

SUBMISSION ON REVIEW OF TECHNOLOGICAL PROTECTION MEASURES EXCEPTIONS

February 2022

Universities Australia (UA) welcomes this opportunity to comment on the Government's review of Technological Protection Measure (TPM) exceptions.

EXISTING TPM EXCEPTIONS

UA submits that each of the current TPM exceptions listed in s40 of the *Copyright Act (1968)* (**the Act**) should remain in force.

In particular, the TPM exceptions listed in ss40(1) (a)-(g)¹ and 40(2)(b) and(e) have been essential to ensuring that universities are able to take full advantage of the copyright exceptions and limitations to which each of these provisions relates. Prior to enacting each of these TPM exceptions the Government engaged in extensive consultation and determined in each case that the use of TPMs would have or be likely to have an adverse impact on the ability of universities, and their staff and students, to engage in non-infringing uses permitted by the relevant copyright exceptions. UA is not aware of any evidence to suggest that any of the s40 exceptions have impaired the adequacy of legal protection to rightsholders, nor the effectiveness of legal remedies against the circumvention of TPMs.

We respectfully request an opportunity to consider and respond to any such evidence as may be submitted by rightsholder groups in the course of this consultation. We are concerned that the process outlined in the Discussion Paper is silent as to any opportunity for stakeholders to address arguments that are raised against them.

CONSEQUENTIAL AMENDMENTS BECAUSE OF MEASURES PROPOSED IN THE DRAFT BILL

The draft Bill contains a number of important reforms that are intended to permit certain reasonable uses of copyright material in the public interest while maintaining appropriate protections and incentives for rights holders. As is noted in the discussion paper released with the draft Bill, the proposed reforms are the culmination of extensive review and consultation that has taken place over many years. As also noted, if the law does not keep pace with technologies and emerging practices, activities that were allowed under copyright exceptions may fall out of scope and become remunerable.

In making this submission, UA urges the Government to have regard to the policy objective at the time that the anti-circumvention regime was enacted; that is, to assist copyright owners to enforce their copyright and to target piracy, not to the stop people from engaging in non-infringing uses of copyright material. It should not be open to rightsholders – rather than parliament – to re-write the copyright balance by determining the scope of copyright exceptions. That will, however, be the case if the copyright reforms set out in the draft Bill are not accompanied by TPM exceptions that enable universities, academics and students to take full advantage of the flexibility that parliament will have intended to inject into the Act.

¹ Noting that the TPM exceptions in ss 40(1)(b) and (c) will need to be amended to reflect the relocation of the copyright exceptions to which they apply.

UA also urges the Government to have regard to the special position of the education sector. This is relevant both to the question of what TPM exceptions are warranted as well as to the question of whether the legitimate rights of copyright owners would be undermined if further TPM were granted. Educational institutions have a long history of protecting and respecting the rights of copyright owners.

In what follows we set out the new (and amended) TPM exceptions sought by UA arising from the reforms contained in the draft Bill.

New exception 1: the doing of an act by a person that does not infringe copyright because of section s 116AJA (limitation on remedies relating to orphan works)

Uses of copyright material rendered non-infringing as a result of the orphan works regime contained in s 116AJA of the draft Bill will include use of audio-visual content as well as works in electronic format (such as CDROMs).

Figure 2 in the Discussion Paper highlights the extent to which Australian library collections comprise orphaned audio-visual material. University library collections also include theses and other works in electronic format such as CDROMs. While much of this content was created prior to the widespread use of TPMs, as each year goes by, more and more orphaned content is subject to TPMs. This legacy digital content includes content where the rightsholder is known, but unlocatable. In the absence of a TPM exception, the proposed orphan works copyright exception will be rendered increasingly limited in scope with respect to content of this kind.

Creating an additional exception permitting circumvention of a TPM by a person doing an act that does not infringe copyright because of s116AJA would not disrupt the broader legal regime intended to protect copyright.

New exception 2: the doing of an act by a person that does not infringe copyright because of section s113FA (fair dealing for quotation)

The proposed quotation exception will apply to all copyright material; including content such as e-books and audio-visual content that is subject to TPMs. In determining whether the proposed exception applies, a user must have regard to fairness factors that include the effect of the use on the potential market for or value of the copyright material.

In the absence of a TPM exception relating to the proposed quotation exception, it will be open to rights holders to render the quotation of exception of little or no practical benefit to the user groups (including public institutions and researchers) who are intended to benefit from it. This would run contrary to the stated intention in the discussion paper of not ruling out reliance on this exception merely because a licensing model exists for the proposed use.

Creating an additional exception permitting circumvention of a TPM by a person doing an act that does not infringe copyright because of s113FA would not disrupt the broader legal regime intended to protect copyright.

Amended exception 1: the doing of an act by a person that does not infringe copyright because of section s113KD (supply of copies to persons)

Section 113KD will replace the existing s49 library copying exception, which is already subject to a TPM exception (see s40(1)(b) of the *Copyright Regulations 2017*). UA requests a consequential amendment to s40 of the Regulations to reflect the relocation of the relevant library copying exception.

Amended exception 2: the doing of an act by a person that does not infringe copyright because of section s113KE (supply of copies to other libraries and archives)

Section 113KE will replace the existing s50 library copying exception, which is already subject to a TPM exception (see s40(1)(c) of the *Copyright Regulations 2017*). Again, UA requests a consequential amendment to s40 of the Regulations to reflect the relocation of the relevant library copying exception.

NEW TPM EXCEPTIONS FOR USERS RELYING ON FAIR DEALING EXCEPTIONS

In submissions in response to the Government's 2017 review of TPMs, UA and others submitted that the scope of the fair dealing exceptions in ss40, 41, 41A, 103A, 103AA or 103C of the Act were being rendered increasingly narrow as the copyright material which users were otherwise permitted to use in reliance on those exceptions was subject to TPMs.

Following this, we were pleased when the *Exposure Draft for the Copyright Regulations 2017* included an amendment to s40 of the Copyright Regulations to permit circumvention of a TPM by students enrolled at and researchers working at educational institutions when relying on any of these fair dealing exceptions (draft ss40(2)(a) and (b)). It was a matter of great disappointment to the university sector when this proposed reform was inexplicably dropped – pending further consideration by the Government – following rights holder objections. We were assured at that time that the Government intended to give further consideration to this in 2018. Now, four years later, the need for TPM exceptions relating to the fair dealing exceptions set out above is even more acute.

UA requests amendments to s40 of the Copyright Regulations to reflect ss40(2)(a) and (b) of the *Exposure Draft for the Copyright Regulations 2017*. Creating these additional TPM exceptions would not disrupt the broader legal regime intended to protect copyright and would ensure that the parliamentary intention with respect to the use of these public interest exceptions was able to be fully realised.