ALCC Australian Libraries Copyright Committee

Australian Digital Alliance

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

The Australian Libraries Copyright Committee (ALCC) and the Australian Digital Alliance (ADA) welcome the opportunity to comment on the exposure draft of the Copyright Regulation 2017.

Below we provide responses to a number of questions set out in the consultation paper. We also provide two additional suggestions for small changes to the regulations as proposed.

A. About the ALCC and the ADA

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 with members representing the following organisations:

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

The ADA is a non-profit coalition of public and private sector interests formed to provide an effective voice for a public interest perspective in copyright policy. It was founded by former Chief Justice of the High Court of Australia, Sir Anthony Mason in February 1999, to unite those who seek copyright laws that both provide reasonable incentives for creators and support the wider public interest in the advancement of learning, innovation and culture. ADA members include universities, schools, disability groups, libraries, archives, galleries, museums, technology companies and individuals.

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.

B. Answers to Departmental Questions

Question 1
How should the Copyright Regulations 2017 require items (such as notices and inquiries) to be published? In particular, how should the Copyright Regulations 2017 require the following to be published?
(a) A notice for the purposes of section 7 (Notice of intended publication of unpublished work kept in public library—paragraphs 52(1)(b) and (2)(b) of the Act).

The ALCC/ADA do not have any suggested changes to the publication process for notices under the act, or the content of notices generally. However, feedback from our members indicates that there is a strong interest in ensuring that if any changes are made that the language in the notice should remain clear and easily read and that any changes to institutional responsibilities are easy to understand.

Most relevant to our members are notices relating to the unpublished works provision (Reg s7). We note that although the current requirement of publication of these notices in the Gazette is not ideal, due to the likely low readership of the Gazette, we are unable to determine another method of publication that is more appropriate. Libraries and archives already take extensive steps to identify and contact copyright owners before publishing unpublished works under this provision, including attempting to contact them directly. The Gazette notice publication is seen as the final due diligence step - a “tick box” to ensure that all avenues to contact copyright owners have been exhausted. We would argue that in the modern era the most important step is clear documentation of due diligence steps taken to identify and contact copyright owners, rather than publication of a specific notice in a specific location.

Question 2
Is the Copyright Regulations Exposure Draft subsection 7(2) requirement that a relevant notice be published at least 2 months, but not more than 3 months, before the publication (or subsequent publication) of a new work sufficient? Should the requirement merely be that a relevant notice be published at least 2 months before the publication of a new work (with no upper limit on how far ahead of the publication a relevant notice may be published)?

The ALCC/ADA agree that it would be beneficial to remove the upper limit on the timeframe for the notice of publication of unpublished works under Reg s7. This will increase flexibility for institutional workflow and be more in line with the reality of library and archive timeframes, with projects involving digitisation and publication often being undertaken over years, not mere months. It will also reduce the chance that an important or valuable project could be prevented by a simple clerical error, or that a delay or other change in circumstances might put an institution acting in good faith in breach of the law.

Questions 3-5
Safe harbour provisions

The ALCC/ADA does not plan to provide comments on the proposed changes to the regulations relating to Australia's safe harbour scheme, as the scheme as currently constituted does not apply to our members. We feel it is inappropriate to comment on a system in which we do not participate.

However, we eagerly await the outcome of the government's recent consultation on the safe harbour scheme, and take this opportunity to again express our strong support for the extension of the scheme to schools, universities, libraries, archives, platforms, online marketplaces and others providing online services in Australia. Should such an extension be made, we will gladly provide feedback on the related regulations as part of the implementation process, and anticipate that such an opportunity will be provided.

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?

The ALCC/ADA welcomes the proposed extensions to the prescribed acts for which circumvention of a technological protection measure (TPM) may be undertaken.

We particularly support the proposal to include in the list of prescribed acts:

- The new preservation, research and administrative provisions for libraries and archives - as the Department notes in its consultation paper, this will solve the frequent dilemma of institutions wishing to undertake reasonable uses like converting out-of-commerce videos into digital form or creating backup copies of digital materials. Collection preservation and administration is an essential part of the role of libraries and archives which does not cause harm to copyright owners, and it is good to see that it is being recognised as such in these amendments.
- the new disability exceptions - these exceptions are so fundamental to the rights of Australians with a disability, and the use of TPMs to defeat them is so widespread, that it is essential that such an exemption be provided. We applaud the application of the exemption to both the institutional user exception and the more general fair dealing, noting that the fair dealing will be the principal method via which Australians with a disability are able to self help to obtain appropriate access to materials.
- The revised educational statutory licence - as with the above amendments, the ability of educational institutions to access material under the educational statutory licence is fundamental to their continued operation. We applaud the government's decision to

translate the TPM exception for the current statutory licence to the simplified and broadened statutory licence that will apply from next year.

Comments on two areas in which we believe additional amendments to the proposed list are warranted are provided below.

s200AB activities

We strongly applaud the inclusion of educational users utilising s200AB in the list of prescribed acts. As the Department notes in their response to the 2012 TPM review this will “not impair the adequacy and effectiveness of legal protections and remedies... particularly because a use under section 200AB can only be done in a special case, in a situation where it does not conflict with a normal exploitation of the work or other subject‑matter, and does not unreasonably prejudice the legitimate interests of the owner of the copyright.” (p.27)

However, we are extremely disappointed and confused that the government has not chosen to extend the same rights to libraries and archives under this provision, as we feel the same logic should apply in both circumstances.

Although we acknowledge that the previously-quoted video to DVD example is now addressed by the preservation provisions, this does not mean that legitimate uses are not still being made under s200AB, nor that they do not require TPMs to be circumvented. Some obvious examples of legitimate uses libraries may undertake under s200AB that may be adversely impacted by TPMS include:

- an excerpt from a commercial DVD being copied as part of a “showreel” for an onsite exhibition; and
- text and data mining on published materials held in the collection in digital form.

Most importantly, we would argue that even in the absence of specific examples, an exemption should be extended to library and archive activities under s200AB equal to that provided to educational providers. The purpose of s200AB is to allow for unforeseen activities that are beneficial to society and that do not harm copyright owners, in order to keep pace with technological developments. Almost by definition, therefore, it will be difficult to name specific activities which may fall within this exception before they occur. However, as the Department has acknowledged in relation to educational institutions, the protections for copyright owners in s200AB are strong. If an activity satisfies these stringent requirements, there seems no logical argument why it should be prevented by a TPM just because it is being undertaken by a library and not an educational institution.

We therefore propose that all uses permitted by s200AB, whether for the purpose of education or maintaining a library and archive, be included in the prescribed acts set out in s40 of the Regulations.

Fair dealings for students and researchers

Similarly, while we applaud the granting of an exemption to fair dealings for students enrolled and researchers working at educational institutions we are disappointed that it has not been extended more broadly to all fair dealings. We note that TPMs represent a substantial barrier to the undertaking of many legitimate activities under the fair dealing provisions - whether it be a critic wanting to copy a small clip from a DVD or a parodist wanting to use use a small spoken word excerpt from a youtube video.

In response to the ALCC/ADA's joint submission to the 2012 TPM review that the lack of a broader fair dealing exemption would prevent non-student filmmakers from creating new work through commentary, parody or reporting, the Department states:

> The Department noted that audio-visual material is incorporated regularly in news reporting and questions the extent to which TPMs prevent commentary, parody and satire. In the absence of evidence of a lack of alternatives to reproducing content from DVDs the Department assessed that TPMs are unlikely to have an adverse impact on the non-infringing use of DVDs by film makers in the circumstances raised by the ALCC and ADA. (p.21)

We find this statement confusing and contradictory - the Department appears to be asking for proof of a negative; ie proof that there are not legitimate ways to access this content. We instead suggest that the Department should be making its decision on the basis of whether there is evidence that legitimate access routes exist. Firstly, we note that large commercial news services who already make use of clips for reporting the news do not provide an appropriate proxy for other filmmakers - they may have avenues open to them that are not available to others due to their far greater licensing options and bargaining power. Secondly, we argue that in the absence of evidence of legitimate options for obtaining access to small snippets of video for use in, for example, online film reviews or parody videos, we must assume that any such activity that does occur is currently being undertaken in breach of the law.

The fact that services and tools are available that make it possible for filmmakers to break CSS and other copy protection technologies in breach of the TPM ban does not mean that the ban does not cause problems. To the contrary, if the Government believes that these fair dealing activities are valuable and supports them taking place, it is incumbent on it to introduce an exemption to ensure that they can be undertaken legitimately. Otherwise the Government is suggesting that documentarians, Youtube commentators and other filmmakers being required to break the law and risk the legal consequences does not have an "adverse impact" on legitimate creation.

We therefore propose that all legitimate uses under the fair dealing provisions in ss40, 41, 41A, 103A, 103AA or 103C of the Act, not just those of students and researchers, be included in the prescribed acts set out in Schedule 10A of the Regulations.

C. Additional comments

Photocopier Notices

The ALCC/ADA would also like to suggest an additional minor amendment to the regulations governing notices to be displayed next to library and archive machines used to make infringing copies (s5). Currently, the regulations prescribe exact dimensions for these notices of 297 millimetres by 210 millimetres (ie A4). We would like to propose that this be amended to be a minimum size.

We understand why there would be an interest in ensuring such a notice is not too small in size and hence is sufficiently drawn to that attention of users. However, there seems no reason why a library or archive should not be allowed to post the same material in a larger format eg foolscap or A3. We are aware of several circumstances in which libraries or archives, in seeking to be best actors and/or in line with internal policies on notices, have posted larger versions of the prescribed notices. There seems no reason why an innocent action of this nature should place an institution in breach of the law.

Notation of Copies

Currently s203H prescribes that copies made under the document delivery and interlibrary loan provisions must have a notation on them stating the date and institution at which the copy was made. For audiovisual works reproduced under s110B this may be attached to the work; but for works reproduced under s49, 50 or 51A it must be made on the work itself.

Feedback from the library community indicates that there is significant concern and confusion about how this provision can be applied to electronic works. It is not immediately clear how to make an annotation on a scanned copy of a work. We note that the metadata created in the work will automatically record the date and time, but not necessarily the institution; furthermore as this metadata can only be seen if sought out, it is not clear that it satisfies the requirements of the section.

The library community would like to propose that the requirements for this notification be amended to make it clear that the prescribed notice can be attached to electronic works, and/or that automatic metadata records satisfy it (for preference both options should be available). If this amendment cannot be made as part of this review, it should be made at the next available opportunity.