

6 October 2017

Our Ref: AS 7948
Your Ref:

Copyright Regulation Consultation
Copyright Law and Policy Section
Department of Communications and the Arts
GPO Box 2154
Canberra ACT 2601

BY EMAIL TO: Copyright.Regulations@communications.gov.au

Dear Copyright Law and Policy Section,

Exposure drafts of the *Copyright Regulations 2017* and the *Copyright Legislation Amendment (Technological Protection Measures) Regulations 2017*

We write on behalf of the Schools Educational Publishers Committee, the Tertiary and Professional Publishers Committee and the Scholarly Journals Publishers Committee (together, **the Committees**) of the Australian Publishers Association (**APA**). The APA is the peak industry body in Australia for publishers of books and journals, hard copy and electronic publications. Established in 1948, the APA is an advocate for all Australian publishers large or small, commercial or non-profit, educational or popular; locally or overseas owned. Over the years the association has grown from modest beginnings and a membership of twenty, to nearly 200 members, representing over 90% of the industry based on turnover.

The Committees have read in draft the submission of the Australian Copyright Council, and support that submission.

The Committees limit their response in this submission to Question 6 of the Consultation Paper, relating to the proposed prescribed acts to be included in section 40 of the *Copyright Regulations* and inserted into Schedule 10A of the *Copyright Legislation Amendment (Technological Protection Measures) Regulations* (together, **the Proposed TPM Regulations**).

1. Executive summary

The Committees cannot over-emphasise how concerned they are in relation to the Proposed TPM Regulations insofar as they would permit hacking and cracking to gain access to access control protected material (such as material available only by password) for the following purposes:

- (a) fair dealing (whether by students, researchers or otherwise) under any of sections 40, 41, 41A, 103A, 103AA or 103C of the *Copyright Act 1968 (the Act)*;
- (b) reliance on section 200AB(3) of the Act by educational institutions;
- (c) reproducing and communicating works by libraries and archives for users (sections 49(6), 49(7) and 49(7B) of the Act);
- (d) reproducing and communicating works by libraries or archives for other libraries or archives (section 50(4) of the Act);
- (e) under Division 2 of Part IVA of the Act, people with disabilities getting initial access to copyright material (to be distinguished from the ability of people with disabilities to convert material to which they already have access into a format they can read or otherwise use); and
- (f) educational institutions accessing copyright material for the purposes of relying on the statutory licences.

In particular, the Committees submit that:

- (a) the Consultation Paper has misconstrued both its task and how to assess relevant evidence in that it has confused the hacking and cracking of material protected by a copy control technological protection measure (a **Copy Control TPM**) with the hacking and cracking of material protected by an access control technological protection measure (an **Access Control TPM**); and
- (b) if introduced in their current form, the Proposed TPM Regulations would likely:
 - (i) lead to a proliferation of hack and crack tools within the broader community; and
 - (ii) further encourage a hack and crack culture within Australian society

each of which would undermine the ability of Australian publishers – and particularly those producing educational and scholarly materials – to build effective digital businesses and thereby support the Australian economy.

As a result, the Committees submit that the Department should either permit the existing regulations to lapse pending a further legislative or administrative review or remake only the existing regulations.

2. More detailed comments on the Proposed TPM Regulations

2.1 *The grounds on which relevant regulations may be made*

Regulations made in relation to the circumvention of Access Control TPMs must comply with the regulation-making power in section 249 of the Act. These in turn are based on the relevant provision in the Australia-US Free Trade Agreement, (**AUSFTA**), Article 17.4(7).

Both section 249 of the Act and Article 17.4(7) relevantly provide that exceptions may only be introduced:

- (a) where “*an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding*”;
- (b) where “*such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding*”;
- (c) “*to the extent that they [that is, the exceptions] do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures*”;
and
- (d) where the exception applies “*in a particular class*” of works or other subject matter.

The regulation-making power in section 249(4)(e) of the Act additionally provides that the Minister must only make a regulation if “*the adequacy of the protection and the effectiveness of the remedies*” in the Act relating to technological protection measures would not be impaired.

The *Consultation Paper* is therefore misleading to the extent that it states (on page 9) that the Minister may permit hacking and cracking merely on the basis that “*a submission has been made requesting*” him or her to introduce such an exception. The Committees are consequently concerned that the Department has too readily accepted submissions from people and organisations wanting exceptions to circumvention prohibitions without subjecting those submissions to adequate scrutiny.

Importantly, the onus is on the proponents of a Proposed TPM Regulation to meet the evidentiary burden imposed under the Act and expected under the AUFTA.

2.2 *The nature of the evidence on which the Proposed TPM Regulations have been formulated*

Contrary to what is required under both the AUSFTA and section 249(4) of the Act, the evidence on which the Proposed TPM Regulations have been formulated:

- (a) is anecdotal at best (therefore failing to credibly demonstrate the relevant needs);

- (b) is old (being some 5 years old, from submissions made in 2012 – and certainly outside the periods required under AUSFTA and section 249(4));
- (c) seems comprised only of assertions rather than any empirical evidence;
- (d) is (in relation to educational institutions and libraries and archives) largely related to issues concerning Copy Control TPMs and not Access Control TPMs; and
- (e) was provided in any case well before the development of much of the business technology that now underpins Australian publishing and particularly publishing in the educational and scholarly fields.

In addition, in the case of Divisions 2, 3 and 4 of Part IVA of the Act (which were only introduced this year) it does not appear that any submissions – let alone any credible evidence of adverse effects that would require circumvention to be permitted – are before the Minister at all.

The Committees also note that the *Consultation Paper* has not canvassed evidence (current or otherwise) as to why any of the existing exceptions relating to Part VB and library or archive circumventions should be retained. In particular, no evidence appears to have been presented as to how frequently or in what situations relevant educational institutions, libraries and archives rely upon these exceptions.

Given the sunseting of the current exceptions, it would appear both legally necessary and sound policy to continue exceptions only if their retention meets the required evidentiary threshold. The Committees refer the Section to the history of similar exceptions under the practices of the Copyright Office in the United States, whereby the need for every Access Control TPM is assessed anew each time the provisions are reviewed. The Committees submit that this is also in line with the requirements of AUSFTA.

As a result, the Committees submit that the Minister does not have a sufficient and current evidentiary base to conclude that any of the Proposed TPM Regulations are either a current or a likely ongoing issue for the proposed beneficiaries of those regulations.

2.3 *Other concerns*

The Committees are also concerned that, contrary to the requirements of section 249(4) of the Act, the Proposed TPM Regulations:

- (a) are not limited to any “*particular class*” of works or other subject matter;
- (b) will encourage the wide distribution of hacking and cracking tools; and
- (c) will further encourage a hack and crack culture within Australia.

Consequently, the general effectiveness of Access Control TPMs would be severely compromised, with the corresponding effect that the ability of Australian publishers – and particularly those producing educational and scholarly materials – to build effective digital businesses and thereby support the Australian economy (including by continuing to produce valuable materials for the Australian education sectors) would be undermined.

The Committees submit that the breadth of the Proposed TPM Regulations conflict with the policy intent behind copyright generally (as a property right) and the circumvention provisions in particular (including the exceptions) which are intended to:

- (d) encourage the production of materials that will be useful to society;
- (e) create an environment in which copyright owners are assured that, subject to minor exceptions, they will generally be able to control and market their material; and
- (f) encourage the development of market place licensing arrangements in relation to copyright material (such as agreements for access to password protected material).

However, what the Proposed TPM Regulations contemplate is that, particularly insofar as the exceptions relating to fair dealing are concerned, every Australian student would be encouraged to hack into otherwise protected

educational resources for their studies without paying to get their own copy of that material or to gain access to that material through an intermediary such as a library or educational institution that has paid for that access.

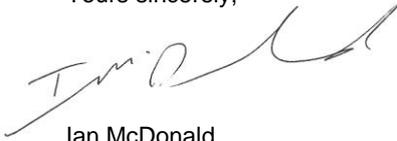
The Committees submit that such an outcome is both *ultra vires* the Act and economically irresponsible.

2.4 Conclusion

The Committees submit that, in light of the above, the Minister should either permit the existing regulations to lapse pending a further legislative or administrative review that can take credible evidence as to current market conditions or remake only the existing regulations (noting, however, our concerns that there is a lack of credible evidence as to the continuing need for these).

Please feel free to contact me if you would like further comment or if you have any questions in relation to the above (including if you would like to speak directly with members of the Committees).

Yours sincerely,



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