

Submission regarding exceptions for technological protection measures in the *Copyright Act 1968*

By the Australian Digital Alliance and Australian Libraries Copyright Committee

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Executive Summary

The Australian Digital Alliance and Australian Libraries Copyright Committee welcome the opportunity to comment on the Attorney-General's review of exceptions in the *Copyright Act 1968* (the Act) for the circumvention of access control technological protection measures (TPMs).

In the digital environment, the use of TPMs in works in digital formats has become ubiquitous. In the copyright landscape, the existence of offence provisions for the circumvention of TPMs that are separated from offences for copyright infringement presents a challenge to the fundamental balancing act of copyright law, which must ensure the rights of creators are safeguarded while at the same time facilitating user access to information and creative works. Without this balance, copyright law cannot be said to be adequately promoting the creation of works of scientific, creative, and cultural value.

The ADA and ALCC believe that the exceptions facilitating the circumvention of TPMs in the Act have not kept pace with the rapid changes in dealing with copyrighted works brought about by digital technologies. These provisions can no longer adequately protect activities that promote the development of the Australian cultural landscape. Such activities include creative pursuits of artists such as film-makers or composers wishing to build on previous works, the activities of educational practitioners supporting students who are engaging in increasingly complex and innovative ways with the digital world, and cultural institutions such as libraries, archives and museums seeking to preserve and provide access to our cultural heritage in more relevant and engaging ways.

This submission recommends the adoption and expansion of exceptions to anti-circumvention laws covering the following activities:

- Access to works for the purpose of making non-infringing copies of those works for the purposes of fair dealing;
- Access to works by libraries and cultural institutions to undertake activities pursuant to the flexible dealing provision in s200AB of the *Copyright Act 1968*;
- Access to works for educational institutions, facilitating flexible dealing under s200AB, and utilising the Part VA and fair dealing exceptions, in line with the recommendations contained in submissions from Universities Australia and the Copyright Advisory Group for the Standing Council on School Education and Early Childhood.

Introduction

This submission is made on behalf of the Australian Digital Alliance (ADA), and the Australian Libraries' Copyright Committee (ALCC).

The ADA is a non-profit coalition of public and private sector interests formed to promote balanced copyright law and provide an effective voice for a public interest perspective in the copyright debate. ADA members include universities, schools, consumer groups, galleries, museums, IT companies, scientific and other research organisations, libraries and individuals.

Whilst the breadth of ADA membership spans various sectors, all members are united in their support of copyright law that appropriately balances the interests of rights holders with the interests of users of copyright material.

The ALCC is the main consultative body and policy forum for the discussion of copyright issues affecting Australian libraries and archives. It is a cross-sectoral committee which represents the following organisations:

- Australian Library and Information Association
- Australian Government Libraries Information Network
- Council of Australasian Archives and Records Authorities
- The Australian Society of Archivists
- Council of Australian University Librarians
- National Library of Australia
- National and State Libraries Australasia

In this submission the ADA and ALCC address the review criteria by commenting on the need to expand current TPMs exceptions to allow libraries, educational and cultural institutions, and consumers to make full use of important exceptions for non-infringing uses in the Act. These are:

- Access to works for the purpose of making non-infringing copies of those works for the purposes of fair dealing;
- Access to works by libraries and cultural institutions to undertake activities pursuant to the flexible dealing provision in s200AB of the *Copyright Act 1968*;
- Access to works for educational institutions, facilitating flexible dealing under s200AB, and utilising the Part VA and fair dealing exceptions. In this matter the ADA and ALCC support the submissions of Universities Australia and the Copyright Advisory Group for the Standing Council on School Education and Early Childhood.

Part I: Exceptions to liability for circumventing TPMs for the purpose of Fair Dealing

The fair dealing exceptions are essential balancing provisions in the Act. Fair dealing, however, does not have a corresponding exception for the circumvention of TPMs. With the increasing ubiquity of digital media, and the abundance of tools to craft new works from digital media, this affects a large number of different users of copyright material. User groups, including members of the ADA and ALCC, have voiced their concerns to us about the stifling of innovation that occurs when innovators and creators are unable to make full use of copyright exceptions.

The creation and use of digital works, many of which are now protected by TPMs, has exploded since exceptions for TPM circumvention were first implemented following the AUSTFA agreement in 2006. We are now seeing a younger generation of budding digital content creators, such as film makers and remix artists who are seeking to use content in new and innovative ways. While the Act allows for such uses as fair dealing, users are being stymied in their creative pursuits by the presence of TPMs on DVDs, Blu-ray discs, and online media.

A media student wishing to copy snippets from a videotape may do so simply by using a home VCR, by either the outdated method of recording to another VHS tape, or using one of the many VHS to DVD converters available on the market.¹ She may then use the clips extracted from the VHS in a presentation or assignment. This is permitted under fair dealing for the purpose of research or study. However, a student who uses clips extracted from a DVD in her work will (most often) have circumvented the TPM on the DVD, thereby infringing copyright. The lack of a circumvention exception here effectively places de facto limits on the scope and relevance of the fair dealing exception.

The migration of home-owned films from VHS to DVD means that, today, very few users will consider using clips extracted from a VHS, and those that do will often prefer to use clips extracted from DVDs as they are of a higher quality. Virtually no audio-visual material produced in the last five years is available on VHS. The result 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. A new exception allowing the circumvention of TPMs when the material is being used under fair dealing would remedy this discrepancy.

¹See, for example <http://vhs-to-dvd-converters-review.toptenreviews.com/diamond-video-capture-review.html>

How does an exception allowing circumvention to perform an activity covered by fair dealing fit into the criteria for adding or varying an exception?

A film produced on DVD is protected under the Act, in s90. While copying any part of this film, or the whole film, is an infringement of copyright, s103C permits fair dealings for the purposes of research and study. Fair dealings for the purpose of criticism or review, or for the purpose of parody and satire, or reporting the news are enumerated in ss103A to 103B. The fair dealing exception is limited to purposes, rather than users.

(D) Has an access control TPM been applied to the work?

Almost all commercial films released on DVD 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.

(E) 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?

The use of CSS on DVDs, while easily circumvented through software freely available on the internet, means that users who wish to deal fairly with a legitimately purchased DVD (rather than downloading the same film without authorisation) are unable to legally extract clips from the DVD to use for the purposes of research and study. Once a user is no longer a student, the ability to further build on her skills and create new work through using extracted clips for commentary, parody, or reporting is similarly restricted. The inability to circumvent TPMs on commercial DVDs for the purposes of fair dealing severely curtails the ability of a budding film-maker to refine her skills and understanding by building on and finding innovative uses for existing material. This is despite the presence of the fair dealing exceptions in the Act that explicitly recognise the need to use copyright material to further the creation of content under the purposes outlined in the Act.

(F) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?

The fair dealing exception is very narrow, being limited to the set of purposes outlined in the Act. Therefore, an extension to the list of TPMs exceptions allowing for circumvention is highly unlikely to impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of CSS generally. The use of film extracts by students, researchers, and other users is unlikely to prejudice the interests of the copyright holder as the extracts that will be used are too small to licence, and in many cases where the user has legitimately acquired the DVD, the rights holder has already received remuneration for the work.

Part II: Exceptions to TPM circumvention facilitating the activities of Libraries, Archives and Cultural institutions

The ADA and ALCC seek the expansion of exceptions to TPM liability to support libraries, archives and cultural institutions in their public interest missions. The Act recognises the need for these institutions to occasionally exercise what would normally be the exclusive rights of the copyright holder, in order to fulfil their essential functions. Accordingly, the existing library exceptions were expanded in 2006 to include s200AB, which covers wider uses “made for the purpose of maintaining or operating the library or archives”.

Acknowledging the existing exceptions allowing libraries to circumvent TPMs, contained in the regulations, the ADA and ALCC support the introduction of a circumvention exception allowing libraries, archives and cultural institutions to circumvent a TPM for the purpose of undertaking an activity under the flexible dealing provision in s200AB of the Act.

The flexible dealing provision was introduced after the most recent review of TPMs exceptions in 2005. It recognises the need for libraries, archives, cultural and educational institutions, and persons and organisations assisting persons with a disability to undertake a wider range of activities in the digital environment to fulfil their mandates than are currently allowed under specific exceptions in the Act.

Libraries currently rely on s200AB to undertake format shifting activities that may not fall into the specific exceptions for preservation activities, such as the creation of back-up copies of works contained in a computer program. The provision also allows libraries, and other organisations to provide works to people with a disability in accessible formats.

How does an exception allowing circumvention to perform an activity covered s200AB(2) or (4) comply with the criteria for adding or varying an exception?

The ADA and ALCC are requesting an exception allowing TPM circumvention by libraries, archives and cultural institutions on works in electronic formats covered by s200AB(2) and (4), in the situations envisaged by the provision. The nature of the requirement in s200AB(1)(a) confines the particular class of works or other subject matter to that corresponding to a ‘special case’. But for the application of s200AB, a use of material in this class would otherwise be an infringement of copyright.

The acts permitted by s200AB(2) and (4) are limited to ‘a body administering a library or archives’, and a person with, or a person or body assisting a person with a disability, including libraries. The ALCC is the peak consultative body representing libraries as they are affected by copyright issues, and therefore seeks this exception on behalf of libraries.

(D) Has an access control TPM been applied to the work?

TPMs are increasingly applied to works and other subject matter that libraries and archives seek to use under s200AB.

- Libraries collect material contained on CD-ROM or other computer programs that date back to the 1990s, and even earlier on formats such as floppy discs. Many of the files on these media are contained in proprietary or encrypted formats. Others require CD keys and passwords to access the material.
- eBooks and articles in PDF format in a Library's collection are generally now protected by DRM or encrypted in ways that may constrain access to the work to proprietary software, restrict access to the material for the purposes of printing or annotating the work, or restrict access to the document's metadata.
- Libraries collections now contain large numbers of music CDs and DVDs protected by TPMs which prevent format shifting.
- Both physical and electronic textbooks in library collections are often accompanied by online supplements which can only be accessed using a code provided by the publisher.

(E) 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?

The use of TPMs on material in library and archival collections affects the ability of these institutions to perform a number of activities that are otherwise permitted under s200AB. The use of a TPM can restrict the ability of an institution to provide access to original copies of works, such as where information is held in encrypted email archives. An example of this occurring is where a library acquires a deceased person's personal papers, including personal papers in digital form, which are encrypted due to the software used at the time the papers were created. If the library does not possess the encryption key and algorithm to unlock the material, the content remains locked unless the encryption can be circumvented. This may be achieved often through the preservation activities allowed in the regulations, however, broader uses of the work that keep pace with developments in technology are less likely to fall under the specific preservation and administrative purposes outlined in s51A, but may be covered by s200AB, such as the ability to use text and data mining to develop a deeper understanding of a collection.

TPMs also affect the ability of libraries and archives to reproduce, reverse engineer, and format shift material to ensure interoperability, to perform security testing and error correction, and can prevent search engines from accessing the metadata on a work. This reduction of functionality of digital works adversely affects otherwise non-infringing use by libraries in a variety of ways:

- Access for persons with a disability
The presence of TPMs on electronic copies of research material restricts the ability of libraries to provide material in alternative access formats for persons with a disability. For example, a print disabled person may access a research article

through the library that is contained in an encrypted PDF or eBook format that contains DRM, which prevents the application of text to audio software to the work. But for the circumvention of the TPM, utilisation of text to audio software on such material would be a non-infringing use under s200AB(4). Educational institutions performing circumvention for this service are already protected from liability as activities ensuring access to works for print disabled persons are covered by the Part VB licence, which is a 'prescribed use' in the Regulations. Libraries are a crucial source of material for persons with a range of disabilities, and should be able to perform these uses with the same protections as educational institutions.

- Collection Management; consolidation of material in outdated formats
Libraries have vast numbers of music CDs and both feature films and educational videos contained on DVDs in their collections, that they are seeking to consolidate into digital repositories which provide networked access. The current exceptions that allow format shifting for preservation purposes require library staff to be satisfied that this material is not commercially available in the desired format before shifting. But for the presence of TPMs on this material, s200AB provides scope for this type of management activity to be carried out in a more streamlined way that does not tax libraries' already stretched resources.
- Access to online textbook supplements
Textbooks held by university libraries often contain online supplements that are restricted to users who have been provided with a password or other key from the publisher, generally on purchasing the text. The codes only provide individual access, and cannot be used by libraries to provide multiple students with access to the supplements. These libraries do not have the resources to manage thousands of unique codes for the increasing numbers of textbooks that offer this feature. If able to circumvent this restriction, educational libraries could copy the content of the online supplement into an authenticated library system, to provide access to users of the print textbook, while ensuring access was still controlled.

(F) Would the exception impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of the TPM?

Allowing circumvention of TPMs to perform activities covered by s200AB(2) and (4) will not impair the adequacy of legal protection contained in the TPMs regime. The conditions that must be satisfied before a use is protected by the provision ensure that the situations in which a TPM may be circumvented are highly circumscribed. The 'special case' requirement in s200AB(1)(a) ensures that the provision is unlikely to be used for widespread or systematic circumvention of TPMs across a whole collection.

Furthermore, there has been no evidence to suggest that the current TPMs exceptions allowing libraries and archives to circumvent for the purposes of preservation and providing controlled access to users have created loopholes for piracy of works, or have otherwise disadvantaged creators.

Part III: Exceptions to TPMs facilitating the activities of educational & research institutions

In relation to exceptions facilitating educational use of material containing TPMs, the ADA and ALCC support the submissions of the Copyright Advisory Group of the Standing Council on School Education and Early Childhood and Universities Australia to this inquiry.

Contextual Factors

While the ADA and ALCC recognise that the Attorney-General's review is restricted to considering exceptions for circumvention within the confines of s249 of the Act, we urge the department to take two crucial contextual factors into account when considering exceptions for TPMs.

The first contextual factor that the ADA and ALCC urge the department to keep in mind is that access to digital works in the current day is inextricably linked to licensing, contracts, and the business models of content providers. Many of the difficulties associated with library use of current TPMs exceptions are to do with the way that licences dictate how material may be used. One example here is of an Irish Historic Towns Atlas, which the NLA holds as an encrypted PDF. While circumventing the encryption on the PDF in order to make use of this material, including by printing the material, or copying the content over to another format, is permissible under Schedule 10 of the Regulations, the licence under which the library is supplied with the atlas states that 'document changes, commenting, page extraction, content copying and printing are not permitted'. As outlined in the ADA and ALCC submission to the 2005 review of TPMs exceptions,² the ability of contracts and licences to override exceptions threatens the utility of the exceptions for all users of material protected by copyright.

The second contextual factor relates to the practical utility of the exceptions provided in the Act. While libraries are permitted to circumvent TPMs under the regulations for certain limited purposes, their practical ability to do so is impeded by lack of resources

² Available at <http://www.digital.org.au/our-work/submission/review-technological-protection-measures-exceptions>

and expertise within the institutions. Should libraries and cultural institutions be given the ability to contract out for the circumvention of TPMs on material in their collections, the operability of the exceptions in the regulations would be vastly improved.³ As the regulation making power in s249 of the Act does not cover the consideration of exceptions for the manufacture of circumvention devices or the provision of circumvention services, however, we suggest that the scope of the ALRC's current Inquiry into copyright exceptions be understood to include considerations of TPM use and circumvention which fall outside the scope of this review.

Recommendations

- 1. That exceptions to anti-circumvention laws covering access to works for the purpose of making non-infringing copies of those works for the purposes of fair dealing be implemented;**
- 2. That exceptions to anti-circumvention laws covering access to works by libraries to undertake activities pursuant to s.49, s.50, s.51A, and s.183 of the *Copyright Act 1968* be preserved; and the extension of these exceptions to cover activities permitted by the flexible dealing provision in s200AB of the *Copyright Act 1968*;**
- 3. That exceptions to anti-circumvention laws are implemented covering access to works for educational institutions, facilitating flexible dealing under s200AB, and utilising the Part VA and fair dealing exceptions, as outlined in the submissions of the Copyright Advisory Group of the Standing Council on School Education and Early Childhood and Universities Australia to this inquiry .**

The ADA and ALCC would welcome the opportunity to make further submissions should the Department require them. If there are other issues, analysis or evidence which the ADA and ALCC can usefully provide information to the Department, the principal contact is Ellen Broad, copyright law and policy adviser, who can be contacted at ebroad@nla.gov.au or (02) 6262 1273.

³ International Study on the Impact of Copyright Law on Digital Preservation, *Country Report for Australia* compiled by Benedict Atkinson, Emma Carroll, Jessica Coates and Brian Fitzgerald (2008) p28. Available at http://www.digitalpreservation.gov/documents/digital_preservation_final_report2008.pdf