

Intellectual Property Arrangements

Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

30 November 2015

Dear Sir or Madam

Submission in Response to the Productivity Commission Issues Paper: Intellectual Property Arrangements

I welcome the opportunity to make a submission in response to the Productivity Commission Issues Paper: Intellectual Property Arrangements (*Issues Paper*).¹

The Commission has been asked to ‘examine the effect and scope and duration of protection afforded by Australia’s intellectual property system ... and recommend changes to the current IP system that would improve the overall wellbeing of Australian society...including changes that would encourage creativity, investment and new innovation by individuals, businesses and through collaboration *while not unduly restricting access to technologies and creative works*’². In so doing, the Commission will ensure that the intellectual property system provide appropriate incentives for innovation, investment and the production of creative works *while ensuring it does not unreasonable impede further innovations, competition, investment and access to good and services*.³

The Commission has highlighted in its Issues paper, in relation to the Australian copyright regime, that the ‘the scope and duration of copyright has been subject to substantial changes in recent years’⁴ with the copyright term being extended, new rights created, and new measures introduced to prevent the circumvention of technological protection measures.⁵

The Issues paper highlights the speed at which the ‘rapid changes in technology has challenged copyright, all the while the protections afforded by copyright and exceptions are very prescriptive and, as many have argued, are insufficiently

¹ Productivity Commission Issues Paper: Intellectual Property Arrangements, Australian Government, October 2015, 19. Herein after referred to as the ‘Issues Paper’.

² Issues Paper, iii.

³ Issues Paper, iii.

⁴ Issues Paper, 19.

⁵ *Copyright Amendment (Digital Agenda) Act 2000 (Cth)*

flexible to cope with rapid change. The Commission has asked in particular, 'What role can fair dealing and/or fair use provisions play in striking a better balance?'⁶

It is this issue that I wish to address. I write in support of the open-ended fair use exception that was recommended by the ALRC in its final report, *Copyright and the Digital Economy*.⁷ Australia needs to adopt an open-ended fair use defence similar to the United States, to ensure there are a broader range of uses that are available as legitimate defences to copyright to balance users' and consumers' rights against those of copyright owners.

In this submission, I wish to highlight circumstances where copyright owners are using technological protection measures to unnecessarily and *unduly restrict access to new technologies*. I wish to draw the Commission's particular attention to the potentially anti-competitive effect that our current regime of technological protection measures (TPMs) may have on a range of unintended (non-copyright) industries, such as agriculture, should Australia *not* adopt a broad US style fair use defence.

The expansion of copyright and TPMs into new (non-copyright) industries

In the past decade, we have seen a rapid increase in products that Australians use everyday, that now require a computer program to enable the device to operate. It is as a result of this, that we are now seeing the impact that copyright (and the regime of technological protection measures used by copyright owners to control their digital works) has on daily life that perhaps was not envisaged in the late 1990s, when the current scheme of technological protection measures were first proposed.

A myriad of modern appliances and machinery, including our toasters, printers, microwaves, phones and cars are all now controlled by computer software programs. The copyright owners of the computer programs that control these devices are able to employ technological protection measures to prevent purchasers of these devices from accessing the control mechanisms. While this may be a reasonable exercise of a copyright owner's rights, in some circumstances, there are circumstances where a consumer or user may wish to access the control mechanisms for reasons other than an act that would constitute an infringement of copyright. The need to repair, modify or calibrate the product or device may be one such circumstance.

The application of the regime of TPMs to everyday devices, including motor vehicles and agricultural machinery, has been the source of much concern and has attracted much attention and debate over recent times in the United States. It is the application of technological protection measures to a wide range of

⁶ Issues paper, 21.

⁷ ALRC, *Copyright and the Digital Economy Final Report 2014* (Report No 122) Commonwealth Government, see recommendation 4-1 and 5.1.

precision agricultural technologies and machinery that I am particularly interested in highlighting to the Commission.

The position under the US TPM Scheme

The US scheme of technological protection measures was introduced into their Copyright Act in 1998 as a result of the passing of the *Digital Millennium Copyright Act 1998* (“DMCA”) (US). The *DMCA* codified in part in 17 U.S.C. § 1201, makes it illegal to circumvent technological measures that are used to prevent unauthorised access to copyrighted works, such as including books, movies, videos, games, computer programs. In this respect, it is not unlike Australia’s TPM scheme.⁸

Section 1201, however, also authorises the Librarian of Congress to make determinations in a rulemaking proceeding every three years, upon the recommendation of the Register of Copyrights, evaluating and, as appropriate, adopting limited exemptions from the general prohibition against circumvention of access controls. One category of exemptions that was proposed in December 2014 was *Proposed Class 21: Vehicle Software—Diagnosis, Repair, or Modification*.⁹ The Library of Congress proposed that this class of exemption would allow circumvention of TPMs protecting computer programs that control the functioning of a motorized land vehicle, including personal automobiles, commercial motor vehicles, and *agricultural machinery*, for purposes of lawful diagnosis and repair, or aftermarket personalization, modification, or other improvement. Under the exemption as proposed, circumvention would be allowed when undertaken by or on behalf of the lawful owner of the vehicle.¹⁰

Many submissions were received in relation to this proposed class of exemption. The Electronic Frontier Foundation¹¹ and the University of Southern California¹²

⁸ s 132APC Copyright Act 1968 (Cth).

⁹ Federal Register, Vol 79 No 239, December 12, 2014/Proposed Rules, Available at <http://copyright.gov/fedreg/2014/79fr73856.pdf>.

¹⁰ Federal Register, Vol 79 No 239, December 12, 2014/Proposed Rules, Available at <http://copyright.gov/fedreg/2014/79fr73856.pdf>.

¹¹ Electronic Frontier Foundation (EFF), see EFF Vehicle Software Repair Pet. at 1. Available at http://copyright.gov/1201/2015/comments-020615/InitialComments_longform_EFF_Class21.pdf.

¹² The University of Southern California (U.S.C. Law) filed two petitions relating agricultural machinery software. The first seeks an exemption to “allow[] farmers to circumvent . . . TPMs for the purpose of modifying their own agricultural machinery to improve efficiency and/or functionality.” U.S.C. Law Vehicle Software Modification Pet. at 1. The second seeks an exemption to “allow[] farmers to circumvent . . . TPMs for the purpose of diagnosing and/or repairing their own agricultural machinery.” U.S.C. Law Vehicle Software Repair Pet. at 1. Available at http://copyright.gov/1201/2015/comments-020615/InitialComments_longform_USC_Class21.pdf

were very supportive of a right of a farmer to repair or modify their agricultural machinery. In effect, their argument is that, without such an exemption, copyright could be used to prevent a farmer from fixing his tractor or combine harvester – given that they are now sophisticated machinery run by complex computer software which is protected by copyright. The plight of farmers who are unable to repair or modify their tractors or farm machinery due to the technological locks imposed by owners of the proprietorial software that is now ubiquitous within the agricultural industry was also highlighted by a number of other submissions.¹³ John Deere Pty Ltd, along with automotive manufacturers, made lengthy submissions to defend against any suggestion that there be exemptions introduced to s 1201 to enable a right of repair to circumvent digital locks on mechanized vehicles.¹⁴

For the purposes of brevity, rather than repeating the arguments for and against the proposed repair exemption, I wish to bring the attention of the Commission to the conclusion reached on this proposal by the US Copyright Office's sixth triennial rulemaking proceeding in late 2015.¹⁵ On October 28, 2015, The Library of Congress, which oversees the US Copyright Office, agreed that an exemption should be granted to circumvent technological protection measures for '*the diagnosis, repair or modification of machinery*.'¹⁶ The Register, in reaching that conclusion observed that '*owners of vehicles and agricultural machinery are adversely impacted as a result of TPMs that protect the copyrighted computer programs on the ECUs¹⁷ that control the functioning of their vehicles*.'¹⁸

¹³ See Submissions to Proposed Class 21 available at <http://copyright.gov/1201/2015/comments-020615/>

¹⁴ See John Deere, *Long Comment Regarding a Proposed Exemption under 17 U.S.C 1201*, http://copyright.gov/1201/2015/comments-032715/class%2021/John_Deere_Class21_1201_2014.pdf , 5. See also some of the commentary that John Deere's submission stirred up: 'John Deere Clarifies: It's Trying To Abuse Copyright Law To Stop You From Owning Your Own Tractor... Because It Cares About You' from the *how-sweet* dept <https://www.techdirt.com/articles/20150513/18001030993/john-deere-clarifies-trying-to-abuse-copyright-law-to-stop-you-owning-your-own-tractor-because-it-cares-about-you.shtml>

¹⁵ <http://copyright.gov/1201/2015/introduction-analysis.pdf>

¹⁶ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Library of Congress, 37 CFR Part 201 [Docket No. 2014-07], 28 October 2015, Available at <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf> , 39

¹⁷ ECU is an abbreviation of the term Electronic Control Unit. The term ECU is a name given to a device that controls one or more electrical systems in a vehicle or device (whether that be a motor vehicle or a piece of agricultural machinery).

¹⁸ *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Library of Congress, 37 CFR Part 201 [Docket No. 2014-07], 28 October 2015,

The Register concluded that ‘reproducing and altering the computer programs on ECUs for the purposes of facilitating diagnosis, repair and modification of vehicles may constitute a *non-infringing activity as a matter of fair use*.¹⁹ The recommended exemption excludes computer programs in ECUs that are chiefly designed to operate vehicle entertainment and telematics systems due to insufficient evidence demonstrating a need to access such ECUs, and out of concern that such circumvention might enable unauthorized access to creative or proprietary content’.²⁰

Accordingly, based on the Register’s recommendation, the Librarian adopted the following exemption:

*Computer programs that are contained in and control the functioning of a motorized land vehicle such as a personal automobile, commercial motor vehicle or mechanized agricultural vehicle, except for computer programs primarily designed for the control of telematics or entertainment systems for such vehicle, when circumvention is a necessary step undertaken by the authorized owner of the vehicle to allow the diagnosis, repair or lawful modification of a vehicle function; and where such circumvention does not constitute a violation of applicable law, including without limitation regulations promulgated by the Department of Transportation or the Environmental Protection Agency; and provided, however, that such circumvention is initiated no earlier than 12 months after the effective date of this regulation.*²¹

Available at <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf> , 39

¹⁹ ‘and/or under the exception set forth in section 117 of the Copyright Act, which permits the owner of a copy of a computer program to make certain copies and adaptations of the program’. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Library of Congress, 37 CFR Part 201 [Docket No. 2014-07], 28 October 2015, Available at <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf>, 39. The US Register of Copyright also concluded that ‘the exemption needed to be carefully tailored to address a number of concerns from the Department of Transport and Environmental Protection Agency (largely in relation to its application to motor vehicles).’ The exemption will not come into effect until 12 months has passed. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Library of Congress, 37 CFR Part 201 [Docket No. 2014-07], 28 October 2015, Available at <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf>, 39.

²⁰ The exemption also excludes circumvention “on behalf of” vehicle owners, as a broader exception allowing third parties to engage in circumvention activities on behalf of others is in tension with the anti-trafficking provisions of section 1201(a)(2) and (b). Moreover, by passing the Unlocking Act—which amended section 1201 to allow unlocking of cellphones and other devices to be carried out by third parties “at the direction of” device owners—Congress indicated its view that extending the reach of an exemption to cover third-party actors requires a legislative amendment. *Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies*, Library of Congress, 37 CFR Part 201 [Docket No. 2014-07], 28 October 2015, Available at <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf> Ibid, 42.

²¹ Available at <http://copyright.gov/1201/2015/fedreg-publicinspectionFR.pdf>, 42-44.

Given that reproducing and altering the computer programs or computer software for the purposes of facilitating diagnosis, repair and modification of vehicles has been accepted as a *non-infringing activity as a matter of fair use in the United States*, I submit that the Productivity Commission should examine as part of its review, whether technological protection measures are operating in industries in such a way that restricts the rights of consumers to access their goods or products in a way in which they would normally expect to. This is particularly the case where the access or use of the software would not involve an act that would amount to an infringement of copyright.

In the new world of precision agriculture which Australia has rapidly embraced, and the resulting exponential rise in data that is being collected, aggregated and disseminate from precision agricultural tools and machinery, there may be the potential for misuse of market power where proprietorial agribusiness software owners use TPMs to extend their rights beyond what is granted to them under copyright law. The adoption of a fair use defence in Australia would ensure that Australia had the flexibility to allow new uses of copyright works, such as a right of repair (particularly of agricultural machinery), that are not currently able to be recognised under our limited purpose-specific fair dealing provisions.

If you have any questions regarding this submission or would like further information or background to that raised in this submission, please do not hesitate to contact me .

Yours sincerely,

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