

Copyright Regulations 2017 Exposure Draft joint response from the ALCC and ADA Supplementary Submission

To supplement our previous submission on the proposed Copyright Regulations 2017, the Australian Digital Alliance (ADA) and the Australian Libraries Copyright Committee (ALCC) wish to provide the following additional comments regarding the prescribed acts included in section 40 of the Copyright Regulations Exposure Draft and in the Technological Protection Measures Regulations Exposure Draft.

In addition to our previous comments supporting the proposed extensions to the prescribed acts for which circumvention of a technological protection measure (TPM) may be undertaken, the ADA and ALCC would also like to take this opportunity to express our strong support for the retention of the existing prescribed Acts that are proposed to be carried over from the current regulations. That is, the prescribed acts currently set out in Schedule 10A of the Copyright Regulations 1969, which allow circumvention of TPMs for the purpose of:

- achieving interoperability in computer programs;
- the use of material by libraries and archives for document delivery and interlibrary loan;
- use of sound recordings in a broadcast; and
- remedying TPMs that are malfunctioning or damaging the product in which they are installed.

We note that a number of the prescribed acts currently set out in Schedule 10 - namely use of material by educational institutions under Division 2A of Part VB of the Act; assisting persons with a print disability; and library and archive preservation - have been replaced by similar exceptions that align with changes introduced by the Copyright Amendment (Disability Access and Other Measures) Act 2017. For example, the prescribed acts will now include an exception for preservation activities by libraries and archives that align with the expanded preservation provision in ss113H. We have commented on these as new TPM exceptions in our previous submission. This submission relates only to those TPM exceptions that will remain substantially the same, and on which we have not previously commented.

Each of the existing prescribed acts currently set out in Schedule 10 of the Copyright Act remain as relevant today as they were when they were first introduced. Together they represent a minimum set of circumstances in which, save for these provisions, TPMs would clearly create barriers to the ordinary, legal and socially beneficial use of content by consumers, researchers, innovators, and cultural institutions.

The public benefit of, for example, ensuring that people can circumvent TPMs that are defective, or that locally-developed technologies can interoperate with each other and their international peers, is self evident. Similarly, every day libraries and archives make use of the existing TPM exceptions to fulfil important basic functions such as ensuring that researchers Australia-wide have access to and can take full advantage of our national collections.

The fundamental necessity of allowing circumvention of TPMs for these existing prescribed acts is demonstrated by the fact that they are replicated in other TPM laws around the globe. For example, through its Triennial Rulemaking for its own anti-circumvention laws, the United States has had exemptions in place since the early 2000s that align generally with the Australian malfunctioning TPM and interoperability exceptions, and the library and archive exceptions.¹

Similarly, we support the continued inclusion of the permanent anti-circumvention exceptions set out in s116AN of the Copyright Act 1968 for permission, interoperability, encryption research, security testing, online privacy, law enforcement and national security and acquisition decisions by libraries and archives. We note that these exceptions are also reflected in US and other international jurisdiction's TPM provisions.

We thank you for the opportunity to comment on the exposure drafts of the Copyright Regulations and the Technological Protection Measures Regulations. Our contact for inquiries related to this submission is Jessica Coates, who can be contacted at jcoates@nla.gov.au or on 02 6262 1118.

¹ See discussion in United States Copyright Office, *Section 1202 of Title 17: A Report of the Register of Copyrights* (June 2017) available at <https://www.copyright.gov/policy/1201/section-1201-full-report.pdf> pp84-101.