sup>

*Effect on enforcement*

In our submission, the proposed exceptions encourage a culture whereby students and researchers can assert that their use is fair dealing and proceed to "crack and hack" TPMs. In our submission, this is contrary to what is intended under the *Copyright Act*. It is also precisely the opposite of the conduct that educational institutions should be encouraging, and is likely to expose educational institutions to the risk of authorisation liability for copyright infringement. Given the ease and speed with which a single "cracked" digital file can be replicated and proliferated online, this approach is likely to inhibit new distribution models for content, which all depend on access-control TPMs.

In our submission, these exceptions fail on each limb of s 249.

Exceptions corresponding with section 200AB

As with fair dealing, in our submission there is a problem basing an exception to the prohibition on circumventing access-control TPMs on a party asserting that their conduct is covered by s 200AB. That is because s 200AB is an extremely broad provision and mere assertion that an activity is covered under s 200AB does not mean that this is correct as a matter of law.

As discussed above, changes to the principal legislation mean that only one of the proposed TPM exceptions is still based on s 200AB. We discuss this proposal before turning to the TPM exceptions based on provisions in the *Copyright Amendment (Disability and Other Measures) Act 2017*.

- (a) Use of audio-visual material for educational purposes by or on behalf of a body administering an educational institution acting under s 200AB.

*Will the doing of the act amount to an infringement?*

As stated above, we are not confident that relying on an assertion that an act is being done pursuant to s 200AB is the same as the act not being an infringement.

<sup>1</sup> See confidential annexure which provides a snapshot of enquiries received by the ACC.

*Particular class of work or other subject-matter*

The proposed exception is confined to audio-visual material and so would appear to meet this criterion.

*Evidence of actual or likely adverse impact*

We query the evidential basis for this exception given the proliferation of audio-visual resources for educators over the last five years through ClickView, Enhance TV and other services. We note that the issue of format shifting is a matter of copy-controls rather than access-controls. We therefore query the relevance of the evidence submitted to the prescription of an exception based on s 116 AN.

*Effect on enforcement*

We are concerned by the “crack and hack” culture that such an exception is likely to encourage and its impact on the development of new business models.

In our submission, the criteria for prescribing this exception have not been established.

(b) Use by a body administering library or archives or key cultural institution

Given amendments made under the *Copyright Amendment (Disability and Other Measures) Act 2017* the Department is now recommending that there be an exception based on the new library and archive provisions due to come into force on 22 December 2017.

This exception is different from that originally put to the Department. We would be concerned if libraries, archives or key cultural institutions were generally permitted to circumvent access-control TPMs under Division 3 Part IVA of the Act which deals with preservation, research and administration of the collection.

*Will the doing of the act amount to an infringement?*

By relying on Division 3 Part IVA, it is at least clear that the act will not amount to an infringement.

*Particular class of work or other subject-matter?*

We do not think that proposed exception satisfies this requirement.

*Evidence of actual or likely adverse impact?*

We do not accept that a case has been established for such a broad exception. Once again, the examples offered as evidence concern difficulties making copies of copyright material for example, for preservation or administrative purposes. In our submission, this is not relevant to whether there should be an exception which permits circumvention of access-control TPMs under s 116AN.

*Effect on enforcement?*

As stated previously, we are concerned that a broad exception of this type will legitimise a “crack and hack” culture and undermine licensing solutions.

(c) Fair dealing for access to copyright material for people with a disability

We refer to our comments above in relation to TPM exceptions based on fair dealing exceptions. In the case of fair dealing for people with a print disability we note that the Marrakech Treaty Roundtable is currently developing guidelines to help stakeholders determine when the exception might apply. This will also provide useful

guidance as to when TPMs may be circumvented without infringing copyright and affecting the commercial availability of material in accessible formats.

From a legal perspective, it is important to distinguish between “access” in the sense of an access-control TPM and “access” in the sense of fair dealing for people with a disability. In our submission, examples of TPMs preventing copyright material from being reproduced in accessible formats is not evidence for the purpose of an exception under s 116AN as it concerns copy-controls not access-controls. Having said that, we support in principle an access-control TPM exception for access to published works by people with a print disability.

The new fair dealing exception for access to copyright material for people with a disability due to come into force on 22 December 2017 is likely to have a broad application. In our submission, a case has not yet been made to create a correspondingly broad access-control TPM exception.

(d) Exceptions corresponding to Part VA

Subject to our overarching concerns about the process for recommending new TPM exceptions, we do not object to this proposed exception.

**Conclusion**

In our submission, the Minister is barred from recommending new TPM exceptions based on submissions received (by another Minister) in 2012. Beyond that, the ACC does not support TPM exceptions based on broad copyright exceptions such as fair dealing and s 200AB flexible dealing.

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

While we acknowledge that the infringement notice scheme has not been utilised in law enforcement, in our submission the policy rationale for having a low-cost enforcement mechanism for summary offences under the *Copyright Act* is still valid. Rather than abolish the scheme, our preference would be to develop ways of making the scheme a viable enforcement tool. This could be done by delegating the power to issue infringement notices to a Commonwealth body or an agreement between the Commonwealth and the States.

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

In our submission, the regulations already provide considerable flexibility as to the proceedings of the Copyright Tribunal. The fact that the Tribunal sits at the Federal Court of Australia and the nature of the disputes that go to the Tribunal, contributes to the formality of proceedings.

**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?**

While publication in a newspaper may seem out of date, we favour a uniform approach to publication requirements, not one that applies only to the Copyright

Tribunal. Given the cost of Tribunal proceedings generally, the cost of newspaper advertising in a newspaper does not seem germane.

**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?**

We note that the exposure draft regulations are largely consistent with the existing regulations, save the omission in draft regulation 71(2) of any directed Tribunal consideration of relevant past licensee usage.

We support Screenrights' suggestion to widen draft regulation 71(2)(d) so that it provides for consideration of 'the purpose and character of the copying or communication, including past assessments made pursuant to section 113P of similar licensed copying or communication by the institution'.

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

We refer to our response to the previous question.

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

In our submission, the list seems appropriate.

**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?**

The ACC has not performed an audit of the transitional provisions and so is not in a position to comment.

Please do not hesitate to contact us if you would like to discuss any matters raised in this submission.

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## **Appendix 1: Australian Copyright Council Affiliates**

The Copyright Council's views on issues of policy and law are independent, however we seek comment from the 25 organisations affiliated to the Council when developing policy positions and making submissions to government. These affiliates are:

Aboriginal Artists' Agency  
Ausdance  
Australian Directors Guild  
Australian Guild of Screen Composers  
Australian Institute of Professional Photography  
Australian Music Centre  
Australasian Music Publishers Association Ltd  
Australian Publishers Association  
Authentic Design Alliance  
APRA AMCOS  
Australian Recording Industry Association  
Australian Screen Directors Authorship Collecting Society  
The Australian Society of Authors Ltd  
Christian Copyright Licensing International  
Copyright Agency|Viscopy  
Illustrators Australia  
Media Entertainment & Arts Alliance  
Musicians Union of Australia  
National Association for the Visual Arts Ltd  
National Tertiary Education Industry Union  
Phonographic Performance Company of Australia  
Screen Producers Australia  
Screenrights