AUSTRALIAN HOME ENTERTAINMENT DISTRIBUTORS ASSOCIATION

AHEDA submission: exposure draft of Copyright Regulations 2017

Question 6 – Technological protection measures (TPMs)

6 October 2017

The Australian Home Entertainment Distributors Association (**AHEDA**) welcomes the opportunity to comment on the exposure draft of the Copyright Regulations 2017.

AHEDA

AHEDA represents the $1.1 billion Australian film and TV home entertainment industry covering both packaged goods (DVD and Blu-ray Discs) and digital content. AHEDA speaks and acts on behalf of its members on issues that affect the industry as a whole such as intellectual property theft and enforcement, classification; media access, technology challenges, copyright, and media convergence. AHEDA currently has 13 members and associate members including all the major Hollywood film distribution companies and wholly-owned Australian companies such as Roadshow Entertainment, Madman Entertainment and Defiant Entertainment. Associate Members include Foxtel and Telstra.

AHEDA limits its submission to question 6 of the Consultation Paper, regarding Part 7 of the exposure draft (Technological Protection Measures) and the TPM Regulations exposure draft, and otherwise supports the submissions of the Australian Film & TV Bodies and Screenrights on the remaining questions in the Consultation Paper and the balance of the draft Copyright Regulations 2017.

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?

AHEDA opposes the proposed new prescribed exceptions under s 40(2)(a), (b) and (f) of the exposure draft of the Regulations (and the corresponding provisions of the TPM regulations exposure draft), that would permit certain "fair dealings" by students and researchers covered by s 200AB(3) of the Act.

The risk inherent in any new exceptions to liability for circumventing access control TPMs is that they will directly and adversely impact AHEDA's members rights. AHEDA's members rely on access control TPMs to protect the market for their content (physical and digital copies of films and TV programs) from widespread infringement. Once an access control TPM on a copy of a film or TV program is circumvented, a copy can be made of the content that is then no longer TPM protected, and that unprotected content can be "freely" circulated amongst members of the public without any technological constraint, e.g. via the internet or an online platform. The availability of unprotected content files directly competes with legitimate copies supplied by AHEDA's members, thereby reducing the income generated from legitimate content (and the means for further investment in creating the content in the future).

AHEDA recognises that exceptions and defences to TPMs may be appropriate in certain limited circumstances (where permitted by the Australia-US Free Trade Agreement (**AUSFTA**)), and where they are limited to circumstances that are clearly justified on the evidence. However, they are not appropriate where they undermine the rights of AHEDA's members that TPMs are designed to protect.

There are limitations under the AUSFTA on Australia's ability to wind back its TPM regime. The first is Article 17.11.4(e) that specifies a **closed list** of permissible exceptions to circumvention of access control TPMs, each of which is limited to certain narrow use cases that are clearly and plainly justified. The catch-all provision under Article 17.11.4(e)(viii) is limited by a series of pre-conditions, as follows:

> "*non-infringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms, when an actual or likely adverse impact on those non-infringing uses is credibly demonstrated in a legislative or administrative review or proceeding; provided that any such review or proceeding is conducted at least once every four years from the date of conclusion of such review or proceeding*." (emphasis added)

The second is under Art. 17.11.4.10: Australia must "*confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder*".

Regs 40(a), (b) and (f) will cause Australia to breach its obligations under the AUSFTA.

The proposed exceptions under s 200AB(3) of the Act are not amongst the specified list of permissible exceptions under Article 17.11.4. The only conceivable basis for the exceptions would have to be a reliance on Article 17.11.4(e)(viii). However the pre-conditions under Article 17.11.4(e)(viii) have not been met in the case of the proposed exceptions, because:

- **they are not confined to "a particular class of works, performances or phonograms".**

  The exceptions make no attempt to limit their application to classes of works. They would permit circumvention of access control TPMs on any type of content. This indiscriminate scope will lead to a similarly indiscriminate effect on the value of content and economic opportunities for licensed supply of the content to educational users (which keeps the content within the control of copyright owners and subject to appropriate remuneration).

- **the exceptions will inevitably extend beyond "non-infringing uses".**

  The new exceptions in Reg 40(2)(a) and (b) are very broadly drafted and rely on a difficult contemporaneous judgment about whether the uses will be "fair dealings", unlike the existing exceptions under reg 40(1) which are clearly defined.[1] In practice, it will amount to a blanket permission for anyone enrolled in a course provided by an educational institution, or who carries out research for an educational institution, to break access control TPMs because they have decided that it is a fair dealing for the purpose of their course or research. This is a form of "honour system" that is impossible to police, and which unreasonably subjects the legitimate interests of copyright owners to an assumption that students – especially students with the technical skills to circumvent access TPMs – will not accidentally or deliberately mishandle the unprotected copy resulting from circumvention e.g. by sharing over educational servers and beyond. Available research of the attitudes and behaviour of students indicates that this assumption is misplaced. While Reg 40(2)(f) is limited to institutional users, there are also significant and parallel risks around TPM-free content ending up on the computer networks of the relevant institutions.

- **the uses has not been "credibly demonstrated in a legislative or administrative review or proceeding" held in the last four (4) years.**

  The last review was conducted in 2012, more than 4 years ago. The only submissions before the Government to which it can refer are dated from 2012, when they were received. There have been dramatic changes in the market for licensed content in the last 5 years, including the content available to educational institutions under educational licences, that has not been collected by the Government by a review conducted in the last 4 years. The process carried out in 2015 or as part of the present review reflect only implementation of the weak consultation obligations in Part 3 of

[1] With the exception of reg 40(1)(f), which is specifically addressed to access permitted by the Marrakesh Treaty.

the *Legislative Instruments Act 2003* (Cth)[2] and not the requirements of Article 17.11.4(e)(viii). None of the 2012 review submissions proposed a fair dealing based exception to access control TPMs. The current process does not "*credibly demonstrate* an *actual or likely adverse impact* on non-infringing uses of *particular classes of works"* as there has been insufficient evidence of the need for students, researchers and educational administrators to break access control TPMs.

There is strong evidence of licensed market solutions for reasonable access to copyright subject matter in educational institutions, including the ability to extract clips of the material for use in assessments and research projects. Some of the solutions can also be found in basic technological solutions, such as "snipping tools" allowing students, researchers and teachers to extract diagrams from e-books into their documents and presentations. AHEDA also relies on the Screenrights submissions concerning the availability of content under educational licences.

In addition the proposed Regs 40(a),(b) and (f) would also be in breach of Art 17.11.4.10 of the AUSFTA, in that they conflict with a normal exploitation of its members' copyright works and subject matter, and unreasonably prejudice the legitimate interests of its members as rights holders.

The economic implications of a TPM-free copy of a single popular film becoming freely available to the public because of an improper use of this exception, or a failure to properly secure a TPM-free copy, are very substantial. (The statistics around the world-leading level of piracy in Australia, especially for films and TV programs, and its implications for the entertainment industry are well-known). There is also a clear conflict with a normal exploitation of the work, via the educational platforms and other licensing solutions referred to above. The proposed exceptions will dis-incentivise content owners from offering these services, which will be detrimental both to the creative economy and to ordinary students and researchers who may not have the technical ability to circumvent TPMs.

There is no evidence to support the argument in the Consultation Paper that Regs 40(2)(a) and (b) will "encourage the use of legitimate, paid content" (page 22). Logically, the reverse will occur, because once a TPM is removed, it is very likely that the TPM-free copy will become infringing content unless proper steps are taken to secure it. The temptation for misuse of content in the online environment (even more so on a university computer network), justifies the existing prohibitions on circumvention of access control TPMs, but not the proposed new exceptions.

Deficiencies in drafting of Regs 40(a), (b) and (f)

AHEDA's concerns about the proposed exceptions are exacerbated by the overly broad drafting of proposed regs 40(2)(a), (b) and (f). First, the requirements to qualify as a student or a researcher in regs 40(2)(a)(ii) and (b)(ii) are overly broad and capable of capturing persons who are not genuinely engaged in qualifying study or research. Secondly, the requirement that the fair dealing be "for the purposes of" the relevant course or research (regs 40(2)(a)(iii) and (b)(iii)) leaves too much discretion to the relevant individuals – especially in the inherently broad and flexible context of study and research. Given the significant prejudice to copyright owners, this should be limited to acts that are objectively "necessary or required" for the purposes of completing the course or for the purposes of the research. This could be even more specifically defined, depending on any evidence of a need for new exceptions – for example, the corresponding US exception is limited to film studies and similar courses (US code of Federal Regulations, Title 37, Part 201, § 201.40). Finally, each of regs 40(2)(a), (b) and (f) is a blanket exception and each lacks any incentive for users to ensure that the TPM-free copy is appropriately used and protected. At a minimum, a deeming provision analogous to s 111(3) of the Act is required, with the effect that the exceptions will be deemed never to have applied if the copy is subsequently used for a different purpose. Existing s 111(3) of the Act is a recognition of the legitimate interests of copyright owners in ensuring that a format-shifted copy of a work for private and

[2] E.g. 17(1)(a), which leaves the nature and scope of any consultation to the discretion of the rule-maker, and s 19, which further dilutes the obligation to consult.

domestic use is not subsequently circulated or viewed more broadly; AHEDA submits that equivalent considerations apply to TPM-free copies of works.

If the Government considers that additional TPM exceptions are necessary for students or researchers to take advantage of the fair dealing exceptions in the Act or for institutional users to rely on s 200AB, a more appropriate provision would be one along the lines of s 296ZE of the UK *Copyright, Designs and Patents Act 1988*. The UK process ensures that TPMs can only be broken where there is a legitimate need to do so, including because copyright owners have not offered a workable solution.[3]

Finally, a student exception allowing circumvention of a TPM for certain educational purposes but not others sends a very confusing message to the public where it is appropriate in one area but would be illegal for another purpose. Good policy making should not confuse people as to what they can legally do and exceptions for students to break TPMs would create unnecessary confusion in an area we are trying to educate the community at large on the value of copyright more generally as well as provide new services and content innovative ways. There is no market failure.

[3] The fundamental differences between proposed Regs 40(2)(a), (b) and (f) and the corresponding UK and US TPM exceptions, highlights the extent to which these proposals are out of step with international practice.