



Submission to the Attorney-General's Department on the Review of Technological Protection Measure exceptions made under the Copyright Act 1968

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About Pirate Party Australia

Pirate Party Australia is a currently unregistered political party, centred around reforming copyright and patents, the protection of privacy and network neutrality, and increased transparency and political participation. The Party formed in 2009, and is part of an international movement that began in Sweden in 2006. Currently there are Pirate Parties registered or active on every inhabited continent, with approximately 250 elected candidates worldwide, including 45 state parliament seats in Germany.

Introduction

Technological protection measures (TPMs) are intended to prevent individuals from committing unauthorised acts which would constitute copyright infringement, such as the copying of media for the intent of unauthorised commercial distribution or electronic transmission of content.

In reality, TPMs often fail to be significant deterrents for those committing such acts. Electronic encryption methods are easily bypassed with the use of 'ripping' software to copy optical media and remove copy-prevention mechanisms, key generation software and 'cracks' to obviate license codes, and stream capturing software to download audiovisual material from online sources. The only implementation of TPMs on copyrighted works which has proved to be a significant deterrent is e-books, however there is still widespread copyright infringement occurring, and e-books are easily found freely available online.

Despite these shortcomings, there is a significant portion of the computing industry devoted to manufacturing new and advanced means of preventing unauthorised access and copying of data.

Laws regarding TPMs have always favoured the rights holders, and there are currently only a few exceptions where circumventing a TPM is permitted. The extent to which TPMs restrict access and copying of data does not adequately balance the rights of the consumer with the rights of copyright holders, and is the result of intense lobbying from private enterprise.

From its inception, copyright was designed in the public interest. By providing a limited monopoly on creative works, an incentive for the creation of art and literature was given. It has since expanded to ensure that the creator is adequately compensated for their work. Over the past century, as a direct result of lobbying by the powerful content industries, copyright has become a mechanism to protect profits, with little or no regard given to what is in the public's best interests.

This 'privatisation' of law has occurred because there has been no attempt at ensuring the industry wants are compatible with the public interest – copyright now works to protect industry against technological competition, and is moving further away from

protecting both the rights of the consumer to legitimately access and interact with works, and the rights of the public to benefit from artistic and intellectual material.

Proposed exception: to permit the copying of material for backup purposes

It is generally accepted, though not necessarily legally permitted, in Australia, that making a backup copy of material (such as duplicating a CD or DVD) for which a person is authorised to access is a legitimate act. However, there is no clear exception to circumventing TPMs (often referred to as 'copy-protection') for this purpose. Circumvention, as described above, is not a difficult task, and it is in the interests of the consumer to be able to create backup copies.

Pirate Party Australia requests a clear exception be made to protect the right of consumers to make backup copies of purchased material by circumventing TPMs, and that the form backup copies take is a decision to be made by the authorised user, provided it does not violate any other part of the *Copyright Act*.

DVDs are particularly prone to prohibitive copy-protection, and while easily circumventable, there is no explicit exception that allows users to bypass it for the described purpose. There is no evidence to indicate that this would have an adverse effect on the rights holder, as copyright infringement is rampant – those committing infringing acts are already bypassing TPMs, while consumers are unsure of the legality of making legitimate backup copies.

Proposed exception: to permit unrestricted format shifting

Duplicating or transcoding copyrighted material for use on a variety of devices is considered a legitimate practice within Australia. This includes copying data onto portable devices or storing data on a computer for convenient access. However, while it is accepted, there is no provision for circumventing TPMs for this purpose.

Pirate Party Australia requests a clear exception be made to allow consumers to circumvent TPMs where it would otherwise prevent them from using copyrighted content on any device of their choosing.

The rigid legal protection for TPMs means that while consumers have the right to duplicate or transcode the material and the technological means to do so, there is no legal protection for their right to circumvent TPMs for this purpose. This is a major shortfall in the extent to which copyright law protects the rights of consumers, and must be addressed. Technology makes it increasingly easier for consumers to access content at numerous locations, yet the law has fallen behind on protecting the benefits these developments bring. Instead of protecting the public's interests it unnecessarily prevents legitimate acts.

Proposed exception: to permit circumvention for fair dealing

Fair dealing provisions ensure that the public has the right to use copyrighted material in certain circumstances without the need for additional permission or license fees. This is an example of the public interest being protected. Unfortunately, the law on circumventing TPMs for the purpose of exercising fair dealing provisions is unclear. There is no reason for TPMs to be used to prevent fair dealing, as this directly and severely impacts the ability for society to develop cultural works, working counterintuitively to the purpose of copyright as a mechanism to promote the creation of works.

Pirate Party Australia requests a clear exception be made to allow circumvention of TPMs where necessary to exercise fair dealing rights.

While consideration must be given to copyright holders, who generally want to prevent the unauthorised distribution of works, commercial interests should never take primacy over the essential cultural needs of the public. In the United States, similar provisions known as 'fair use' allow for new platforms of cultural participation and learning such as Wikipedia, now one of the most popular repositories for knowledge worldwide, and provide a high level of accessibility to information in areas where resources are limited. These benefits are harmed if TPMs prevent fair dealing to be exercised.

Conclusion

Technological protection measures are barriers to many legitimate uses, regardless of whether exceptions exist or not. Circumvention software is outlawed, making it difficult to circumvent TPMs even where permitted. However, Pirate Party Australia accepts that the copyright industries have an interest in limiting access to materials and reducing the ability to duplicate content. Current technologies are often ineffective, but new technologies are constantly developed, making it more and more difficult to use works for legitimate purposes.

Pirate Party Australia advocates that additional exceptions are made in order to protect certain legitimate uses of copyrighted material, which it feels are extremely important in ensuring copyright remains balanced. These exceptions would allow the legitimate creation of backup copies, format shifting and protect fair dealing.

While there is indication that all three are in fact legitimate uses, and would fall under Part V, Division 2A, Subdivision A, Sub-section 116AN (9) of the *Copyright Act*, Pirate Party Australia believes that clear exceptions must be provided in order to ensure no confusion over the public's rights occurs, and that any implied rights are protected under Australian copyright regulations.